Turf Law Journal (TLJ)

The *Turf Law Journal* is a peer-reviewed and internationally indexed journal published by the School of Law of the University of Limpopo, South Africa. The purpose of the journal is to give a platform for high quality research on transformative and developmental perspectives about law in South Africa and beyond.

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Volume 5 (2025)

PRINT ISSN: 2789-746X
ELECTRONIC ISSN: 2790-7783

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Journal of the School of Law
University of Limpopo

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Published and hosted by
School of Law
University of Limpopo
New R-Block, Ground Floor
Private Bag X1106
Sovenga, 0727
South Africa

Contents

Published: 23 January 2025, Doi: https://doi.org/10.62726/tlj.v5.107

Editorial

Hoolo 'Nyane
Editor-in-Chief

This volume marks a milestone in the journal's history. It is not only the largest yet but also the one that, by and large, enabled the journal to be indexed in two major databases: EBSCOhost and the Directory of Open Access Journals (DOAJ). These indexings came shortly after the journal was included in African Journals Online (AJOL), another reputable African database. We value these recognitions, as they reflect our commitment to international standards. The journal is also being reviewed by other indexers. The DOAJ listing is especially significant, as it is approved by South Africa's Department of Higher Education for research subsidy eligibility.

Getting the journal listed in accredited indices is a significant achievement; it marks a turning point. It is a mix of pride and responsibility: while it is a major milestone, it also brings a strong sense of duty. Indexing organisations have specific standards that are very demanding for scientific journals. Meeting these standards and earning accreditation may seem challenging, but the greater challenge lies in managing a scientific journal that consistently adheres to these global benchmarks. This is the real challenge that confronts us, and the one we are ready to take up.

The TLJ long-term vision is to create a platform for original research that diverges from dominant research patterns. As a journal originating from a historically disadvantaged institution in South Africa – the University of Limpopo – it aims to affirm African scholarship and support the broader decoloniality project. The journal seeks to provide a rare space for alternative scholarly views that challenge mainstream ideas across law and related fields of study. It naturally serves as a home for a new generation of scholars, often disillusioned with dominant research trends - those from South Africa, Africa, and beyond - who have long desired academic platforms that differ from the mainstream and genuinely want to contribute to critical and alternative thought.

This volume exemplifies the core journal vision outlined above. It includes articles by scholars from across Africa addressing challenging questions in South Africa and other African countries. In their article titled 'The Efficacy of Arbitration as a Tool for Resolving Employment Disputes in Nigeria: Lessons from South Africa,' Oluwayemi Ogunkorode, Kemisola Akanle, and Tayewo Adewumi examine arbitration, the employer–employee relationship, and dispute-resolution processes in Nigeria and South Africa, drawing lessons from South Africa's approach. They assess the effectiveness of arbitration as a dispute-resolution mechanism in both countries and conclude that South Africa's strong arbitration provisions could serve as a model for Nigeria.

In the article titled 'An Examination of the Legal Framework for Parties' Rights when Mortgaging Land under Nigerian Property Legislation', Busari Morufu Salawu examines

the complex conveyance of rights in Nigeria. The Nigerian system relies on various land tenure types that generally follow the principles set out in the Land Use Act of 1978. The article examines how mortgage deeds over land are drafted in Nigeria, discusses the rights and obligations of the parties, and evaluates the legal and judicial attitudes that shape them.

Ferdinand Temba offers a Tanzanian perspective in an article titled 'The Legal Framework of the Commission of Mediation and Arbitration in the Settlement of Labour Disputes in Tanzania'. The article reviews the legal status of the Commission of Mediation and Arbitration (CMA) in resolving labour conflicts in Tanzania. It discusses how labour disputes are settled through mediation and arbitration under the Employment and Labour Relations Act, Cap 366 RE 2019 (ELRA), and the Labour Institutions Act, Cap 300 RE 2019 (LIA). The focus is on the CMA's legal and institutional structure, the authority of mediators and arbitrators, and court rulings regarding the CMA's scope.

In their article titled 'The Land Question, Economic Collapse and the Right to Development in Zimbabwe', Carol Chi Ngang and Garufu Paradzai analyse ongoing land conflicts in Zimbabwe. They outline twenty years of economic decline, emphasising core and surrounding issues, especially overlooked land disputes and the tendency to blame political leaders for the nation's slide into failure. While the land repossession movement triggered major socio-economic upheaval, the authors argue that the economy might have collapsed anyway due to conflicting interests.

In a comparative study of three countries - Nigeria, Ghana and Kenya – Obinna Nnanna Okereke, Uche Nnawulezi Septhian, and Eka Adiyatma focus on gender discrimination in bail suretyship. In the article titled 'Comparative Analysis of Gender Discrimination in Bail Suretyship in Nigeria, Ghana and Kenya: A Review of Ken Nwafor v Economic and Financial Crimes Commission (2021)', they contend that male sureties are often preferred in bail proceedings across many African criminal justice systems, including Nigeria, Ghana, and Kenya. This preference persists despite the absence of explicit legal provisions preventing women from assuming this role. This practice is rooted in cultural biases that view women as the 'weaker sex', and these biases are reflected in legal practice. This case review examines the legal implications of denying women the right to act as sureties, focusing on the Nigerian case of *Ken Nwafor v Economic and Financial Crimes Commission* (2021).

In an article titled 'Registration of Health Professionals in the United Kingdom and Botswana: A Comparative Analysis of the Overarching Principles,' Patrick Masokwane assesses the laws governing the registration of health professionals in Botswana and compares them with those in the United Kingdom (UK). The article discusses the legal framework for the overarching functions of regulatory bodies and the governance arrangements in both jurisdictions. In the UK, professional registration has advanced significantly since the 18th century, whereas in Botswana it remains in its early stages. The primary intention of the law is to protect the public as users of health services; as such, these provisions represent a public good. The article examines several leading cases in health registration and emphasises the need to safeguard the public without disadvantaging professionals.

In an article titled 'The Influence of ChatGPT-generated Data on the Administration of Justice in South Africa', Isiphile Petse and Usenathi Phindelo argue that, as a medium for South African legal practitioners to conduct legal research, ChatGPT is a threat to the

courts and the administration of justice. ChatGPT has become a manipulative tool that deceives legal professionals. For instance, the chatbot has generated false or misleading legal documents. The information generated by ChatGPT not only misleads the court but also misleads legal practitioners who use it without verification. Failing to verify ChatGPT-generated information could result in a legal practitioner being found guilty of the common-law crime of perjury, especially when a legal practitioner presents incorrect information in court. This article examines the cases of *Mavundla v MEC: Department of Cooperative Governance and Traditional Affairs and Others*; *Michelle Parker v Amanda Forsyth NO and Others, and Roberto Mata v Avianca* to illustrate the impact of ChatGPT-generated information on the courts and the administration of justice.

In the article 'Delict in Cyberspace in South Africa: Reflection on Recent Judicial Developments', Desmond Oriakhogba and Nompumelelo Ndwandwe explore the judicial application of the law of delict to cyberspace issues in South Africa. This exploration takes place against the backdrop of the risks of harm, such as pure economic loss, occurring in cyberspace, especially those resulting from the exercise of professional duties. Specifically, the article examines how recent case law, such as *Edward Nathan Sonnenberg Inc v Hawarden* [2024] ZASCA 90, has addressed gaps in the law of delict regarding liability for patrimonial harm caused by third-party fraudsters in cyberspace. The article further examines the courts' application of the constitutional values of dignity, fairness and freedom to the development and application of the law of delict in addressing harms in cyberspace.

In the article titled 'Revisiting Vaccine Mandates and Human Rights in South Africa,' Slungu Joseph Thobela examines vaccine mandates, which have consistently sparked heated debates about human rights. These mandates gained prominence during the COVID-19 pandemic that affected the world in 2020. Different countries responded to the pandemic in various ways and at different times; there was no universal strategy. Each country tailored its response based on its legal framework. Implementing vaccine mandates became a common approach in combating the pandemic. Like many nations, South Africa adopted a series of restrictive measures, including lockdowns. Public institutions, such as universities, enforced vaccine mandates for access, raising concerns about their constitutionality. A key question was whether these mandates aligned with South Africa's 1996 Constitution.

In the article titled 'Water Resource Protection in Africa's Mining Sector: A Nigerian Perspective', Oluwatosin Busayo Igbayiloye and Oluwabunmi Lucy Niyi-Gafar argue that mining extractives contaminate water sources in mine communities, leading to serious health issues for people, animals, aquatic life, and farmland. Mining often creates competition for water between local communities and companies, sparking social conflicts. Nigeria, heavily dependent on extractive industries, experiences this challenge. While mining is seen as a key economic sector for Nigeria's growth, it is crucial to weigh the potential benefits against the environmental and social costs. This article reviews the current water management in mining and explores how mining activities impact water resources, along with the obstacles faced in Nigeria.

In an article titled 'The Systematic Failure Surrounding Records of Proceedings in the Lesotho Court of Appeal', Bokang Moshoeshoe, Monaheng Rasekoai, and Mathalea

Ntaote address the enduring question of records for cases in the Court of Appeal of Lesotho. They contend that the preparation and filing of these records in the Court of Appeal have been marred by chronic dysfunction for decades. This article interrogates the enduring and institutionalised nature of this problem, one that has persisted unabated since the 1970s and continues to undermine justice to this day. Drawing on jurisprudence, historical analysis, and procedural rules, the article exposes the systemic failures that have allowed this problem to fester at the very apex of the country's judiciary. It attributes shared responsibility to litigants, legal representatives, judges of the High Court, registrars and other relevant court officers, all of whom have contributed, by action or omission, to a pattern of procedural decay. The result is delayed justice, denied appeals, and a crisis of confidence in the superior courts of record.

In the case comment titled 'Legal Challenges Faced by Accused Persons with Speech and/or Hearing Impairment in South African Courts: An Analysis of Kruse v S 2018 (2) SACR 644 (WCC)', Isiphile Petse examines the legal obstacles faced by accused individuals with speech and/or hearing impairments in South African courts. The note focuses on the specific difficulties SHI defendants face during court proceedings, with particular reference to the *Kruse v S* 2018 (2) SACR 644 (WCC) case. It highlights barriers that hinder SHI accused persons from fully comprehending court processes and considers possible legal remedies. Furthermore, the note offers recommendations to improve the treatment of SHI-accused individuals within South Africa's criminal justice system, particularly in courtroom settings.

We are proud to present this volume to our readers and sincerely thank all contributing authors, anonymous reviewers, editors, and typesetters. We truly value the collaborative effort that has gone into producing a volume of this quality and size, and we remain grateful.

How to cite:

'Nyane, H 'Editorial' (2025) 5 *Turf Law Journal* iv-vii.

Received: 28 January 2025, Accepted: 23 March 2025, Published: 25 April 2025, Doi: https://doi.org/10.62726/tlj.v5.60

The Influence of ChatGPT-generated Data on the Administration of Justice in South Africa

Isiphile Petse * and Usenathi Phindelo**

Abstract

ChatGPT, as a medium for South African legal practitioners to conduct legal research, is a threat to the courts and the administration of justice. ChatGPT has become a manipulative tool that deceives legal professionals. For instance, the chatbot has generated false or misleading legal documents. The information generated by ChatGPT not only misleads the court but also misleads legal practitioners who use the information without verification. Failing to verify the information generated by ChatGPT means that legal practitioners could be found guilty of committing the common-law crime of perjury, especially when a legal practitioner presents incorrect information during court proceedings. This article examines the cases of Mavundla v MEC: Department of Cooperative Governance and Traditional Affairs and Others; Michelle Parker v Amanda Forsyth NO and Others *and* Roberto Mata v Avianca *to illustrate the impact of ChatGPT-generated information on the courts and the administration of justice. The article also refers to various methods and guidelines that South African legal practitioners can use to verify the accuracy of information produced by ChatGPT. Furthermore, the article examines existing codes of conduct and suggests sanctions that can be used when incorrect or biased information is presented in court. In conclusion, the article suggests that the EU AI Act is a framework South Africa can consider when developing its legal guidelines for artificial intelligence.*

Keywords

Chat Generative Pre-trained Transformer (ChatGPT), administration of justice, South African courts, legal practitioners, perjury, code of conduct, Legal Practice Council

1. Introduction

Chat Generative Pre-trained Transformer (ChatGPT)[1] is a language model that was

1 Wilson, M 'ChatGPT Explained: Everything You Need to Know About the AI Chatbot' (2023) <https://www.techradar.com/news/chatgpt-explained> accessed 31 August 2023; *Michelle Parker v Amanda Forsyth NO and Others* case no 1585/20 (29 June 2023) para 86. The court defined a chatbot as a computer program designed to simulate conversation with human users over the Internet.

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released in November 2022 by OpenAI.[2] ChatGPT uses advanced artificial intelligence (AI) techniques to generate coherent, natural-sounding, human-like language responses to prompts or inputs.[3] ChatGPT can fulfil a wide range of requests made via text, including generating a gratitude letter.[4] and assisting with legal research.[5] Despite its ability to answer questions and help with legal research, the chatbot has changed how society obtains legal information.[6] This has heightened exposure to legal claims arising from AI-related violations of fundamental human rights.[7] South African lawyers' use of ChatGPT to conduct legal research has become an increasing problem. In a regional court case, *Michelle Parker v Amanda Forsyth NO and Others*,[8] the plaintiff's attorney explained that his partner had sourced cases using ChatGPT.[9] South African lawyers and judges in other jurisdictions, such as the United States of America,[10] Colombia[11] and the Netherlands,[12] have also used ChatGPT.

ChatGPT has proven to be a significant problem and a threat to the integrity of the courts and the quality of the legal information accessed and used. For example, a judge in a subdistrict court in Gelderland, Netherlands, based a verdict on information generated by ChatGPT. This reliance on chatbot-generated content astonished experts,

2 Perlman, A 'The Implication of ChatGPT for Legal Services and Society' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294197> accessed 1 September 2023; Schulman, J, Zoph, B & Kim, C et al 'Introducing ChatGPT' (2022) <https://openai.com/blog/chatgpt> accessed 1 September 2023.

3 Kalla, D & Smith, N 'Study and Analysis of ChatGPT and its Impact on Different Fields of Study' (2023) 8 *International Journal of Innovative Science and Research Technology* 828; Lo Chung, K 'What is the Impact of ChatGPT on Education? A Rapid Review of the Literature' (2023) 13 *Education Science* 1.

4 Lund, BD 'A Brief Review of ChatGPT: Its Value and the Underlying GPT Technology' (2023) <https://www.researchgate.net/publication/36680957> accessed 1 September 2023; *Michelle Parker* (note 1) para 86. ChatGPT can also compose various forms of written content, including articles, social media posts, essays, code and email.

5 *Michelle Parker* (note 1) para 87 (in this case, the plaintiff's attorneys used ChatGPT to conduct legal research); Perlman (note 2) 2.

6 Perlman (note 2) 1–2. The author also confirms that 'AI tools like ChatGPT hold the promise of altering how we generate a much wider range of legal documents and information'.

7 Ka Mtuze, S & Morige, M 'Towards Drafting Artificial Intelligence (AI) Legislation in South Africa' (2024) *Obiter* 163.

8 Note 1.

9 Para 86.

10 *Roberto Mata v Avianca Inc* case 22-cv-1461 (PKC) (the plaintiff's counsel submitted six cases that were generated by ChatGPT); Maruf, R 'Lawyer Apologizes for Fake Court Citations from ChatGPT' (2023) <https://edition.cnn.com/2023/05/27/business/chat-gpt-avianca-mata-lawyers/index.html> accessed 3 September 2023.

11 Luke, T 'Colombian Judge Says He Used ChatGPT in Ruling' (2023) <https://www.theguardian.com/technology/2023/feb/03/colombia-judge-chatgpt-ruling> accessed 3 September 2023 (Judge Manuel, a judge in Colombia, used ChatGPT to make a ruling); Janus, R 'A Judge Just Used ChatGPT to Make a Court Decision' (2023) <https://www.vice.com/en/article/k7bdmv/judge-used-chatgpt-to-make-court-decision> accessed 3 September 2023.

12 Quekel, S 'Disbelief at Dutch Judge Using ChatGPT in Verdict: "'This is really unacceptable'" (2024) <https://www.ad.nl/binnenland/ongeloof-om-nederlandse-rechter-die-chatgpt-gebruikt-in-vonnis-dit-kan-echt-niet~ae3288e10/?referrer=https%3A%2F%2Fwww.dutchnews.nl%2F> accessed 31 April 2025.

who voiced significant concerns regarding the potential for inaccuracies. They emphasised that employing such technology in the judiciary raises serious ethical and practical challenges.[13] The use of ChatGPT by lawyers and judges has shown that the chatbot can be discriminatory[14] and misleading.[15] This article analyses the legal impact of ChatGPT-generated information on the courts and the administration of justice. The analysis identifies and discusses existing codes of conduct prohibiting South African legal practitioners from presenting incorrect and biased information in court.

Secondly, the article explores existing sanctions that could be imposed by the courts, especially when legal practitioners provide biased and incorrect information. Lastly, to protect the independence, impartiality, dignity, and accessibility of the courts, the organs of state bear a paramount duty to ensure that legislative measures are executed accordingly.[16] This article calls for ChatGPT to be human-centric and to maximise the benefits of AI solutions while minimising lawyers' risk and exposure to legal claims arising from AI-related violations of fundamental human rights.[17]

The article suggests that the EU's AI Act is a framework that South Africa can consider in developing its legal guidelines for AI. It recommends different methods that South African legal practitioners can use to verify the accuracy of the information generated by ChatGPT.

2. The impact of ChatGPT on the courts and the administration of justice

ChatGPT has generated false or misleading legal information that has been used in the courts.[18] In *Michelle Parker*,[19] the court heard that an attorney used information generated by ChatGPT[20] without verifying the accuracy of the information generated by the chatbot.[21] The court inquired whether the information that was generated by the chatbot was, in fact, accurate. The court asked the defendant and the plaintiff to make a concerted effort to locate the suggested information[22] or authority.[23] The plaintiff's counsel conceded

13 Ibid.

14 Janus, R 'Facebook's AI Chatbot: "Since Deleting Facebook My Life has been Much Better"' (2022) <https://www.vice.com/en/article/qjkkgm/facebooks-ai-chatbot-since-deleting-facebook-my-life-has-been-much-better> accessed 3 September 2023: 'In 2016, Microsoft unleashed an AI chatbot called Tay, which was shut down after it turned into a racist, holocaust-denying conspiracy theorist after less than a day of interacting with users on Twitter.'

15 Janus, R 'Stack Overflow Bans ChatGPT for Constantly Giving Wrong Answers' (2022) <https://www.vice.com/en/article/wxnaem/stack-overflow-bans-chatgpt-for-constantly-giving-wrong-answers> accessed 3 September 2023; *Roberto Mata v Avianca* (note 10) para 4 (the court stated that 'five decisions submitted by plaintiff's counsel contain similar deficiencies and appeared to be fake as well'); *Michelle Parker* (note 1) para 87.

16 Constitution of the Republic of South Africa, 1996, s 165(4).

17 Ka Mtuze & Morige (note 7) 163.

18 Perlman (note 2) 18.

19 Note 1. The case was heard on 22 May 2023.

20 Para 86: 'the plaintiff's counsel explained that his attorney had sourced the cases through the medium of ChatGPT'.

21 Para 87. The court noted that the plaintiff's attorneys used the AI medium to conduct legal research and accepted the results without satisfying themselves about the accuracy of the information generated.

22 Para 79.

23 Para 80. The information or authority referred to was case law.

that the information could not be sourced,[24] which resulted in the defendant's attorneys being unable to access the information generated by the chatbot.[25] The court found that the citations, facts, and decisions generated by the chatbot were fictitious.[26] The information generated by the chatbot can not only mislead the court,[27] it can also mislead any reckless legal practitioner who uses and presents the generated information without verification.

In the United States, a similar incident occurred in *Roberto Mata v Avianca Inc*,[28] where an attorney submitted six cases generated by the chatbot.[29] The court confirmed that the citations and decisions in the submitted cases did not exist.[30] The *Roberto Mata* case showed that the use of information generated by ChatGPT impacts the courts, and any legal practitioner who uses the chatbot must be aware that the information it generates could be false.[31]

In South Africa, the East London Circuit Local Division held in *Mzayiya v Road Accident Fund*[32] that legal practitioners must ensure that court documents such as pleadings, affidavits, and heads of arguments are authentic. If they mislead the court by using ChatGPT, they risk committing the common-law crime of perjury.[33] It is important to note that when legal practitioners rely on information generated by ChatGPT, they must remember their paramount duty to the courts and the administration of justice.[34] In *General Council of the Bar of South Africa v Geach and Others*[35] it was correctly emphasised legal practitioners' duty towards the courts:

> [Legal practitioners] are the beneficiaries of a rich heritage and the mantle of responsibility that they bear as the protectors of our hard-won freedoms is without parallel. As officers of our courts lawyers play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It, therefore, stands to reason that absolute personal integrity and scrupulous honesty are demanded of each of them ...[36]

Legal practitioners not only have a positive duty to be honest in the information they present, but they must also uphold the Constitution, 1996 and ensure that justice is

24 Ibid.
25 Para 85.
26 Para 87.
27 Para 88. The defendants' counsel submitted that the attempt to provide fictitious information misleads the court and such an act must be met with an appropriate punitive cost order.
28 Note 10.
29 Paras 25, 27, 29; Maruf (note 10).
30 Para 2. The court stated that one of the six cases, *Varghese*, contained a decision with internal citations and non-existent quotes.
31 Maruf (note 10). The attorney admitted that he was unaware that ChatGPT's information could be false.
32 *Mzayiya v Road Accident Fund* [2021] 1 All SA 517 (ECL).
33 Ibid.
34 Ibid. Chapter 8 of the Constitution provides for the protection of the courts and the administration of justice.
35 2013 (2) SA 52 (SCA).
36 Para 87.

correctly administered even outside the courts.[37] Section 165(4) of the Constitution states that '[o]rgans of state, through legislative and other measures, must ensure that independence, impartiality, dignity, accessibility and effectiveness of the courts are protected'.[38] In *Mzayiya*, the court explained the extent to which legal practitioners have a legal duty towards the court as follows:

> (i) They are encouraged to refuse cliental mandates that would jeopardise the administration of justice.[39]
>
> (ii) They have a legal duty not to use evidence and legal points that mislead the court.[40]
>
> (iii) They are required to conduct themselves with honesty and integrity.[41]

Legal practitioners must not commit an act of perjury or sabotage the administration of justice[42] by using the chatbot. In South Africa, information obtained or presented in a manner that violates any right contained in the Bill of Rights of the Constitution must be excluded or considered inadmissible if the admission of such information would render the trial unfair or detrimental to the administration of justice.[43] This means that when a legal practitioner presents or relies on incorrect information generated by ChatGPT without proper verification, they increase the risk of violating the public trust[44] and the rights protected by the Bill of Rights, such as a client's right to a fair trial. Even though such information can be excluded and deemed inadmissible by the courts, no procedural guidelines or court precedents exist to emphasise that ChatGPT's false information can render a trial unfair or undermine the administration of justice, as illustrated in this article.

Moreover, in many cases, excluding information obtained or presented in ways that violate Bill of Rights protections is not absolute. Consequently, there is a significant likelihood that courts may accept evidence or data generated by ChatGPT that is either unconstitutional or illegally obtained. This may happen when the court cannot determine whether the legal practitioner has verified the information.

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37 Section 2 of the Constitution not only invalidates law and/or conduct that is inconsistent with it but requires that any obligation imposed by it must be fulfilled.

38 Section 165(4) of the Constitution.

39 *Mzayiya* (note 32) para 93. See Van Eck, M 'Duties of Practitioners to Court?' (2022) available at <https://www.derebus.org.za/duties-of-practitioners-to-court/> accessed 9 September 2023.

40 *Mzayiya* (note 32) para 83. In addition, the court stated that legal practitioners should not be 'permitted to knowingly offer or rely on false evidence or to misstate evidence'. See Van Eck (note 39).

41 *Mzayiya* (note 32) para 82; Van Eck (note 39).

42 *Mzayiya* (note 32) para 83. Kroon AJ confirmed that '[t]o suppress evidence or worse still to suborn perjury, is to sabotage the administration of justice and it strikes at the heart of the legal practitioner's duty to court'.

43 Section 35(5) of the Constitution.

44 *Mavundla v MEC: Department of Cooperative Governance and Traditional Affairs and Others* [2025] ZAKZPHC 2 para 24.

Currently, South African courts and the Legal Practice Council have the discretion to verify and investigate the accuracy of information generated by ChatGPT and presented by legal practitioners. In a recent South African case, *Mavundla v MEC: Department of Cooperative Governance and Traditional Affairs and Others*,[45] the High Court emphasised the need to scrutinise and investigate artificially generated fictional citations presented by a legal practitioner in court. In investigating the accuracy of the information, Judge Bezuidenhout appointed two legal researchers to verify the presented information, and they discovered that the citations were from ChatGPT.[46] In many cases, courts usually regard information presented by legal practitioners as authoritative, meaning that the courts usually trust that the information provided during court proceedings has been verified before being presented.[47]

Thus, the court in the *Mavundla* case viewed the inclusion of false citations by legal practitioners as a serious threat to fundamental trust in the legal system.[48] As a result, due to the implications of ChatGPT for the legal profession, the court referred the matter to the Legal Practice Council for further investigation,[49] without providing a precedence or court judgment that can assist or influence the decisions made by courts in the future.

The *Mavundla* case illustrates that while precedent holds significant weight in common-law systems, the fabricated information generated by ChatGPT undermines the principles of legal reasoning and academic integrity, especially if the data is unverified and uncorrected by the courts. Therefore, as part of the investigation, courts should also examine the conditions under which the information was acquired and potentially establish common-law rules that govern the use of ChatGPT by legal practitioners without infringing on rights, in accordance with section 36 of the Constitution.

Section 36(1) of the Constitution states that 'the rights contained in the Bill of Rights may be limited only in terms of the law of general application and to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom'.[50] In *S v Naidoo*,[51] the court held that the law of general application can be a statutory or a common-law rule[52] that permits illegal or unconstitutional information to be admitted.[53] This is regarded as a constitutionally permissible limitation of the rights enshrined in the Bill of Rights.[54] However, in the absence of statutory and common-law rules that regulate the use of ChatGPT-generated data in South African courts, legal practitioners will continue to waste valuable judicial time and resources.[55]

45 Note 44.
46 Para 50.
47 Para 20.
48 Para 24.
49 Ibid.
50 Section 36(1) of the Constitution, 1996.
51 1998 (1) SACR 479 (N).
52 *S v Naidoo* 1998 (1) SACR 479 (N) 500.
53 Schwikkard, P & Van der Merwe, S *Principles of Evidence* 4 ed (Juta & Co, 2015) 240.
54 Ibid.
55 *Mavundla* (note 44) para 16.

3. Ethics of Legal Practitioners' Use of ChatGPT

In South Africa, the professional conduct of legal practitioners must be regulated, and accountability must be ensured.[56] The South African Legal Practice Council (the Council) must uphold and advance the rule of law, the administration of justice and the Constitution.[57] The Council has developed a Code of Conduct that can be reviewed and amended and applies to all legal practitioners in South Africa,[58] particularly when addressing the use of ChatGPT-generated data by legal practitioners in court.

In the *Mzayiya* case, regarding the Council's Code of Conduct (the Code), the court emphasised that legal practitioners should maintain the highest standards of honesty and integrity by upholding the principles and values enshrined in the Constitution.[59] This means that legal practitioners must constantly be subjected to their legal duty to the court,[60] the interests of justice,[61] and the observance of the law.[62] Legal practitioners must bear in mind article 57.1 of the Code before they use misleading information generated by ChatGPT in courts. Article 57.1 of the Code states:

> A legal practitioner shall take all reasonable steps to avoid, directly or indirectly, misleading a court or a tribunal on any matter of fact or question of law. In particular, a legal practitioner shall not mislead a court or a tribunal in respect of what is in papers before the court or tribunal, including any transcript of evidence.[63]

Even though the *Mzayiya* case did not refer to the Code, it correctly discussed principles similar to those in the Code. Legal practitioners in South Africa are governed by the Constitution, court judgments, the Legal Practice Act, and the Code; apart from the mentioned sources, legal practitioners are accountable for recklessly presenting misleading information generated by ChatGPT during court proceedings.[64] Recklessness affects the courts and the administration of justice; therefore, this conduct infringes on the rights conferred by the Constitution.[65]

Even though the Legal Practice Act and the Code do not make provision for an incident where the legal practitioner provides misleading ChatGPT information in court, the *Mzayiya* case confirmed that a counsel who is dishonest is guilty of misleading the court and is thus party to perjury.[66] For example, in the *Michelle Parker* case, the defendant's counsel alleged that the plaintiff's counsel attempted to mislead the court; the court

56 Legal Practice Act 28 of 2014, long title – summary of the scope and purpose of the legislation.
57 Section 5 of the Legal Practice Act.
58 Section 36(1) of the Legal Practice Act.
59 Articles 3.1 and 3.2 of the Legal Council's Code of Conduct 2019.
60 Articles 3.3 and 3.3.1 of the Code.
61 Article 3.3.2 of the Code.
62 Article 3.3.3 of the Code.
63 Article 57.1 of the Code.
64 Wilson (note 1) refers to *Michelle Parker* (note 1).
65 Section 2 of the Constitution, 1996 not only invalidates law and/or conduct inconsistent with it but requires that any obligation imposed by it must be fulfilled.
66 *Mzayiya* (note 32).

highlighted that such an act must be met with a punitive costs order, and the attorney's conduct must be reported to the Legal Practice Council.[67]

While the court has mentioned the possibility of a lenient sanction, it is essential to recognise that cases involving AI must be addressed on a case-by-case basis. This need stems from the complex nature of AI and its unique influence on the administration of justice. For example, although legal practitioners relied on incorrect information generated by ChatGPT in the *Michelle Parker* case, that information was not presented in court. In contrast, the *Mavundla* case involved a candidate attorney using the chatbot, with the principal presenting that information in court. Each case presents a distinct issue, indicating that different sanctions may be appropriate. The question remains: can the use of misleading information generated by ChatGPT be considered perjury?

4. Sanctions for the use of misleading information generated by ChatGPT

In the *Michelle Parker case*, the court warned that sometimes legal practitioners can become careless and overly zealous. This can lead them to place excessive trust in the integrity of legal research generated by AI, often recklessly.[68] This leaves the court with no option but to question the intent of the legal practitioner presenting the misleading information.[69] Legal practitioners must be held liable even if they did not intend to mislead the court. This was elaborated upon in the *Michelle Parker* case, where the court stated:

> Although the plaintiff's attorneys did not intend to mislead anyone, the inevitable result of his debacles was that the defendant's attorneys were indeed misled into thinking that these authorities were real. As a result, they would have invested a significant amount of time and effort in their futile attempts at tracking down these cases ...[70]

In the *Michelle Parker* case, the court did not decide whether a legal practitioner who shares incorrect and/or misleading information should be found guilty of perjury. Still, the court confirmed that the embarrassment associated with a legal practitioner relying on non-existent information generated by the chatbot does call for punishment.[71] The acts of dishonesty and misleading the court may be seen as perjury.[72] Snyman states that '[p]erjury consists in the unlawful and intentional making of a false statement in the course of a judicial proceeding by a person who has taken the oath or made an affirmation before, or who has been admonished by, somebody competent to administer or accept the oath, affirmation or admonition'.[73]

Snyman's definition of perjury does not extend to false statements, affidavits, declarations or case law authority, especially when a legal practitioner shares a list of information generated by ChatGPT with the other party.[74] Section 9 of the Justice of the

67 *Michelle Parker* (note 1) para 89.
68 Ibid.
69 Para 91.
70 Ibid.
71 Ibid.
72 *Mzayiya* (note 32).
73 Snyman, C *Criminal Law* 6 ed (LexisNexis, 2014) 332.
74 The court in *Michelle Parker* (note 1) para 81 stated that the plaintiff's attorneys forwarded a list of cases to the defendant's attorney as constituting the authorities.

Peace and Commissioners of Oaths Act (JPCOA)[75] extends the scope of false statements to affidavits and declarations.

Section 9 of the JPCOA states that '[a]ny person who, in an affidavit, affirmation or solemn or attested declaration made before a person competent to administer an oath or affirmation or take the declaration in question, has made a false statement knowing it to be false, shall be guilty of an offence and liable upon conviction to the penalties prescribed by law for the offence of perjury'.[76] Section 9 of JPCOA is broader than Snyman's definition as it includes affidavits, affirmations and declarations but does not state whether these affidavits, affirmations, declarations and false statements should be made during judicial proceedings or outside of court.[77] In providing clarity, a statement constituting perjury can be verbal or an affidavit.[78] Snyman confirms that the statement (an affidavit or verbal statement) does not have to be material to the issue to be decided in the court proceedings; however, there must be an inference from the evidence presented during the judicial proceedings.[79]

In the *Michelle Parker* case, the court confirmed that the plaintiff's legal team did not submit the information (list of cases) generated by ChatGPT to the court as binding authorities.[80] The list of non-existent cases was only sent to the other party's legal practitioner as the authority that the plaintiff's legal team would rely on during the court proceedings.[81] The court confirmed that if the court had been satisfied that the plaintiff's legal team had attempted to mislead the court, the outcome would have been far more severe.[82] Perhaps such an act would have constituted perjury.

Unlike the *Michelle Parker* case, in the *Roberto Mata*[83] case in the USA, the plaintiff's legal representatives submitted a legal brief that included six non-existent judicial opinions and citations before receiving an order from the court.[84] The court affirmed that the court was presented with an unprecedented circumstance.[85] A legal practitioner unlawfully and intentionally used false information generated by ChatGPT during the

75 16 of 1963.

76 Section 213(6) of the Criminal Procedure Act 51 of 1977 states: 'Any person who makes a statement which is admitted as evidence under this section and who in such statement wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury, shall be deemed to have committed the offence of perjury and shall, upon conviction, be liable to the punishment prescribed for the offence of perjury.'

77 *Raith Gourmet Trading (Pty) Ltd v Halligan; In re: FOCSWU obo Davids and Others v De Kock and Others* [2014] ZALCJHB 259 para 25. A false statement made in the course of judicial proceedings has been held to include an affidavit 'which the law permits to be used in judicial proceedings as evidence, for example, in motion proceedings or in actions where the Court or the law permits evidence to be given by means of affidavits'. See Snyman (note 77) 333.

78 Snyman (note 77) 332.

79 Ibid 332; *R v Matakane* 1948 (3) SA 384 (A) paras 391–393; *R v Wallace* 1959 (3) SA 828 (R) paras 829–830.

80 *Michelle Parker* (note 1) para 89.

81 Ibid.

82 Ibid.

83 *Roberto Mata* (note 10).

84 Paras 24, 25, 27 and 29.

85 Para 21; Maruf (note 10). Judge Kevin Castel of the Southern District of New York wrote: 'The court is presented with an unprecedented circumstance.'

judicial proceedings. The court found that the lawyers acted in bad faith and made false and misleading statements to the court, while they could have avoided such conduct.[86] The judge ordered the legal practitioners to pay a fine of $5,000.[87]

In the *Michelle Parker* case, the court also granted a costs order, which the defendant sought as an appropriate sanction.[88] Even though the dispute was not about legal practitioners misleading the court, this case is relevant. In South Africa, the only appropriate sanction for the use of incorrect, non-existent and misleading information generated by ChatGPT in court is a sanction dealing with perjury[89] or possible referral to the Legal Practice Council for misconduct,[90] which are too lenient. In both criminal and civil proceedings,[91] a person who knowingly makes a false statement in an affidavit is guilty of an offence, with penalties that are the same as those for perjury.[92] Section 28 of the Criminal Procedure Act (CPA), partly governs the substantive consequences of the unlawful act of giving false information.[93] Section 28(2) of the CPA states that

> Where any person falsely gives information on oath under section 21 (1) or 25 (1) and a search warrant or, as the case may be, a warrant is issued and executed on such information, and such person is in consequence of such false information convicted of perjury, the court convicting such person may, upon the application of any person who has suffered damage in consequence of the unlawful entry, search or seizure, as the case may be, or upon the application of the prosecutor acting on the instructions of that person, award compensation in respect of such damage, whereupon the provisions of section 300 shall *mutatis mutandis* apply with reference to such award…[94]

This means that evidence led during court proceedings assists the court in determining the amount to be awarded. Perjury is sanctioned on a case-by-case basis, depending on the matter in dispute, and is evidence-led.[95] Legal practitioners should never present

86 Merken, S 'New York lawyers sanctioned for using fake ChatGPT cases in legal brief' (2023) <https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/> accessed 12 September 2023.

87 Ibid. $5,000 equals R94 762.60.

88 *Michelle Parker* (note 1) para 91. The court stated that the embarrassment associated with an incident of a legal practitioner relying on non-existent cases was sufficient punishment for the plaintiff's attorney.

89 *Mzayiya* (note 32); *Michelle Parker* (note 1); s 9 of the JPCOA; s 319(3) of the CPA.

90 *Mzayiya* (note 32) para 94; *Michelle Parker* (note 1): 'If a legal practitioner makes himself guilty of misconduct, then an obligation rests on the professional organisation which has jurisdiction over the practitioner, the Legal Practice Council, to bring the errant practitioner to book, it is the watchdog of the profession.'

91 *Talacar Holdings (Pty) Ltd v City of Johannesburg Metropolitan Municipality and Others* [2023] ZAGPJHC 250 para 16.

92 Pete, S, Hulme, D & Du Plessis, M et al *Civil Procedure: A Practical Guide* (Juta & Co, 2016) 194.

93 Swanepoel, JP, Joubert, JJ & Terblanche, SS *Criminal Procedure Handbook* 12 ed (Juta & Co, 2020) 188.

94 Section 28(2) of the CPA.

95 *S v Ncamane* [2019] ZAFSHC 220. The accused was convicted of a contravention of s 9 of the JPCOA. The court sentenced the accused to six months' imprisonment which was wholly suspended for five years on condition that he was not convicted of perjury again.

AI-generated information, such as that produced by ChatGPT, under oath without proper verification, as doing so could amount to perjury and undermine the integrity of the legal profession in South Africa. In *Rondel v Worsley*,[96] Lord Denning emphasised that legal practitioners must be loyal to a higher cause: truth and justice.[97] This means that a legal practitioner must not consciously misstate the facts or knowingly conceal the truth.[98] The only way a legal practitioner can be loyal to his or her legal duty to the courts is to verify the information before presenting it.

5. Limited methods to verify information generated by ChatGPT

ChatGPT can be regarded as a helpful tool,[99] but the answers provided by the chatbot are not always reliable.[100] In the age of instant gratification from technology, legal practitioners should not forget good old-fashioned independent reading.[101] Independent reading must be infused with the efficiency of modern technology.[102] That will enable legal practitioners to verify the accuracy of the information generated by the chatbot.

In the *Parker* case, the court confirmed that legal practitioners must come to court with a legally independent mind that does not merely repeat the unverified research of a chatbot.[103] Legal practitioners must also use ChatGPT as a starting point rather than the final product; legal practitioners must ensure that they clearly define tasks and validate information against credible sources involving human expertise and interpersonal interaction,[104] such as the Bing search engine, which improves ChatGPT.[105] Apart from using Bing to improve the quality and accuracy of information generated by ChatGPT,[106] technical measures should also be considered. Whenever data collection and processing

96 [1966] 3 All ER 657 (Eng CA).

97 At 665; *Mzayiya* (note 32) para 89.

98 Ibid.

99 Frackiewicz, M 'The Advantages and Limitation of Using ChatGPT for Legal Research and Analysis' (2023) <https://ts2.space/en/the-advantages-and-limitations-of-using-chatgpt-for-legal-research-and-analysis/> accessed 17 September 2023: 'ChatGPT can be used to automate the summarisation of legal documents, allowing researchers and analysts to quickly grasp the key points of a document without spending hours reading through it.'

100 Ibid; Manie, A 'My Learned Bot – ChatGPT can be a Powerful Tool for Lawyers, but Caution is the Name of the Game' (2023) <https://www.dailymaverick.co.za/opinionista/2023-02-12-my-learned-bot-chatgpt-can-be-a-powerful-tool-for-lawyers-but-caution-is-the-name-of-the-game/> accessed 17 September 2023: 'ChatGPT's responses can be incomplete, inaccurate and dangerously misleading at times.'

101 *Michelle Parker* (note 1) para 90.

102 Ibid.

103 Ibid.

104 Manie (note 107). The author sets out strategies to enhance the effectiveness and address the limitations of ChatGPT in the legal industry.

105 Perlman (note 2).

106 Ibid; Ortiz, S 'What is ChatGPT and Why Does It Matter? Here's What You Need to Know' (2023) <https://www.zdnet.com/article/what-is-chatgpt-and-why-does-it-matter-heres-everything-you-need-to-know/> accessed 17 September 2023. Due to ChatGPT's data being limited up to 2021, the chatbot was unaware of events or news that had occurred since then. This problem was addressed through ChatGPT's integration into Bing as its default search engine. Bing is a plugin that gives ChatGPT the ability to index and provide citations.

are deemed illegal, such data should not be used and must be excluded, particularly if it produces discriminatory results.[107] This indicates that legal practitioners require not only a solid understanding of the law but also interdisciplinary skills to adapt to technological advancements. They should be mindful of when to employ tools like ChatGPT, acknowledging that it may occasionally contain outdated or fabricated information.[108]

The data produced by ChatGPT represents a serious threat to the integrity of our courts and the administration of justice, as well as to the work of legal researchers and practitioners. To protect the legal profession from these dangers, the courts must take decisive action by imposing significant sanctions on legal practitioners who irresponsibly mislead them. However, without laws, legal professionals, including the South African courts, will be unable to maintain the integrity of the legal system and uphold justice for all. ChatGPT's harmful and misleading information will remain unregulated, and legal practitioners who use ChatGPT will not know how to safeguard their rights and obligations.

6. Steps for developing a regulatory framework for ChatGPT in the legal profession

In formulating a regulatory framework for ChatGPT, we should consider the key regulatory issues in the European Union (EU), the first jurisdiction to enact AI legislation.[109] The EU's AI framework can provide valuable insights for developing an AI legal framework in South Africa.[110] European authorities have implemented a comprehensive approach to safeguarding ChatGPT users and upholding their rights. This strategy not only protects users, including legal professionals but also ensures that the chatbot's developers and providers are held accountable.

The EU AI Act[111] does not explicitly define ChatGPT; however, it generally defines AI systems as machine-based systems designed to operate with varying levels of autonomy.[112] The Act also offers a neutral definition of a general-purpose AI system, which refers to an AI system based on a general-purpose AI model capable of serving various purposes, for both direct application and integration into other AI systems.[113]

According to the definitions, ChatGPT is a versatile general-purpose AI system. Its ability to generate text tailored to user prompts in diverse contexts showcases its flexibility and power. Moreover, its functionality allows for seamless integration with other AI systems, making it an invaluable tool for various applications.[114]

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107 Terzidou, K 'Generative AI for the Profession: Facing the Implications of the Use of ChatGPT Through an Intradisciplinary Approach' (2023) <https://www.medialaws.eu/generative-ai-for-the-legal-profession-facing-the-implications-of-the-use-of-chatgpt-through-an-intradisciplinary-approach/> accessed 23 January 2025.

108 Ibid.

109 Hickman, T, Lorenz, S & Teetzmann, C 'Long Awaited EU AI Act Becomes Law after Publication in the EU's Official Journal' (2024) <https://www.whitecase.com/insight-alert/long-awaited-eu-ai-act-becomes-law-after-publication-eus-official-journal> accessed 24 January 2025.

110 Ka Mtuze & Morige (note 7) 168.

111 European Union Artificial Intelligence Act 2024/1689.

112 Article 3(1) of the EU AI Act.

113 Article 3(66) of the EU AI Act.

114 Terzidou (note 111).

The definitions are essential as South Africa starts to establish a legal framework for AI. Incorporating ChatGPT into forthcoming South African legislation will assist legal practitioners in evaluating the associated risks and enable them to determine whether the chatbot has an unacceptable, highly limited or minimal risk,[115] as outlined in article 6 of the EU AI Act. Article 6 of the EU AI Act effectively outlines the classification rules for AI systems deemed to be high-risk, making clear reference to Annex III of the EU AI Act.[116] This structured approach enhances transparency and accountability in deploying advanced AI technologies. These classifications do not explicitly label ChatGPT as a high-risk AI system. However, since the chatbot is employed by judicial authorities to research and interpret facts and legal matters, the Act recognises that these intended uses can affect the administration of justice.[117] When a chatbot produces frivolous information, a considerable risk is involved.

We recommend that South Africa should prioritise several essential components in developing its AI legal framework: transparency, human oversight, mandatory risk management and enhanced content moderation.[118] Furthermore, as outlined in article 16 of the EU AI Act, chatbot providers should be held liable and accountable for the information their systems generate.[119]

7. Conclusion

Legal practitioners' increasing reliance on ChatGPT in South Africa presents a serious challenge that cannot be ignored. Without appropriate legislation, regulations or official policies governing the ethical use of this technology, the legal profession is at risk.[120] Developing frameworks to protect the integrity of legal practice is crucial. To achieve this, we urgently need more legal literature to inform and guide the creation of robust policies and ethical standards. Acting now is essential for the future of the country's legal profession.

Strict measures and sanctions are needed to hold legal practitioners accountable[121] for any negligent and misleading actions. A coordinated approach is essential to ensure the effective use of chatbots while safeguarding the administration of justice and human rights. The *Michelle Parker* and *Mavundla* cases emphasise that legal practitioners must remember their obligations to the courts and the administration of justice during legal research. South Africa should use the EU AI Act as a model to create a robust AI framework. This framework will ensure accountability for legal practitioners and those who provide and develop chatbots. Embracing this approach will foster responsibility and trust in our society regarding AI technology.

115 Ibid.
116 Article 6(2).
117 Annexure 8(b) of the EU AI Act.
118 Article 2 of the EU AI Act.
119 Article 16 of the EU AI Act.
120 Ka Mtuze & Morige (note 7) 167.
121 Brand, D 'Responsible Artificial Intelligence in Government: Development of a Legal Framework for South Africa' (2022) 14 *eJournal of eDemocracy* 146; Gless, S 'AI in the Courtroom: A Comparative Analysis of Machine Evidence in Criminal Trials' (2020) 51 *Georgetown Journal of International Law* 251. Gless believes that the authenticity and legitimacy of AI should be human-centred.

How to cite:

Isiphile Petse and Usenathi Phindelo 'The Influence of ChatGPT-generated Data on the Administration of Justice in South Africa' (2025) 5 *Turf Law Journal* 1-14.

Received: 15 July 2025, Accepted: 9 August 2025, Published: 9 September 2025, Doi: https://doi.org/10.62726/tlj.v5.79

Delict in Cyberspace in South Africa: Reflection on Recent Judicial Developments

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Abstract

This article explores the judicial application of the law of delict in cyberspace issues in South Africa. This exploration takes place against the backdrop of the risks of harm, such as pure economic loss, occurring in cyberspace, especially those resulting from the exercise of professional duties. Specifically, the article examines how recent case law, such as Edward Nathan Sonnenberg Inc v Hawarden *[2024] ZASCA 90, addressed the gaps existing in the law of delict on the question of liability for patrimonial harm occasioned by third-party fraudsters in cyberspace. The article further examines the courts' application of the constitutional values of dignity, fairness and freedom to the development and application of the law of delict in addressing harms in cyberspace. As noted in the article, recent case law demonstrates the extent of the legal duties of professionals, their clients and third parties impacted by the exercise of professional duties to prevent patrimonial harm occasioned by the activities of fraudsters in cyberspace in South Africa. The case law marks a significant step towards solving problems caused by emerging cybersecurity challenges, addressing the gap in the law of delict concerning liability for online scams causing pure economic harm.*

Keywords

cyberspace, cyber delict, pure economic harm, professional duty, South Africa

1. Introduction

As digital technology continues to develop, there appears to be an integration of the physical world and cyberspace, which is demonstrated by our unavoidable dependence on digital technology in our daily communication, business activities, as well as the resulting risks and harms that raise challenging questions in the field of the law of delict, as discussed in part 2 below. Indeed, as part of our daily life, cyberspace continues to challenge the remit of the existing legal frameworks, including the law of delict, and the courts are increasingly grappling with the emergence of what has been termed 'cyber delict'[1] in South Africa.

1 Etsebeth, V 'Cyber Delict – Que Sera Sera?' (2008) *Without Prejudice* 42.

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The term 'cyber delict' – or 'cyber tort' as used in other common-law countries[2] – is not used here to indicate any special type or class of delict. The term was coined in a 2008 article written by Verine Etsebeth,[3] and is used here for convenience to describe those activities in cyberspace that may result in delictual wrongs, including defamation and pure economic loss, among other things. Cyber delict is explained further below. It suffices now to note that cyber delict has spurred a discourse on the extent to which the traditional principles of the law of delict can address the surge in delictual actions occurring in cyberspace.[4] Recent case law has reinforced the need to further engage in this discourse in order to determine whether the court's application of delictual principles in this case has closed an important gap relating to pure economic harm resulting from wrongful conduct in cyberspace.[5]

According to Loubser and Midgely,[6] the courts are 'increasingly confronted with cyber-delict', such as online defamation.[7] However, 'it is only a matter of time before courts are confronted with patrimonial harm issues such as […] pure economic harm in the cyberspace'.[8] Also, the risk of pure economic harm associated with cyberspace 'is especially encountered in conveyancing transactions, where fraudsters may attempt to intercept email communications between the attorney and the client and attempt to divert money into fraudulent accounts'.[9] In such situations, 'would the legal convictions of the community dictate that an attorney who does not exercise proper care when interacting online or via email be held liable in delict for damages? What are the policy considerations that would favour or militate against the imposition of liability in such cases?'[10]

Based on a desktop review, we reflect on recent case law, especially the High Court's decision in *Hawarden v Edward Nathan Sonnenberg Inc* ('*ENS* High Court'),[11] and the Supreme Court of Appeal's (SCA) decision in *Edward Nathan Sonnenberg Inc v Hawarden* ('*ENS* SCA'),[12] against the backdrop of the emerging South African jurisprudence relating

2 Holschuh, J '#civilrightscybertorts: Utilizing Torts to Combat Hate Speech in Online Social Media' (2018) 82(3) *University of Cincinnati Law Review* 953; Georgescu, GG, Marin, PM & Vasile, D 'Jurisdiction over Cyber Torts under Brussels I BIS Regulations' (2016) <https://portal.ejtn.eu/PageFiles/14777/Written%20paper_Romania.pdf> accessed 15 July 2025.

3 Etsebeth (note 1).

4 Iyer, D 'An Analytical Look into the Concept of Online Defamation' (2018) 32(2) *Speculum Juris* 125; Marx, FE 'Iniuria in the Cyberspace' (2010) 31(1) *Obiter* 146; Roos, A & Slabbert, M 'Defamation on Facebook: Insparta v Richter 2013 6 SA 529 (GP)' (2014) 17 *Potchefstroom Electronic Law Journal* 2849; Alheit, K 'Delictual Liability Arising from the Use of Defective Software: Comparative Notes on the Positions of Parties in English Law and South African Law' (2006) 39(2) *Comparative and International Law Journal of Southern Africa* 26; Khan, F 'The Impact of COVID-19 on Cyberbullying: A Delictual Claim for Emotional Harm?' (2021) 54 *De Jure* 565.

5 *Edward Nathan Sonnenberg Inc v Hawarden* [2024] ZASCA 90; *Hawarden v Edward Nathan Sonnenberg Inc* [2023] ZAGPJHC 14; *Ndlozi v Media 24 t/a Daily Sun and Others* [2023] ZAGPJHC 1040. See also *RM v RB* 2015 (1) SA 270 (KZP); *Heroldt v Wills* 2013 (2) SA 530 (GSJ).

6 Loubser, M & Midgley, R *The Law of Delict in South Africa* (OUP 2017) 332.

7 Ibid at 16.

8 Ibid.

9 Ibid at 332.

10 Ibid.

11 *Hawarden v Edward Nathan Sonnenberg Inc* (note 5).

12 *Edward Nathan Sonnenberg Inc v Hawarden* (note 5.

to the application of delictual principles to cyberspace. The article begins – in the second part – by examining the development of the law of delict in South Africa to demonstrate the evolution of the principles and rules applicable to the physical world, but adaptable to the present virtual reality made possible by digital technology. The second part also deals with the role played by the Constitution of the Republic of South Africa, 1996 (Constitution) in adapting delictual principles to cyberspace, especially in view of the need to uphold the constitutional values of dignity, fairness and freedom. The third part reviews the *ENS* High Court and SCA cases, while the fourth part discusses the implications of the judgments in the cases. The fifth part concludes the article.

2. Applying the law of delict to cyberspace: A South African perspective

2.1 The interaction between cyberspace and delict

The law of delict is a branch of private law, which plays a crucial role in providing civil remedies for personal injuries, damage to property, and violation of personality rights by wrongful conduct. The fundamental premise in the law of delict is that harm rests where it falls; that is, each person must bear the damage they caused.[13] However, in certain legally recognised situations the burden of damage is transferred from one individual to another, resulting in the latter being obligated to bear the former's damage or provide compensation for it.[14] Neethling and Potgieter accurately identify the conditions under which a person, according to the law of delict, must bear the damage that they have caused to another, thereby incurring civil liability for that damage.[15] For instance, when damage results from a delict, the wrongdoer is legally required to compensate the aggrieved party.

Delictual liability is governed by a generalising approach, which means that general principles relating to the need to prevent harm to persons and property, to promote freedom and fairness, to uphold human dignity, and to maintain societal *boni mores* regulate delictual liability.[16] Thus, to be held delictually liable, there must be a causal (factual and legal) link between the harm suffered by the plaintiff and the wrongful conduct of the person who is at fault.[17] In *H v Fetal Assessment Centre*, the court held that 'harm-causing conduct is a prerequisite for further enquiry into the other elements of delict, namely wrongfulness and fault. Without harm-causing conduct, there is no conduct which can be wrongful or committed with the requisite degree of fault.'[18] These principles apply irrespective of which individual interest is impaired, and regardless of how and where the impairment is caused.[19] Based on this, the law of delict in South Africa can accommodate changing circumstances and new situations more efficiently.[20] Indeed, although South African law of delict developed ages ago in the physical world as demonstrated by its common-law

13 Neethling, J & Potgieter, J *Law of Delict* (LexisNexis 2015) 18.
14 Ibid at 18.
15 Ibid.
16 Loubser & Midgley (note 6) 4-25.
17 *H v Fetal Assessment Centre* [2006] 4 All SA 541 (SCA) para 1.
18 Ibid.
19 Loubser & Midgley (note 6) 5.
20 Alheit (note 4); Khan (note 4).

origins,[21] delictual principles are adaptable and have evolved to the extent that they are applicable to wrongs occurring in cyberspace. Moreover, owing to its flexibility and pliancy, the law of delict has developed to meet societal needs that have emerged in modern times.

The rise of accessible digital technologies and the expansion of the internet have given rise to new forms of behaviour that may result in harm being suffered in cyberspace. Cyberspace is a virtual environment of online communication and data exchange.[22] Unfortunately, it is also a realm where wrongful acts can cause harm to others. Klein AJ judicially acknowledged this much in *Fourie v Van Der Spuy and De Jongh Inc. and Others*,[23] where the judge noted that the 'rate at which cybercrime occurs makes the internet a very unsafe working area'.[24] Cyber criminals and hackers exploit the internet for monetary gain, while others perceive cyberspace as a platform for unbridled information exchange and expression of opinions.[25] De Vos aptly captures this phenomenon by noting that 'there is something about internet websites and social media platforms that seem to bring out the worst in people. Reasonably decent people who might well carefully weigh their words can become raving hatemongers and irresponsible tattletales on these platforms.'[26]

Specifically, the practice and business of law in South Africa is not insulated from the risks of harm occurring in cyberspace as a result of the activities of cyber fraudsters. Recognising such risks, key standard-setting bodies in the legal profession in South Africa continue to issue advisories on how to ensure safety in cyberspace while conducting the business of the law.[27] For instance, in 2018, the Law Society of South Africa (LSSA) issued a cybercrime advisory, calling on attorneys to be aware of the dangers of business email compromise (BEC), especially in relation to their clients.[28] The advisory was 'aimed primarily at attorneys fulfilling their duty of care to clients by making them aware of the potential risk' of BEC.[29] It urged attorneys to warn clients of the risk and recommended a model warning that should be contained in communications between attorneys and their clients.[30]

Notably, aside from the difference in the modus and medium of occurrence, harm suffered in cyberspace as a result of cybercrime does not differ from harm in the physical world. Examples of delict in cyberspace include online defamation, where false and defamatory comments made through digital platforms or emails harm someone's reputation.[31]

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21 Loubser & Midgley (note 6) 16.
22 Mabeka, NQ & Cassim, F 'Interpreting the Provisions of the Cybercrimes Act 19 of 2020 in the Context of Civil Procedure: A Future Journey' (2023) 44(1) *Obiter* 19.
23 *Fourie v Van Der Spuy and De Jongh Inc. and Others* [2019] ZAGPPHC 449.
24 Ibid para 25.
25 Mabeka & Cassim (note 22).
26 Cited in Iyer (note 4) 125.
27 Legal Practice Council Fraud Alert (2020) <https://www.derebus.org.za/wp-content/uploads/2020/07/Notice_Fraud-alert-to-Legal-Practitioners.pdf> accessed 15 July 2025; LSSA 'LSSA Advisory: Cybercrime: Business Email Compromise' (2018) <https://www.lssa.org.za/news/lssa-advisory-cybercrime-business-email-compromises/> accessed 15 July 2025. The Legal Practitioners Indemnity Insurance Funds frequently publishes cybercrime risks alerts. <https://lpiif.co.za/2023/?post_type=aiif_risk> accessed 15 July 2024.
28 LSSA ibid.
29 Ibid.
30 Ibid.
31 See *Ndlozi* (note 5).

Hate speech, expressed through derogatory posts based on race, gender or sex, for example, is another form of harm in cyberspace (which may also be criminal), especially where it violates personality rights such as personal integrity and dignity.[32] BEC, a form of cyber fraud where fraudsters trick an unsuspecting recipient of business emails into divulging company secrets or paying money to them, is a further example of conduct resulting in harm occurring in cyberspace.[33] BEC may give rise to pure economic loss, as occurred in the *ENS* High Court and SCA cases (discussed below).

Understanding the effect of cyberspace as both a medium of expression and a source of harm is crucial within the framework of the Constitution. The digital realm has become a dominant platform for communication, allowing individuals to express their thoughts, share information, and connect with others across the globe. This vast reach and accessibility underscore the importance of protecting freedom of speech and expression, as enshrined in constitutional principles. However, cyberspace also presents significant challenges, particularly concerning the potential for harm. Online defamation, for instance, illustrates how false and defamatory statements can rapidly spread across digital platforms, causing substantial damage to an individual's reputation. The anonymity and speed of the internet can exacerbate these issues, making it difficult to trace the source of harmful content and to mitigate its impact effectively.

Therefore, within the constitutional framework, a delicate balance must be maintained between safeguarding free expression and protecting individuals from harm. Legal provisions must address the unique nature of cyberspace, ensuring that while the right to free speech is upheld, mechanisms are in place to hold individuals accountable for wrongful actions, such as defamation. This balance is essential for fostering a safe and just digital environment where the rights of all users are respected and protected.

2.2 The role of the Constitution in shaping delictual principles online

According to the Constitutional Court in *Carmichele v Minister of Safety and Security*:[34]

> [The] common law, especially in the field of delictual liability, has constantly required development. Where a court develops the common law, the provisions of section 39(2) of the Constitution oblige it to have regard to the spirit, purport and objects of the Bill of Rights. … This requires not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law. … Not only must the common law be developed in a way which meets the section 39(2) objectives, but it must be done

32 Burchell, J 'Balancing "Equality of Respect" with Freedom of Expression: The Actio Iniuriarum and Hate Speech' in Bradfield, G, Fagan, A & Scott, H (eds) *Private Law in a Changing World: Essays for Danie Visser* (Juta, 2020) 203-227; Len, LKLTS & De Ruijter, A 'Conceptualising the Tortuous Harms of Sexist and Racist Hate Speech' (2023) 2(1) *European Law Open* 8; Holschuh (note 2).

33 Orekeng, KS 'The Dangers of Business E-mail Compromise' (2023) *De Rebus* <https://www.derebus.org.za/the-dangers-of-business-e-mail-compromise/> accessed 15 July 2025; LSSA (note 25); SABRIC 'Business Email Compromise' <https://www.sabric.co.za/stay-safe/business-email-compromise/> accessed 15 July 2024.

34 *Carmichele v Minister of Safety and Security* [2001] ZACC 22.

> in a way most appropriate for the development of the common law within its own paradigm.[35]

Although the above case does not relate to delict in cyberspace,[36] the Constitutional Court's guidance is important when examining claims based on harm suffered online, especially where they raise questions relating to advancing the law of delict through a constitutional lens. Thus, the advancement of delictual principles and rules to accommodate harm suffered in cyberspace in South Africa must be pursued through the prism of the Constitution, especially given the requirement that the development of the law of delict, like other common law, must align with and uphold the constitutional values of human dignity, equality and freedom embedded in the Constitution.[37]

The foregoing represents the judicial attitude demonstrated in *Heroldt v Wills*,[38] where the High Court addressed the issue of defamation on social media. In that case, an interdict was granted against the defendant for posting derogatory messages about the plaintiff, suggesting that he was an unfit father to his girls because of 'the alcohol, the drugs, the church'.[39] The defendant had initially declined to remove the posts, arguing that she had the right to freedom of expression, which the court had to balance against the plaintiff's right to privacy and dignity.[40] The court emphasised the importance of balancing the right to freedom of expression with the right to dignity, protected under the Constitution.[41] The court acknowledged the transformative impact of digitisation on communication and the potential for harm in cyberspace.[42] Thus, it clarified that defamatory statements made on social media platforms have the potential to cause significant damage to a person's reputation.[43] Moreover, the court considered the constitutional values of dignity and freedom of expression, striking a balance to protect individuals from harm while respecting the right to express opinions.[44] Importantly, this case underscores the dynamic nature of delictual principles in the face of technological evolution and the imperative for the common law to be adapted in line with constitutional values.

In *RM v RB*,[45] Chetty J delineated the boundary for our courts concerning the protection of social media users. The case involved a family. Citing concerns about the father's use of alcohol and drugs, the mother took to Facebook to criticise the father's care of their daughter, who had previously spent the weekend with him. Chetty J noted that while courts have the authority to compel the removal of defamatory messages from social media, they should refrain from issuing orders that prevent individuals from expressing

35 Ibid paras 35 and 55.
36 For a discussion of the case, see Fagan, A 'Reconsidering *Carmichele*' (2008) 125(4) *South African Law Journal* 659.
37 Section 1(a) of the Constitution of the Republic of South Africa 1996.
38 *Heroldt* (note 5).
39 Ibid para 7.
40 Ibid.
41 Ibid para 6.
42 Ibid para 8.
43 Ibid para 6.
44 Ibid para 7.
45 *RM v RB* (note 5).

themselves through social media or other means.[46] This reasoning effectively strikes a balance between the constitutionally enshrined right to freedom of expression and the right to dignity.[47] The court proactively advanced the development of the law of delict by incorporating constitutional values into its framework. By doing so, the court underscored the importance of upholding individual rights while also acknowledging the complexities of modern digital interactions. Consequently, the court's jurisprudential evolution reflects a dual commitment to constitutional principles and an acute awareness of the challenges and potential harms in cyberspace. This approach ensures that the law remains relevant and responsive to contemporary issues, providing robust protection for individuals without undermining their fundamental freedoms.

In *Le Roux v Dey*,[48] a compelling precedent in South African legal history was set, addressing harm that results from student activities in cyberspace. In this instance, the first defendant crafted a computer-generated image at his residence, superimposing the likenesses of his school's principal and deputy principal onto a picture featuring two unclothed male bodybuilders in a sexually suggestive pose.[49] The school's emblems were overlaid onto the genital areas of the individuals in the image.[50] The first defendant then shared this manipulated image with a fellow student via computer. The second and third defendants further propagated the image by distributing it among numerous other students at the high school.[51] The principal and deputy principal were in an embarrassing situation. Despite disciplinary measures having been taken against the students involved, unfounded rumours persisted at the school, which continued to harm the dignity of the deputy principal. In response, the deputy principal took legal action, seeking damages for defamation and arguing that his right to human dignity had been infringed. The case eventually reached the Constitutional Court, where the students defended their actions by arguing that the image was merely a schoolboy prank and lacked any defamatory intent.[52] The Constitutional Court, however, rejected the defendants' claim of lacking intention, recognising the fundamental importance of respecting school authority figures for maintaining discipline – a crucial element for the proper functioning of the education system. The court acknowledged a growing trend in South African schools to challenge the status and authority of teachers, leading to a breakdown in discipline.[53] Consequently, the court affirmed the defamatory nature of the manipulated computer image and mandated that the students apologise and pay compensation to the plaintiff.[54] This decision highlights that defamatory actions, especially those that affect the dignity of educators or students, whether they occur within or outside the school environment and involve cyber-related

46 Ibid para 276.
47 Ibid.
48 *Le Roux v Dey* [2011] ZACC 4.
49 Ibid para 13.
50 Ibid para 14.
51 Ibid.
52 Ibid.
53 Ibid para 24.
54 Ibid.

activities, not only breach South African common law but also violate constitutional principles by undermining an individual's dignity.

In *Roestoff v Cliffe Dekker Hofmeyr Inc*,[55] the plaintiff, an attorney, brought a legal action against the defendant, a firm of attorneys. The plaintiff maintained a private bank account with Absa, while the defendant managed trust accounts with Standard Bank and Nedbank. The plaintiff sought to recover funds from the defendant, as money from his personal account had been routed by an internet fraudster through the law firm's trust account. The law firm, unaware of any wrongdoing, treated the transaction as genuine and disbursed the funds to a closed corporation, acting on instructions purportedly from a client who had supplied the necessary documents. Everything appeared in order at the time, and the firm, in good faith, executed the transfer. Du Plessis J determined that the law firm exhibited no negligence in its actions since it did not know that the funds originated from a scam. The court, per Du Plessis J, emphasised that once an owner's funds are deposited and mingled with other funds in an account, the original owner loses control over it. The court further underscored that the law firm was oblivious to the fact that the money belonged to the plaintiff and originated from a scam. The court noted that the plaintiff did not dispute seeing warnings about phishing scams but claimed not to have read them' the court deemed this to be neglectful.[56] The court, therefore, concluded that the defendant acted in good faith and without negligence, and was not liable for the restitution of the funds. The court absolved the defendant of any obligation to repay the plaintiff. In the context of this article, the significance of the case rests on the court's recognition of the general duty of attorneys in respect of moneys deposited in their trust accounts. The court ruled that attorneys have a legal duty to depositors of money in their trust accounts. Attorneys also owe this legal duty to persons who are not their clients.[57] According to the court, an attorney's:

> legal duty is broad enough to include that the defendant in this case, even though he did not know who the plaintiff was, had a legal duty to the plaintiff to, without negligence, deal with the deposit in the trust account. In my view, the key question in this case is whether the defendant was negligent. I therefore accept without finding that the defendant had a legal duty to the plaintiff to deal with the deposit in a way that would not cause harm to the plaintiff.[58]

Finally, in *Ndlozi v Media 24*,[59] the High Court, per Wilson J, ruled that online reports by the defendant were unlawful and defamatory.[60] The court ordered the defendant to promptly remove reports, which falsely accused the plaintiff of rape, from all its media platforms, including its website, Twitter account and Facebook account.[61] The court's application of

55 *Roestoff v Cliffe Dekker Hofmeyr Inc* 2013 (1) SA 12 (GNP).
56 Ibid para 81.
57 Ibid paras 71, 82 and 83.
58 Ibid para 83.
59 *Ndlozi* (note 5).
60 Ibid.
61 Ibid para 72.

delictual principles and its rejection of any public interest claim was crucial in a case of delict because it ensured the proper adherence to the legal framework governing wrongful acts, emphasising the protection of individual rights against defamation. The rejection of any claim of public interest in publishing defamatory content highlights the need to balance freedom of expression with the rights of individuals. While freedom of speech is a fundamental right, it is not absolute and must be exercised responsibly, especially with regard to potentially harmful speech. By refusing to prioritise public interest over the protection of individual rights, the court reinforced the principle that rights and freedoms are not to be arbitrarily infringed upon, even in the name of public discourse. The court underscored that the harm caused by disclosing a rape complaint at an early investigative stage outweighed any potential public benefit.[62] The court held that the reports were defamatory and unlawful, emphasising that the defendant's actions interfered with a police investigation by prematurely publishing the complaint.[63] Underscoring the important role that constitutional values play in cases of this kind, the court noted that:

> [T]he inquiry into whether a publication is for the public benefit is also generally the stage of deliberation at which a court will balance the right to freedom of expression, including media freedom, against the right to dignity of the person defamed … . In my view, that balancing act must take place against the backdrop of 'the appropriate norms of the objective value system embodied in the Constitution' … . That value system embraces, I think, a confidentiality interest that does not just protect the suspect's right to dignity. It also protects the integrity of the police investigation. Most importantly, in a case like this, it protects the dignity and privacy of the complainant. … [T]he right to privacy 'seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of a broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life.' … [T]hat autonomy encompassed the right to choose whether, when and how to disclose intimate details about one's private life.[64]

This case demonstrates the instrumental role played by the Constitution in the evolution and application of delictual principles to cyberspace in South Africa. Importantly, the case further underscores the adaptability of the law of delict in adjudicating not only physical realm cases but also those arising in cyberspace.

3. The *ENS* High Court and SCA cases

The brief facts in the *ENS* High Court case were that the plaintiff purchased immovable property from a seller who appointed the defendant as the conveyancer to handle the sale. Under the sale agreement, the plaintiff paid a deposit for the purchase price and agreed to pay the balance of R5.5m through an electronic funds transfer (EFT) to the defendant's trust

62 Ibid para 70.
63 Ibid para 69.
64 Ibid paras 63-64.

account for the seller's benefit pending the registration of the transfer. The defendant's account details were sent to the plaintiff via email. Through BEC, the payment made by the plaintiff was intercepted and diverted by an internet fraudster. The plaintiff suffered patrimonial loss as a result and instituted an action against the defendant for the loss of 5.5 million sustained by her as a result of the cyber fraud. The plaintiff succeeded in the High Court, but failed in the SCA. This part sets out the issues considered and decisions reached by the High Court and the SCA. The next part comments on the positions of the courts.

3.1 Issues raised in the High Court

The legal question in the High Court was whether the defendant, a conveyancing firm, was negligent in the manner in which they sent their account details to the plaintiff and should be held liable for the patrimonial harm incurred through BEC. The plaintiff and a secretary in the conveyancing department of the defendant had been emailing back and forth about the property that the plaintiff was purchasing. The defendant represented the latter.[65] Cyber-criminals compromised the plaintiff's email inbox, and she paid the amount she owed on the property into the wrong bank account.[66] Subsequently, she claimed that the defendant, as a qualified attorney with enormous conveyancing experience, ought to have known of the risks of BEC and should have taken steps to prevent it from occurring. The plaintiff claimed that the defendant owed her a duty of care and its failure to exercise that duty gave rise to the BEC that led to the pure economic loss that she suffered. Accordingly, the plaintiff claimed that the defendant was liable to her for the pure economic loss that she had suffered.[67]

The defendant's argument was based on the premise that, should the court find it liable, this would set a precedent that would expose all conveyancing firms, regardless of size, to similar claims from third parties with whom they have no direct relationship.[68] These claims would stem from losses incurred due to fraudulent activities, such as the hacking of email accounts.[69] The defendant emphasised that such a ruling would impact not only law firms but also all businesses that commonly transmit invoices, including their banking details, via email – a widespread practice, according to the defendant.[70] Moreover, the defendant argued that the prevailing norm in the marketplaces is that the responsibility lies with the debtor, particularly when opting for electronic payments, to ensure that funds are directed to the correct account.[71] In light of this, the defendant urged the court to resist expanding liability for pure economic loss in this instance, citing the Constitutional Court's caution, in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*,[72] against creating 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[73]

65 *ENS* High Court (note 5) para 6.
66 Ibid para 15.
67 Ibid.
68 Ibid para 112.
69 Ibid.
70 Ibid.
71 Ibid para 113.
72 *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC).
73 *ENS* High Court (note 5) para 113.

3.2 Decision of the High Court

The court held that the defendant has a legal duty to 'prevent harm resulting from the conveyancer's failure to warn the depositor of the dangers of cyber hacking and spoofing of emails or of the fact that PDF attachments to emails containing sensitive information such as bank account details are not invulnerable to BEC'.[74] The court held further that 'the interests of the defendant as well as the society demand that a legal duty is recognised in this case'.[75] The court followed the *dictum* in *Estate Van der Byl v Swanepoel*,[76] and held that 'where one of two innocent parties have to suffer a loss arising from the misconduct of a third party it is for the public advantage that the loss should fall … on that one of the two who could most easily have prevented the happening or the recurrence of the mischief'.[77] Thus, the court held that ENS is a sophisticated commercial entity and is well-positioned to foresee the risk of BEC occurring. Individuals in society need to be better placed to respond to the ever-evolving threat of cybercrime, which is sophisticated and technical.[78] Moreover, the defendant, an experienced conveyancer, was aware of the inherent risks in conveyancing transactions based on its prior knowledge of the dangers of BEC.[79] The foreseeability of the risk of BEC imposed a duty on the defendant to take precautions against potential harm, and its failure to do so was deemed negligent in the given circumstances.[80]

Furthermore, the court held that 'the facts that are common cause and as found regarding this matter leave no doubt …, but for the negligent transmission of its account details and failure to warn [the plaintiff] upfront of the inherent danger of BEC, she would not have suffered the loss'.[81] The court stated that the defendant was the factual cause of the plaintiff's loss, as it provided its bank account details and was responsible for their accuracy and secure transmission.[82] On the enquiry relating to legal causation, the court held that the negligent conduct of the defendant was linked sufficiently closely or directly to the loss suffered by the plaintiff, given that the loss was reasonably foreseeable under the circumstances.[83] Consequently, the court concluded that it was reasonably foreseeable under the circumstances that the plaintiff might suffer loss as she did. Thus, ENS was the proximate cause of the plaintiff's harm. Legal causation was also established, as the defendant's negligent conduct was sufficiently linked to the plaintiff's loss, given that the loss was reasonably foreseeable under the circumstances.[84]

Additionally, the defendant's failure to ensure the safe transmission of the account details was considered wrongful conduct. In assessing wrongfulness, the court determined

74 Ibid para 126.
75 Ibid para 131.
76 *Estate Van der Byl v Swanepoel* 1927 AD 141.
77 Ibid at 150.
78 *ENS* High Court (note 5) para 117.
79 Ibid para 131.
80 Ibid para 130.
81 Ibid para 129.
82 Ibid.
83 Ibid.
84 Ibid para 129.

that the plaintiff's loss, in this case, was quantifiable and determinate, mitigating concerns about indeterminate liability as a policy consideration against recognising liability for pure economic loss.[85] The court also found that factual causation was established because, but for the defendant's negligent transmission of its bank account details and failure to inform the plaintiff of the risks of BEC, the plaintiff would not have suffered the loss.[86] As a result, the High Court ordered that the plaintiff's claim be upheld, with costs on the scale typically applicable between an attorney and its client, including the costs incurred for the engagement of two counsel.

3.3 Issues raised at the SCA

The defendant, ENS (as appellant), appealed against the decision of the High Court.[87] The issue before the SCA was whether the plaintiff (as respondent) had adequately established the element of wrongfulness for a delictual claim arising out of an omission causing pure economic loss. At the SCA, the parties offered the same arguments that they had advanced before the High Court, which are discussed above.

3.4 Decision of the SCA

The SCA's decision was based on the principle that individuals are generally not liable in delict for losses caused by omission, unless there is a legal duty to act.[88] In this instance, the SCA found that no such legal duty existed between ENS (the appellant) and Ms Hawarden (the respondent).[89] This was because there was no contractual relationship between ENS and Ms Hawarden and, thus, her loss occurred at a time when there was no attorney–client relationship.[90] Pursuant to this, the SCA held that the respondent suffered loss, not as a result of any failure in the appellant's system, but because hackers had infiltrated her email account and fraudulently diverted her payment meant for the appellant into their own account.[91] The interference that caused the loss was a result of the respondent's email account having been compromised.[92]

From the records, the SCA found that the respondent had earlier been warned via letter of the risk of BEC. Consequently, the SCA held that it would have been fairly easy for the respondent to have avoided the risk.[93] As the respondent did with the estate agent, she should have verified the appellant's bank account details before making the payment.[94] The court held that the respondent had ample means to protect herself from the loss in view of the fact that there was an active line of communication between her and the appellant before the payment was made, as well as the option of a bank guarantee for cash transfer,

85 Ibid para 130.
86 Ibid.
87 *ENS* SCA (note 5).
88 Ibid para 19.
89 Ibid.
90 Ibid para 20.
91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.

which she failed to take advantage of.[95] Furthermore, the SCA clarified that any warning by the appellant of the risk of BEC would have been meaningless, in the circumstances of this case, because by that time the cybercriminal was already embedded in the respondent's email account, and consequently the risk had already materialised.[96]

Therefore, the court held that a finding that the defendant's failure to warn the respondent attracted liability would have profound implications not only for the attorneys' profession, but for all creditors who send their bank details by email to their debtors.[97] According to the SCA, the *ratio* of the High Court judgment that all creditors in the position of the appellant owe a legal duty to their debtors to protect them from the possibility of their accounts being hacked is untenable.[98] The SCA concluded that the High Court should have declined to extend liability in this case because of the real danger of indeterminate liability.[99] The appeal was therefore upheld.[100]

4. Reflections on the High Court and SCA decisions

To a large extent, we prefer the High Court's judgment rather than the SCA's judgment. We must, however, note that the strength of the SCA's decision rests on the court's finding that the respondent (Hawarden) had ample opportunities to verify the account details before depositing the money in the account, but failed to take advantage of these opportunities. Moreover, there was evidence that the estate agent had initially warned the respondent about the risks of BEC. Even so, we believe that the appellant's omission does not completely absolve the appellant, as a firm of attorneys and professional conveyancers, of liability for its failure to discharge their professional duty towards the respondent. Indeed, the respondent was not the direct client of the appellant. However, as demonstrated below, the case law shows that a professional's legal duty to act with care, skill, and diligence extends to third parties in whose favour it acts, pursuant to the direct contractual relationship between it and its clients.[101] We turn to this later. For now, we should note, however, that the respondent's failure to use the alternative opportunities to confirm the account details should have been regarded as contributory negligence, with the effect of being apportioned a share of the damages at best. Unfortunately, this issue was not raised in the SCA.

The evolution of cyberspace has ushered in a paradigm shift in legal considerations, challenging traditional delictual principles and requiring a careful examination of their applicability in this new realm. The *ENS* SCA and High Court cases provided a pivotal moment where the judiciary confronted the complexities of pure economic harm caused by BEC, a relatively recent addition to the jurisprudence on delict in cyberspace in South Africa. Notably, the High Court applied the well-established elements of harm, conduct, causation, fault and wrongfulness, akin to those used in adjudicating delict actions in the physical world, demonstrating the adaptability of the law to address emerging challenges.

95 Ibid para 26.
96 Ibid para 20.
97 Ibid para 21.
98 Ibid.
99 Ibid.
100 Ibid.
101 *Roestoff* (note 55).

The established precedent of the court in *casu*, particularly in evaluating wrongfulness, has significantly influenced and demonstrated the adaptability of the law of delict to the advancements in technology. As a key determinant of liability, wrongfulness involves evaluating whether it is reasonable to impose legal responsibility on the defendant for the harm resulting from their conduct.[102] In *Gerber v PSG Wealth Financial Planner*,[103] the court held that PSG had to compensate Gerber for financial losses incurred due to cybercriminal activities. This decision was grounded in PSG's contractual obligations and failure to implement adequate security measures, providing a clear basis for liability.[104]

Similarly, the *ENS* case involved a compromise of the respondent's email systems, leading to cybercriminals impersonating the appellant's email address. Unlike the PSG scenario, however, the respondent and the appellant in the *ENS* SCA and High Court cases had no direct contractual relationship. Even so, as held in *Roestoff v Cliffe Dekker Hofmeyer*,[105] the legal duty owed by attorneys in relation to money deposited in their trust account is broad enough to cover both their clients and third parties who are not their clients.[106] Moreover, an established principle of the South African law of delict is that the negligent performance of a contractual duty, especially by a professional, that results in pure economic loss to a third party can entitle that third party to claim against the professional. It is immaterial that the third party is not a party to the contract.[107] Thus, in examining the intersection of professional liability, contractual obligations and the duty of care of attorneys, it is imperative to recognise the unique characteristics that define the attorney–client relationship. As members of an established and organised profession, attorneys operate within a framework that demands specialised knowledge, skill and care.[108]

As demonstrated in the second part above, the legal profession emphasises the competence of its practitioners, requiring them to adhere to a standard commensurate with the expertise expected from a reasonable person in their profession, especially concerning their dealings in cyberspace. The client–attorney relationship, a quintessential element of legal practice, is inherently contractual. This contractual dimension imposes an implicit obligation on attorneys to perform their professional services with the knowledge, competence and skill reasonably expected of a member of the legal profession. The contractual duty establishes a foundation for the professional conduct of attorneys, ensuring that their clients – including persons for whose benefit their clients have retained their services – receive a standard of service that aligns with the specialised nature of legal practice. Moreover, in the legal landscape, courts have consistently recognised that attorneys may be held liable for delicts concerning pure economic loss suffered by

102 Neethling & Potgieter (note 13) 45.
103 *Gerber v PSG Wealth Financial Planner* [2023] ZAGPJHC 270.
104 Ibid para 52.
105 *Roestoff* (note 55).
106 Ibid paras 81, 82 and 83.
107 For instance, see *EG Electric v Franklin* 1979 (2) SA 702 (E); *Perlman v Zoutendyk* 1934 CPD 151; *Longueira v Securitas of SA* 1998 (4) SA 258 (W).
108 Loubser & Midgley (note 6) 326.

their clients as a result of the attorney's wrongful conduct.[109] This acknowledgement underscores the broader responsibility that attorneys bear beyond the contractual realm as demonstrated in the *ENS* High Court case.

Based on the foregoing, we argue that the SCA erred by narrowly construing the absence of a direct contractual relationship as a ground for absolving the appellant of liability. This approach reflects a regressive and overly simplistic view that fails to align with the dynamic legal landscape required to address the complexities of cyberspace. The SCA's focus on the absence of a direct contract overlooks the broader duties that professionals, particularly attorneys, owe in an interconnected digital world. Legal precedents, such as *Gerber v PSG Wealth Financial Planner* and *Roestoff v Cliffe Dekker Hofmeyer*, emphasise that the duty of care extends beyond the confines of a contractual relationship, especially when dealing with professionals who operate within a framework demanding specialised knowledge, skill and care. The High Court's decision was not only about adhering to precedent, but also about recognising that the legal profession must respond to the challenges posed by cyber threats, which can cause significant economic harm to clients and third parties alike.

Moreover, the High Court rightly identified that the essence of wrongfulness in delict lies in determining whether it is reasonable to impose legal responsibility on the defendant. The firm's failure to warn about potential cyber risks, despite knowing about the increasing prevalence of email fraud, constitutes a breach of the duty of care expected of a legal professional. The SCA's reluctance to impose this duty, under the guise of avoiding 'indeterminate liability', appears to run against the current cyber reality: it fails to appreciate that, in this digital age, the scope of professional responsibility must necessarily expand to address the real and substantial risks posed by cybercrime. It also ignores the fact that delictual liability is determined on a case-by-case basis. Thus, success in one situation is not a guarantee of success in subsequent cases. Moreover, upholding the appellant's liability in the *ENS* SCA case would have aligned the South African law of delict with the principle of negligent enablement of cybercrime emerging in US tort law.[110] By clinging to outdated notions of legal duty and failing to recognise the adaptability of delictual principles in cyberspace, the SCA's decision is a missed opportunity to advance the law in a way that meets the demands of modern technology. The High Court's judgment, which embraces this necessary evolution, provides a more compelling and forward-thinking framework for addressing the challenges of cyber fraud, ensuring that victims are not left without recourse in an increasingly digital world.

Indeed, in *Fourie v Van Der Spuy and De Jongh Inc. and Others*,[111] the High Court confirmed the duty of attorneys in a situation involving loss suffered by a client as a result of the activities of fraudsters in the digital space. The case involved the erroneous payment by the respondents (the attorneys) of the sum of R1 744 599.45 meant for the applicant (their client) to a cyber fraudster, as a result of hacked emails. Holding the respondents

109 Ibid.

110 For a discussion, see Rustad, ML & Koenig, TH 'The Tort of Negligent Enablement of Cybercrime' (2005) 20 *Berkeley Technology Law Journal* 1553.

111 *Fourie* (note 23).

jointly and severally liable to pay the applicant the amount in dispute, the court, per Klein AJ, held that:

> [t]he 2nd Respondent was negligent and failed to exercise the requisite skill, knowledge and diligence expected of an average practising attorney and thus failed to discharge her fiduciary duty to the Applicant by transacting via e-mail whilst fully knowing that fraud is prevalent in her profession and not employing any measures to ensure that neither she nor the Applicant will fall victim to fraud.[112]

Although the above case focused on contractual relations between attorneys and their clients, it is nonetheless relevant in appreciating the importance of the attorney's professional duty in relation to guarding against the risks of BEC. Earlier, the High Court had similarly held an attorney responsible for the loss suffered by its client, as a result of BEC. This was the case of *Jurgens and Another v Volschenk*,[113] where the attorney represented the client in a conveyancing transaction. However, through BEC, the payment from the sale of the property was intercepted by internet fraudsters. According to the High Court, per Tokota J, it is 'the duty of an individual attorney to ensure, as far as she/he is able to do so, that he/she measures up to the high standards demanded of him/her'.[114]

Nonetheless, a crucial nuance emerges in the *ENS* SCA case, where the appellant did not represent the respondent, but was acting on behalf of the property seller. Despite this, the appellant in the *ENS* SCA case remained bound by a legal duty to the respondent, according to *Roestof v Cliffe Dekker Hofmeyer*, as already discussed above. As the High Court correctly noted in the *ENS* case, the appellant (as defendant) was obligated to 'prevent harm resulting from the conveyancer's failure to warn the depositor of the dangers of cyber hacking and spoofing of emails or of the fact that PDF attachments to emails containing sensitive information such as bank account details are not invulnerable to BEC'.[115] Consequently, the appellant demonstrated negligence by failing to alert the respondent to the risks of cyber hacking, an oversight that the High Court correctly highlighted. The appellant, who was in a position to foresee this harm, was held accountable for failing to provide the necessary warnings – a foresight not necessarily apparent to a layperson.

5. Conclusion

To some extent, the SCA erred in its judgment by failing to account for the evolving nature of delictual liability in the context of cyberspace, particularly when addressing the responsibilities of professionals like attorneys in the digital age. The High Court, on the other hand, correctly recognised the need for the law to adapt to the realities of the digital era, where new forms of harm, such as BEC, demand a reassessment of established legal principles. The development of the digital space has introduced unprecedented opportunities and challenges, making it essential for the law to evolve in tandem. The *ENS* SCA and High Court cases mark a pivotal moment in the application of delictual

112 Ibid paras 18, 20, 24 and 30.
113 *Jurgens and Another v Volschenk* [2019] ZAECPEHC 41.
114 Ibid paras 22 and 26.
115 *ENS* High Court (note 5) para 130.

principles to the digital realm, particularly in addressing the liability of attorneys for pure economic loss caused by cyber fraud. The High Court's judgment successfully closes a gap in the law of delict that had previously left victims of BEC and similar online scams without adequate legal recourse.

We have identified the complexities of applying traditional delictual principles to the emerging landscape of cyberspace, emphasising the need for a cautious yet adaptable approach. The High Court's decision reflects this careful balancing act, ensuring that the law protects individuals from the unique risks posed by digital transactions while maintaining the integrity of established legal principles. The SCA's refusal to impose liability on ENS, based on the absence of a direct contractual relationship, fails to recognise the broader duty of care that professionals owe in the digital age. By embracing the adaptability of the law of delict to address the challenges of cyberspace, the High Court demonstrated a forward-thinking approach that protects the values of dignity, fairness and freedom in an increasingly digital world. The SCA's decision, by contrast, represents a step backward, neglecting the judiciary's role in ensuring that legal frameworks evolve to meet the demands of new technologies without compromising fairness or coherence. The High Court rightly struck the balance between tradition and evolution, ensuring that the law remains resilient and capable of addressing the complexities of modern delictual actions in cyberspace.

How to cite:

Desmond Oriakhogba and Nompumelelo Ndwandwe 'Delict in Cyberspace in South Africa: Reflection on Recent Judicial Developments' (2025) 5 *Turf Law Journal* 15-31.

Received: 4 December 2024, Accepted: 20 April 2025, Published: 09 May 2025, Doi: https://doi.org/10.62726/tlj.v5.55

Comparative Analysis of Gender Discrimination in Bail Suretyship in Nigeria, Ghana and Kenya: A Review of *Ken Nwafor v Economic and Financial Crimes Commission* (2021)

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Abstract

Male sureties are often preferred in bail proceedings across many African criminal justice systems, including Nigeria, Ghana, and Kenya. This preference persists despite the lack of explicit legal provisions preventing women from assuming this role. This practice is rooted in cultural biases that view women as the 'weaker sex', which is reflected in legal practices. This case review examines the legal implications of denying women the right to act as sureties, focusing on the Nigerian case of Ken Nwafor v Economic and Financial Crimes Commission (2021). *It draws comparative lessons from the legal frameworks of Ghana and Kenya. The review argues that gender-based discrimination, notably the denial of women's rights to serve as sureties, is both unconstitutional and illegal, as it infringes upon fundamental rights. The constitutions of Nigeria, Ghana, and Kenya do not support gender inequality, and no international law or statute prohibits women from serving as sureties. The review adopts a doctrinal approach to emphasise the need for concrete evidence to demonstrate discriminatory practices. It calls for legal reforms that ensure gender equality and rejects the notion that gender should influence legal rights or responsibilities. It advocates for enacting stronger legal frameworks alongside grassroots advocacy and awareness campaigns regarding gender equality. The review concludes with recommendations to eliminate gender-based discrimination in the criminal justice systems of these countries, ensuring equal treatment for all individuals, regardless of gender.*

Keywords

bail surety, gender discrimination, Nigeria, Ghana, Kenya

1. Introduction

In some African countries' criminal justice systems, women are often prevented from serving as surety for defendants, such as when the detained individual is the woman's

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husband. In Nigeria, Ghana, and Kenya, before an accused person or defendant can be released on bail by the court, the police, or other law enforcement agencies, they must provide a reliable surety. However, an accused person may be granted bail on their own recognisance. In this scenario, they confirm a bond of self-recognition and are granted bail under specific conditions. This applies to suretyship in all criminal institutions. The role of a surety is to secure the freedom of a defendant, an assumed innocent individual, for any necessary date. The concept of suretyship relates to the bail process as it guarantees bail for an accused person. Bail is defined as a contract in which a defendant is released to their surety to secure their attendance at an investigation or a court trial.

The primary purpose of bail in any criminal justice system is to ensure that the defendant does not fail to appear for the investigation process or the trial in court. Institutions with the power of criminal investigation and trial can grant bail. In Nigeria, bodies such as the police and the Economic and Financial Crimes Commission (EFCC), among others, have such powers. Courts with criminal jurisdiction can also grant bail to defendants. While bail is a concept, suretyship is the process of its actualisation. Additionally, while bail represents the process, the surety is the person standing for it, as both work together in the criminal law process. In the criminal law process, bail, principally so-called, is the temporary freedom granted to the defendant on the grounds of demanding their appearance to answer their case when required. The surety is the person who undertakes to take responsibility for the consequences of the defendant's presence until the matter is resolved. A surety guarantees the bail or appearance of another or others until the matter is finalised by the Court or Police, among others. The surety represents the defendant under terms and conditions set by the Institutional Authorities. The surety must possess reasonable qualifications required by the Court or the involved Institution. Such qualifications may include owning landed property and being a credible and reliable person in society. Additionally, the jurisdiction of the surety's residence, business, and personal wealth may be stipulated as a condition. A surety may be asked to attest to a bond known as recognisance. This is an undertaking of a specific financial sum to be forfeited to the Government should the defendant jump bail. All the above pertain to the character of the surety. The obligations, rights, and liabilities of a surety are outlined in criminal jurisprudence.

The most important obligation is the defendant's production when due for investigation or trial. A surety can forfeit the bail bond whenever the defendant fails to meet the bail conditions. The surety's property may be seized upon his demise. If the bond is not fulfilled, the surety has the right to withdraw from the contract, which may result in the re-arrest of the defendant he supported. The surety may be required to deposit the bail bond sum with the Authority. However, in practice, his pledge to do so is generally accepted. This case review examines the unpopular practice amongst courts and law enforcement agencies of rejecting females as sureties for the bail of accused persons in Nigeria, Ghana, and Kenya. It is found that some specific requirements or conditions may be ordered for a surety to stand for bail, but such processes are discriminatory. Utilising the doctrinal research method, this work interrogates the right of the female gender to surety detained defendants within the Court or Criminal Law Institutions in Nigeria as per the case of

Ken Nwafor v EFCC.[1] The work argues that there is no legal impediment to justify the practice in Nigeria, Ghana, and Kenya, where females are exempted from suretyship based on gender.

2. The case of *Ken Nwafor v EFCC*

2.1 Brief facts

The case involved an appellate matter concerning the final judgment of the High Court of the Federal Capital Territory (FCT), Abuja, rendered on October 28, 2015. The appellant's claims, as the applicant in the lower court, were rejected due to a lack of merit. This led to the case being brought before the Court of Appeal, FCT Division. The appellant had entered into a business arrangement to purchase contracts from Mr. Femi Gbadamosi, but the business ultimately failed. Consequently, Mr. Femi filed a petition against him with the EFCC, alleging cheating and seeking the EFCC's assistance in recovering the amount he had spent. The EFCC invited the appellant, who asserted it was a failed civil transaction. Despite this, he was arrested and detained. The appellant subsequently brought a case before the lower court to enforce his fundamental rights.

On the other hand, the respondent stated that it received a petition written by one Gbadamosi Tajudeen Femi, who alleged criminal fraud, forgery, obtaining money under false pretences, and issuing a dud cheque against the appellant. An investigation into these allegations by the EFCC revealed that the appellant received sums from the petitioner to facilitate obtaining a contract from the Millennium Development Goals Office (MDG), but failed to do so, and the petitioner was issued a forged award contract document. As a result, the appellant was invited by the EFCC for investigation and was subsequently granted bail. The applicant, now the appellant before the Court of Appeal, filed an appeal. He attempted to overturn the High Court's judgment at the appeal hearing. Despite being served with the court papers, the EFCC did not file a response or participate in the proceedings.

The two issues raised by the appellant in the appellant brief were: (a) can a citizen be rejected and discriminated against as a surety based on her marital status and sex?; and (b) whether or not, considering section 46(1) of the 1999 constitution (as amended), Order 11 and 2 of the FREP Rules 2009, the Appellant is entitled to the reliefs when his rights are likely to be contravened?

2.2 Appellant counsel's submission

On the issue of whether a Nigerian citizen can be discriminated against as a surety based on her sex and marital status, counsel for the appellant argued that the Constitution of the Federal Republic of Nigeria 1999 (as amended) safeguards the rights of citizens without regard to their status or gender. Therefore, it prohibits any discrimination based on birth status, sex, or any form of disability or marginalisation. He further submitted that in criminal law jurisprudence, bail is a right for every person, regardless of gender or sex.

1 [2021] 13 NWLR (PT 1794); See *Udeh v FRN* [2001] 5 NWLR (PT 206) 312 at 324 paras F-G; *Nwude v FGN* [2004]17 NWLR (PT 902) 306 at 326, paras E-H; *Comptroller of Prison v Adekanye* [1999] 10 NWLR (PT 623) 40; *Suleiman & 1 Anor v C.O.D* [2008] 8 NWLR (PT 1089) 296.

Additionally, it was argued that the facts presented by the appellant were not challenged or contradicted by the EFCC. They contended that unchallenged and uncontroverted facts constitute salient evidence that can be relied upon to make appropriate findings of fact. In the record of the appeal, the appellant stated the facts in paragraph 27 of the motion in the lower court as follows:

> That EFCC asked me to get 2 Civil Servants to take me on bail, so I called my wife who works with Federal Staff Hospital as a Medical Doctor and one Engr. Chris to bail me. They however said I should bring a reliable surety (2 digit level civil savant) the next day to replace my wife, but that even if I could not get one that I should still endeavor to report back at their office by 10 am the following day. I left that evening and reported back the next morning at 10 am being the 9/4/2015.[2]

The EFCC refuted the above claim. The Court of Appeal, in its erudite judgment, upheld the principle that both males and females are equal before the law; therefore, any practice that divides their roles into superior and inferior is unconstitutional. In legal terms, both sexes can serve as sureties for a defendant on equal terms. In this context, it is illegal and unconstitutional to deny women the right to act as sureties for bail based on their gender. The Constitution views this as an infringement of their fundamental rights and considers it discriminatory.

2.3 Why the appellant failed on the first issue on appeal?

The appellant failed in this case regarding the wife's suretyship not because of substantive law, which is clear, but due to the evidence in procedural law. He could not provide the Appellate Court with documentary evidence concerning the bail refusal by the EFCC. In other words, since the appellant claimed that his wife was rejected as one of his sureties by the EFCC, the burden of proof rested on him to substantiate this allegation. In legal terms, proof is necessary to establish or deny an alleged fact. It is the responsibility of the party asserting a claim to provide evidence. In this context, he argues that the existence of a legal claim depends on presenting evidence to support it, and failing to do so results in the failure of his case in law. Therefore, the appellant was required to provide documentary proof of his wife's rejection as a surety by the EFCC. Additionally, he could have obtained an affidavit or oath from his wife, the primary party affected by the alleged discrimination by the EFCC. This is because, in law, any issue that is supported and relied upon requires documentary evidence to be proven in court. The mere presentation of oral evidence alone is insufficient to support or substantiate the claims made by a party without reference to relevant documents.

The appellant's wife did not complete any bail papers to serve as surety for him, which the respondent rejected before the lower court. Furthermore, there is no direct evidence regarding the appellant's wife, who was allegedly dismissed as a surety solely based on her gender.

2 See Pages 1-6 of the Record of Appeal of the Court of Appeal Abuja Division; R.A. Oyoru 'An Assessment of Gender Discrimination in Workplace and its Influence on Workers Performance: A Literature Review' [2023] 3(2) *International Journal of Advanced Research on Multi Disciplinary Studies* 1–9.

These are critical factual issues raised by the appellant. The burden, which by law rests firmly on him, is to provide credible evidence. As the law requires, the appellant failed to present credible and sufficient evidence to support the allegation.

2.4 Issues distilled and determined by the Appellate Court

2.4.1 Conditions guiding the granting of bail to a suspect

The Appellate Court ruled that when a defendant is detained and it is found that the investigation cannot be finalised within the stipulated time, the next option is to release him temporarily on bail upon fulfilling fair conditions.[3] The illegality and unconstitutionality of rejecting a surety solely based on sex: The law does not allow for dichotomy, separation, or division between the sexes regarding the authority to act as a surety for bail. In criminal law, both possess the same capacity.

On whom does the onus of proof of assertion of denial of the right to stand as a surety lie: To prove a particular fact in law, the person who proposes it is enjoined to prove it. The onus is on him to prove to the court what he asserts as the truth of the case. It is he who asserts that must prove. In this case, the Appellant alleged that the EFCC excluded his wife from being one of his two sureties, and this allegation was firmly denied. Therefore, the onus was on the Appellant to prove this allegation, as he had made it against the respondent.[4] This is because, under sections 131 and 132 of the Evidence Act 2011, he who asserts the reality of a fact is obligated to prove it. Section 133 of the Evidence Act then imposes the burden upon the defendant to disprove it.

2.4.2 The relationship between documentary and oral evidence

There is a connection between supporting documents and oral evidence. When a document is claimed to prove a fact in law, the absence of such a document and reliance on oral evidence to establish the facts within the document without further support is unreasonable. The appellant's wife did not complete the bail papers correctly, as one of his two sureties was rejected by the EFCC. Furthermore, there was no direct evidence from the appellant's wife, who was allegedly dismissed as a surety simply because she was female. All these were critical facts that the appellant positively alleged, and the burden of proof, by law, rested entirely on him to provide credible evidence. Therefore, as the law mandates, the appellant failed to present credible and sufficient evidence to support the allegation.

2.4.3 The effect of the failure of the respondent to file a respondent brief

It is the position of the law that when a defendant is served correctly and fails to respond, whether by oversight, neglect, or intentionally, it constitutes an admission under our procedural law. The failure of a respondent to counterargue the facts or arguments in an appeal suggests consent.

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3 NWLR, n 8, 592 paras D-F, 600, paras A; Institute for Security Studies (ISIS), Gender Inequality of African Women [2022] 1-3.

4 Ibid, 598, paras G-C; *1GN (Nig) Ltd v Pedmar (Nig) Ltd* [2013] LPELR – 41064; *Oguche v FBN Plc* [2020] 4 NWLR (Pt1715) ratio 1 at 535; *Momoh v Umoru* [2011] 15 NWLR (Pt1270) 217; *Mbanefo v Agbu* [2014] 6 NWLR (Pt 1403) 238]; *S* [2017] 13 NWLR (Pt 1581) 52.

2.4.4 Failure of one party to respond to the other party's case

When one party does not answer a case presented by another, it does not automatically prove that the facts align with the Court's position. Consequently, the failure of one party to address the facts in another's case does not inherently grant merit to the other party's case, as the court is tasked with assessing arguments fairly. In the present matter, the EFCC, despite being served with the court documents in the appeal, did not file its Respondent's Brief nor participate in the entire process. Nevertheless, the Appellate Court considered the sole issue on its merits.

3. The legality of women standing as surety for bail in Nigeria, Ghana and Kenya

The position of law is that it is unconstitutional and illegal to reject a surety based on sex. Many statutory instruments are created to enhance and ensure that women's rights are protected from marginalisation and violation at the international level. Consequently, measures are enacted to curtail male dominance in law. The Convention on the Elimination of Discrimination Against Women (CEDAW) is a leading international treaty in this fight. For this reason, CEDAW defines discrimination against women as:

> Any distinction, exclusion or restriction on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[5]

The above definition states that the exclusion of women from acting as sureties represents an act of marginalisation of their rights. It urges state parties to combat the relegation of womanhood, addressing its various forms, content, and practices, while advocating, through all concerted efforts, sustainable policies designed to eliminate discrimination against women. Furthermore, it asserts that sustainable legislation should progress in all aspects of life, denouncing male-dominant practices related to gender from the grassroots level.

This significantly challenges the belief that women are weaker vessels. The explicit provision of CEDAW, which has evolved into international customary law, is globally enforceable, and Nigeria, as a signatory, is bound by it. The Administration of Criminal Justice Act (ACJA), 2015 of Nigeria provides thus: '[a] person shall not be denied, prevented, or restricted from entering into a recognisance or standing as surety for any defendant or applicant on the ground only that the person is a woman.'[6]

This directly addresses the discrimination against women acting as sureties in criminal cases, emphasising that they should be treated as a rule, not an exception. The provision of the 1999 Constitution of Nigeria is also very instructive. Section 42(1) provides thus:

5 CEDAW, Article I.
6 Administration of Criminal Justice Act 2015, Section 167(3).

> A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject.

The above clarifies the rhetoric surrounding the treatment of women as second-class creations of God, which subordinates their human rights under the guise of masculine control. The 1999 Constitution of Nigeria states in section 42(2) that: '[n]o citizen of Nigeria shall be subjected to any disability or deprivation merely because of the circumstances of his birth'. As a foundational legal document of the country, it prohibits any form of discriminatory treatment based on gender. Therefore, sexual preference is irrelevant, as equality before the law should be upheld. Furthermore, the Administration of Criminal Justice Act 2015 and the Administration of Criminal Justice (Repeal and Re-enactment) Law of Lagos State 2011 (ACJL) of Nigeria contain similar provisions that empower the Chief Judge to regulate the registration and licensing of individuals, corporate bodies, or persons to act as bondspersons within the jurisdiction of the Court in which they are registered.

This indicates that any individual or corporate body duly registered and licensed is empowered to act as a surety or bondsperson. A female or a male may own the above institution, as women have equal participatory rights under Nigerian law. Bail granted by law is usually closely related to securing the accused's attendance at his trial before the Court or being available to the Police for further investigation. It is for the protection of the accused person's rights guaranteed under the 1999 Constitution of Nigeria. Section 36(5) provides that '[e]very person who is charged with a criminal offence shall be presumed innocent until he is proven guilty'. Section 35(1) of the foregoing Constitution equally provides that '[e]very person shall be entitled to his liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law'… (a) in the execution of the sentence or order of a Court in respect of a criminal offence of which he has been found guilty' respectively. Strictly speaking, bail in criminal jurisprudence is curtailed at the altar of creation status. It deprives women of equal participatory rights to men.

There is no legal impediment preventing women in Nigeria from acting as sureties for bail. To underscore this point, the Administration of Criminal Justice Act, 2015 of Nigeria, for instance, provides that: '[a] person shall not be denied, prevented or restricted from entering into a cognisance or standing as surety for any defendant or applicant on grounds of gender'. This provision is gender-sensitive and prohibits discriminatory practices against women. It is a settled issue that women legally are not exempt from suretyship in the Nigerian criminal justice system. This practice also operates in Ghana, where a woman can lawfully stand as surety. The above provisions suggest that issues bordering on gender are not a determining factor for suretyship in Nigeria.

The Constitution of Ghana is clear and explicit on this matter as it provides thus: '[I]f a person arrested, restricted or detained, is not tried within a reasonable time, he shall be released either unconditionally or upon a reasonable condition, necessary to ensure

his appearance at a later date for trial or proceedings'. The above implies that there is no dichotomy or segregation regarding sexual class as it relates to surety in law. Compared to section 42(2) of the 1999 Constitution of Nigeria, which is not specific on bail but prohibits segregation due to birth conditions, the Ghanaian constitutional provision mentioned above is non-selective regarding sex class for a surety. Since the law is firmly against discrimination based on gender in Ghana, why then does equality elude women in their role as sureties within the criminal justice system of the courts and law enforcement agencies in Ghana?

The above question also represents jurisprudential rhetoric in Kenya. The country has legal provisions like those in Nigeria and Ghana that entail gender mainstreaming in the criminal justice system. In the criminal regulatory and institutional Practice Direction, the Kenya Bail and Bond Policy Guidelines define bail as:

> Agreement between an accused person or his or her sureties and the Court that the accused person will attend court when required and that should the accused person abscond, in addition to the Court issuing warrants of arrest, a sum of money or property directed by the Court to be deposited, will be forfeited to the Court.[7]

The phrase 'his or her surety' indicates that the above regulatory bail and bond guideline is gender-sensitive regarding the sex class of a surety. Simply put, a surety can be male or female, signifying that the Kenyan Criminal Administration of Justice permits both sexes to stand as sureties. Underscoring the previous assertion, the same regulatory policy defines a surety thus: '[a] person who undertakes to ensure that an accused person will appear in Court can abide by bail conditions. The surety puts up security such as money or title to a property, which can be forfeited to the court if the accused fails to appear in court'.

The term 'any person' refers to the concept of surety, which does not favour the male sex but encompasses all human beings, denoting both male and female. To support the equality provisions mentioned, the Constitution of Kenya states that a detained person shall be released conditionally on bond or bail to a surety by the court or law enforcement agencies unless there are compelling reasons to the contrary.

The above provision for releasing an arrested person does not signify that the surety must be male; however, 'any person' symbolises or includes both sexes as a qualification for suretyship in the Kenyan criminal justice system. Despite the comprehensive equality provisions and ongoing efforts by the Government of Kenya to reduce gender discrimination, the barriers remain persistently difficult. Like Nigeria and Ghana, the law must be applied to confront and dismantle the entrenched discrimination within the cultural and religious spheres in Africa.

4. Conclusion and recommendations

Nigeria, Ghana, and Kenya are democratic countries that uphold equality before the law within their legal systems. Any law or practice that demeans or discriminates against gender

7 See National Council on the Administration of Justice 'Kenya Bail and Bond Policy Guidelines' (2015) 1.

equality is considered barbaric and undermines the fundamental principles of equality before the law. The Constitution of the Federal Republic of Nigeria 1999 (as amended) states in section 2(2) that no one shall be subjected to any form of discrimination based on their circumstances of birth. In the same vein, section 1(3) also indicates that any law found inconsistent with the provisions of the Constitution shall be null and void to the extent of its inconsistency. These clauses suggest that all legislation and practices in Nigeria must strictly adhere to the spirit and letter of the Constitution. Therefore, the practice of gender inequality that downgrades the status of women concerning bail processes or as sureties contravenes existing laws and hinders human development in Nigeria. Such an unequal stance should be eradicated from any legislation worldwide, as it undermines the fundamental principles of equality before the law. Nevertheless, there are specified conditions in bail processes for a surety; qualification for suretyship should not be based on gender, as this would constitute discriminatory practices that violate the rights of the person standing as surety.

In Nigeria, Ghana, and Kenya, the process and risks of jumping bail may lead to discrimination against women in the bail process. This issue is compounded by the complex obligations, rights, and liabilities of suretyship within the legal system. The obligation to produce the accused on schedule is not straightforward. A surety may risk forfeiting the bail bond if the accused fails to appear. Additionally, the court can attach her property to recover the bond if the woman's surety dies before the bail bond payment is made. Failing to meet the financial requirements of bail could also be a factor. If the woman surety fails to produce the accused at the required time, she may be liable to pay the specified amount. While she may be allowed to show cause, if her justification is insufficient before the court, she risks forfeiture of finances, property, or a jail term not exceeding six months.

Suretyship is associated with several rights. She can recant her suretyship at any time, which requires the surety to provide a new one. If he fails, he may face a bench warrant or remand. She can collect a security bond to support the bail bond whenever necessary. A surety has the right of audience in court before the bond sum or deposited security is forfeited. Regarding the surety, she has the right to be informed of the court's intention to forfeit her bail bond and the right to appeal this decision, among other rights.

The above conditions apply to Nigeria, Ghana, and Kenya. Denying a woman her rights to bail constitutes a clear violation of two fundamental human rights principles. It implies a denial of freedom for both the accused and the woman involved and represents a retrogressive assault on womanhood. It also amounts to injury to the feminine world, positioning it as inferior to the male counterpart. As mentioned earlier, various arguments have been made against this abhorrent practice of denying a woman the power of suretyship based on her sex. Some have suggested that rejecting female sureties stems from remnants of traditions incompatible with the law and natural justice.

Another reason is to protect women from losing their bond, which may include imprisonment. This chauvinistic approach is unhealthy and unconstitutional. In light of gender mainstreaming, such practices should be discarded as barbaric, especially since women now work in the courts and law enforcement agencies in these countries. Additionally, anyone qualified to serve as surety should be utilised. This work examines

the case of *Ken Nwafor v EFCC* and connects it to the statutory laws that condemn the practice of denying women the right to act as sureties. It concludes that denying women this right in any criminal process is baseless and unconstitutional.

Considering the above, this paper makes the following six recommendations: First, explicit implementation structures should be established to ensure non-discrimination against women in all criminal law statutes in Nigeria, Ghana, and Kenya. Second, advocacy and awareness policies should focus on sustainability and equality in all aspects of life. Third, discrimination against women serving as sureties should be punishable under all criminal legal frameworks. Fourth, government policies should incorporate gender mainstreaming. Fifth, gender education should be integrated into primary and university curricula. Finally, women should assert their rights by providing documentary evidence to support oral claims of discrimination in suretyship.

How to cite:

Obinna N Okereke, Uche Nnawulezi and Septhan E Adiyatma 'Comparative Analysis of Gender Discrimination in Bail Suretyship in Nigeria, Ghana and Kenya: A Review of *Ken Nwafor v Economic and Financial Crimes Commission* (2021)' (2025) 5 *Turf Law Journal* 32-41.

Received: 17 May 2025, Accepted: 5 August 2025, Published: 12 September 2025, Doi: https://doi.org/10.62726/tlj.v5.69

The Systematic Failure Surrounding Records of Proceedings in the Lesotho Court of Appeal

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Abstract

The integrity of the appellate process hinges on the timely availability of a complete and accurate record of proceedings. Yet, in Lesotho, the preparation and filing of these records in the Court of Appeal has been marred by chronic dysfunction for decades. This article interrogates the enduring and institutionalised nature of this problem, one that has persisted unabated since the 1970s and continues to undermine justice to this day. Drawing on jurisprudence, historical analysis and procedural rules, the article exposes the systemic failures that have allowed this problem to fester at the very apex of the judiciary in the country. It attributes shared responsibility to litigants, legal representatives, judges of the High Court, registrars and other relevant court officers, all of whom have contributed, by action or omission, to a pattern of procedural decay. The result is delayed justice, denied appeals, and a crisis of confidence in the superior courts of record. This is more than a technical failing; it is a constitutional scandal. By critically examining how record mismanagement compromises the right to a fair hearing and erodes the authority of the appellate court, this article calls for urgent and radical reform. It makes several key recommendations to address the failures on the part of legal representatives, litigants, court officers and judges – all aimed at uprooting this longstanding plague, and ensuring the integrity, efficiency and accountability of the record-keeping process.

Keywords

record of proceedings, Court of Appeal, fair trial, justice, Rules, punitive costs

1. Introduction

In a legal system, the timely and accurate filing of complete appeal records is arguably one of the most crucial tools for ensuring access to justice, preserving the rule of law, and facilitating the fulfilment of the Court of Appeal's constitutional duties. Legal uncertainty

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and judicial inconsistency can contribute to poor access to the justice system. Inaccurate and incomplete records of proceedings and missing court records create legal uncertainty, which aggravates access to justice. A record of proceedings is integral to the appeal; it embodies the factual basis for the relevant case and is vital for framing the grounds of appeal. Gumboh posits that its availability and accuracy are indispensable to the enjoyment of the right to a fair trial.[1]

The courts of Lesotho have been struggling to maintain a healthy degree of public trust. Matlosa states that the courts of law enjoy the trust of only 44% of the public.[2] Thurston argues that lack of evidence in the form of records can lead to the justice system failing to ensure justice for citizens, and this leads to a loss of faith in the administration of justice.[3]

In the Lesotho Court of Appeal, late filings, incomplete records and problematic documentation are persistent issues that undermine the efficiency of the appellate process. This article explores the longstanding problem of delayed, missing and deficient appeal records in the Lesotho Court of Appeal, examining the legal implications, the systemic causes, and their impact on the parties involved and the broader administration of justice. Motsaathebe and Mnjama[4] opine that records are fundamental to the efficient and effective operation of the legal system of a country and even more crucial to the administration of law than to any other function of the public sector.

The effective running of the court depends on the accuracy, authenticity and reliability of records of proceedings. Their availability is crucial for purposes of appeal, and therefore a functional system for keeping records for the judicial system must be maintained. The court staff should have access to the records and should be able to retrieve them on time.[5] Musembi states that efficient court services are a strong foundation of good governance.[6] Missing court records, among other related problems, is a common phenomenon in African countries. Courts in Lesotho, Namibia, Ghana, Eswatini and South Africa, to mention a few, have grappled with this problem.[7] While defective, missing and incomplete appeal records are a common procedural issue in many jurisdictions,[8] the frequent occurrence of incomplete and problematic records in Lesotho has raised serious concerns

1 Gumboh, E 'Justice in Limbo: Missing Court Records in Malawi' (2025) 4(1) *Justices: Journal of Law* 1.

2 Matlosa, K 'When Democracy Fades Away: Loss of Faith in Local Government Elections in Lesotho, 1960–2023' in 'Nyane, H & Kapa, M (eds) *Local Governance and Decentralisation* 35.

3 Thurston, A 'Fostering Trust and Transparency through Information Systems: Reliable Official Recordkeeping Systems Provides Evidence that is Crucial to Accountable, Transparent Democracies' (2005) 36.

4 Motsaathebe, L & Mnjama, N 'The Management of High Court Records in Botswana' (2009) 19 *Records Management Journal* 173.

5 Wanjiru, MJ 'The Effectiveness of Records Management Practices at the Judiciary: A Case of Eldoret High Court Registry, Uasin Gishu County, Kenya, Mwangi June Wanjiru' (MSc Research Project, Kenyatta University, 2022).

6 Musembi, M 'Efficient record management as a basis of good governance (2005). <http://africa.peacelink.org/wajibu/articles/art_9633.html> accessed 13 May 2025.

7 Gumboh (note 1).

8 In a paper on Kenya and court records, Mnjama states that 'the system for managing records in courts is seen as inefficient and ineffective with common cases of missing files from court records

about the integrity of the appellate process. The failure to meet prescribed deadlines, along with the submission of incomplete or improperly prepared records, disrupts the judicial process, causing unnecessary delays in resolving disputes and contributing to injustice in the Court of Appeal. Furthermore, these issues place a significant burden on the parties seeking redress and the court itself, creating an environment where justice is often delayed and sometimes denied.

This article examines the legal framework governing the filing of appeal records in the Lesotho Court of Appeal, the longstanding nature of these issues, and their impact on the administration of justice. By analysing relevant case law, court practices, and institutional challenges, the article provides a comprehensive view of the matter, emphasising both the systemic factors that contribute to the problem and possible solutions.

2. Constitutional framework: The Court of Appeal as a superior court of record

The Constitution of Lesotho does more than establish a court structure; it embeds a vision of how justice should function in practice. Part of that vision includes the requirement that both the High Court and the Court of Appeal must be recognised as superior courts of record.[9] On the surface, this may seem like a formal classification. However, upon closer inspection, it carries profound and practical implications – especially with regard to the dignity, independence, and effectiveness of the judiciary. The Court of Appeal, the highest court in the land, as a general rule, does not hear evidence afresh.[10] The court works from what is already on the record – records that should reflect everything that transpired in the courts below. It goes without saying, then, that its ability to deliver justice depends

management unit'. See Mnjama, N 'Corruption, Court Records and Justice Administration in Kenya' (ESARBICA, 2007). See also Maseh, E 'Records Management Readiness for Open Government in the Kenyan Judiciary' (UKZN, 2015) who argues that the absence of appropriate systems in place for record-keeping and controls has led to collusion between court officials and lawyers, which has resulted in the subversion of the course of justice. See also a case study by Saman, W & Haider, A 'Electronic Court Records Management: A Case Study' (2012), which indicates that there were several legal issues in the court records management. In a case study of the High Court of Botswana, Mnjama, N 'The Management of High Court Records in Botswana' (2009) 19(3) *Records Management Journal* 173-189 revealed that the court was faced with various challenges such as retrieval, misplacement and/or loss of records, and also issues of inadequate storage. South African courts grappled with the issues of incomplete or defective records of proceedings in cases such as *S v Mthembu* 2012 (1) SACR 517 (SCA) para 17, where Ponnan JA and Petse AJA (writing for the court) with reference to two earlier SCA decisions, namely *S v Legoa* 2003 (1) SACR 13 (SCA) and *S v Ndlovu* 2003 (1) SACR 331 (SCA), stated that 'a fair trial enquiry does not occur in vacuo, but ... is first and foremost a fact-based enquiry'. The effect of an incomplete record on appeal, which applies equally to reviews, which impacts such fact-based enquiry, was aptly stated in *S v Chabedi* 2005 (1) SACR 415 (SCA). Also see *S v Sebothe and Others* 2006 (2) SACR (T) para 5: 'On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recording of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible.'

9 Constitution of Lesotho, sections 119(3) and 123(4).

10 *Hoohlo v Hoohlo* NO LAC (1995-1969) 266-281 at 276.

almost entirely on the accuracy, completeness and availability of those records. A defective or missing record is not just a clerical error; it can derail an appeal, obscure the truth and ultimately deny justice.

The Constitution makes this dependence clear. Section 119(3) refers to the High Court as a superior court of record, and section 123(4) does the same for the Court of Appeal. But what does this really mean? At a basic level, a court of record can be defined as a court whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony.[11] Furthermore, those records carry legal weight. They are meant to be authoritative accounts of what happened in court – presumptively correct, unless proven otherwise. The moment that standard drops, the system starts to crumble.

This is not just a theoretical concern. In many cases – especially criminal appeals – the record is all that an accused person can use to challenge a conviction or sentence. The stakes are often incredibly high. Recognising this, section 12(3) of the Constitution guarantees that any person tried for a criminal offence is entitled, upon request and subject to a reasonable fee, to a copy of the record of proceedings 'within a reasonable time'. This is not a luxury. It is a right tied directly to the right to a fair trial and to the possibility of appeal.

But rights are only as strong as the systems that support them; this is where the challenge lies. Poor record-keeping practices – manual systems, lost files and inaudible recordings – are not just an administrative problem; they represent a structural weakness that goes to the heart of justice delivery. Even though the government attempts to support the courts, if the judiciary itself does not modernise and invest in better record management, the system will continue to fail. This is why the state's constitutional duty to assist the courts cannot be narrowly interpreted. It must extend to providing proper infrastructure, digitised systems, trained personnel and ongoing support to ensure that the record of proceedings is not only generated but preserved and made available when needed. This is also why judicial leadership must treat record management as a matter of institutional priority, not as an afterthought. Ultimately, the designation of the High Court and the Court of Appeal as superior courts of record is not only about status – it is about responsibility. It reflects a deeper constitutional commitment to the rule of law, procedural fairness and public trust in the justice system. And unless we take that commitment seriously – through deliberate policy, sound administration and adequate resources – we risk turning that constitutional promise into an empty label. The Court of Appeal cannot function in a vacuum. Its authority rests on the integrity of the records before it. And if the records are broken, justice will be too.

3. Legal framework and procedural duties

This section outlines the legal framework governing the preparation and filing of appeal records, and highlights the rules and duties imposed on different persons. It also examines the consequences of non-compliance and the Court of Appeal's discretion to condone procedural defects in appropriate cases. The filing of records in the Court of Appeal is

11 Kumar, K S, 'Article 129 - Supreme Court to Be a Court of Record' (November 30, 2019). Available at SSRN: <https://ssrn.com/abstract=3496027> or <http://dx.doi.org/10.2139/ssrn.3496027> accessed 21 May 2025.

governed by the Court of Appeal Rules, 2006.[12] Rule 5 provides that the appellant shall, in every appeal, lodge with the Registrar seven copies of the record of proceedings from the High Court.[13] This must be done no later than three months after the appeal has been noted or a certificate of the judge has been filed.[14] A copy of the record must also be served on each respondent.[15] This period may be extended by a written agreement between the parties to the appeal.[16] However, failure by the appellant to file the record within the prescribed or extended period results in the appeal being deemed to have lapsed.[17]

Responsibility for the preparation of the record lies with the appellant or their legal representative in civil matters, and with the Director of Public Prosecutions (DPP) in criminal matters.[18] In the event of dereliction of this duty, such persons may be subjected to an adverse costs order, including costs *de bonis propriis*.[19] A certificate confirming the correctness of the record, signed by the appellant or their attorney, or the DPP, must accompany the record and be served on all parties to the appeal.[20] The Rules provide that if the appellant breaches any provision of the Rules, their appeal may be struck off.[21] However, the court retains the discretion to condone such breaches upon application by the appellant.[22]

On the other hand, the High Court Civil Litigation Rules, 2024,[23] while mainly relevant in High Court procedure, contain several provisions relevant to the present discussion, most notably Rules 157 and 158. Rule 157 defines a record of proceedings, outlines the modes of recording and transcription, affirms the parties' right of access to transcribed records, and assigns duties to various court officers concerning the maintenance and availability of such records.

Rule 9(5) further affirms that the Registrar is the ultimate custodian of court records, and parties entitled to such records may access them through the Registrar's office. Rule 158(4) addresses instances where the record of proceedings in completed cases is lost or goes missing. In such cases, the Registrar must, by affidavit, declare that the record has been lost and initiate a process of reconstruction. This involves obtaining the presiding judge's notes as well as affidavits from legal representatives and witnesses regarding the content of the lost record. Sub-rule (5) ensures procedural fairness by requiring that parties and their witnesses must be given an opportunity to review the reconstructed record and submit their respective versions.

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12 Court of Appeal Rules 182 of 2006.
13 Rule 5(1). See *Thamae v Molotsi and Others* C of A (CIV) No. 20/2017 para 12.
14 Ibid.
15 Ibid.
16 Rule 5(2).
17 Rule 5(3).
18 Rule 7(1).
19 Ibid.
20 Rule 7(2).
21 Rule 15(1).
22 Rule 15(2). Whenever an appellant realises that he has not complied with the rule he should, without delay, apply for condonation. See also *Croeser v Standard Bank* 1934 AD 77; *Reeders v Jacobsz* 1942 AD 395.
23 High Court Civil Litigation Rules 65 of 2024.

The dual framework created by the Court of Appeal Rules, 2006 and the High Court Civil Litigation Rules, 2024 reveals both a vertical and a horizontal diffusion of responsibility in the preparation of appeal records. Vertically, the appellant, the legal representatives, the DPP and the Registrar each have clearly delineated roles. Horizontally, these roles are interconnected, and a failure by one actor often disrupts the procedural chain, resulting in significant delays and, in some cases, injustice. While the Court of Appeal Rules emphasise timelines and consequences, the High Court Rules focus on the integrity and accessibility of records. The interaction between these frameworks is not always seamless, particularly when a missing or incomplete record triggers Rule 158, compelling a laborious process of reconstruction that can undermine the reliability of the appellate process.

The reliance on strict procedural compliance must arguably be balanced against the broader aims of justice. The Court of Appeal's discretion to condone procedural breaches is an acknowledgement of this balance, but it also introduces a degree of legal uncertainty. The exercise of discretion, often guided by factors such as prejudice to the respondent's prospects of success and the importance of the subject matter of the appeal, means that outcomes in similar cases may diverge. This can lead to inconsistency, especially where condonation is granted despite prolonged or repeated defaults. The judgments of the Court of Appeal reflect a tension between procedural rigidity and judicial pragmatism – one that raises questions about the fairness and predictability of appellate adjudication. This tension is further complicated by systemic issues, including chronic administrative inefficiencies, understaffing, and outdated technologies for recording and transcribing proceedings. These structural deficiencies shift what should be personal accountability into the realm of institutional failure, blurring the line between negligence and impossibility. As the following historical analysis and case study demonstrate, the problem is not new. Instead, it is part of a recurring pattern where legal rules, although clear on paper, falter in practice – inviting a critical assessment of whether the current procedural architecture is fit for purpose in ensuring meaningful access to appellate justice.

4. A persistent procedural breakdown: Institutional and individual failures

The issue of late, incomplete or inaccurate records in the Lesotho Court of Appeal is a persistent procedural defect that has, over time, become a recurring problem. Despite the clarity of the Court of Appeal Rules and the expectations they impose, non-compliance has become alarmingly routine. This section examines the extent of the problem by tracing its historical roots, identifying current manifestations and exposing the systemic flaws – administrative, professional and institutional – that allow it to persist with impunity.

The archives of the Court of Appeal reveal a trail of cases where justice faltered – not for lack of merit, but due to technical non-compliance and institutional inertia. In *Lesotho Electricity Corporation v Forrester*,[24] the filed record of proceedings was extremely lengthy and gravely deficient with regard to both inclusion and omission.[25] Parts of the record constituted duplications and application papers relevant to the issues on appeal were omitted. There

24 LAC (1970-1979) 321.
25 Ibid at 332J.

were gaps in the record of evidence.[26] No attempts were made to reconstruct the omitted but relevant portions of the record until the Court of Appeal stated its requirements.[27] This was a civil appeal governed by the Basutoland, Bechuanaland Protectorate and Swaziland Court of Appeal Rules, 1955.[28] According to the 1955 Rules, the Registrar of the High Court was required to prepare the record, and in doing so, she had to provide an opportunity for the parties or their counsel to appear before her and be heard.[29] The rules mandated that the Registrar, the parties and their counsel had to exclude all irrelevant documents not relevant to the subject matter of the appeal and generally reduce the bulk of the record as far as practicable, taking special care to avoid duplication of documents and unnecessary repetition.[30]

The court stated that the state of the record considerably increased the burden on the judges of appeal who heard this case.[31] The court was of the view that, in terms of Rule 31, the parties could not evade responsibility for an inadequate record, particularly the appellant, who needed to ensure that the record had the materials needed to challenge the judgment of the court *a quo*.[32] The court proceeded with the record as supplemented, although it was in a poor state.[33] The court expressed its frustration, stating that if it had been necessary to postpone, it would have been at the appellant's cost and probably on the attorney–client scale.[34] The court further warned that, in the future, litigants might expect that if the record was like the one in this case, the appeal would be struck off the roll with costs on an appropriate scale.[35]

Lesotho Electricity Corporation v Forrester reveals both institutional and individual failures, reflecting the systemic weaknesses prevalent at the time. Institutionally, the Registrar of the High Court bore a statutory duty under the 1955 Rules to prepare a concise and relevant record,[36] ensuring parties were heard in the process. The failure to meet these obligations, alongside the absence of timely corrective action, points to a breakdown in procedural rigour and oversight. The appellant, tasked with ensuring the adequacy of the record, neglected this responsibility by failing to supplement or rectify the deficiencies until prompted by the court. The result was a burdensome, incomplete[37] and disorganised record that hampered the appellate process. This dual lapse underscores a broader systemic issue: ineffective coordination between court administration and litigants, weak enforcement of procedural rules, and a culture of tolerating procedural laxity, all of which threaten the integrity and efficiency of the appellate system.

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26 Ibid at 333A-D.
27 Ibid at 333B-C.
28 Basutoland, Bechuanaland Protectorate and Swaziland Court of Appeal Rules 141 of 1955.
29 Ibid Rule 31(1).
30 Ibid Rule 31(2).
31 *Forrester* (note 24) at 332J-333A-B.
32 Ibid at 333D-E.
33 Ibid at 333F-H.
34 Ibid.
35 Ibid at 333G-H.
36 Namakula, CS 'The Court Record and the Right to a Fair Trial: Botswana and Uganda' (2016) 16 *African Human Rights Law Journal* 177.
37 *Matilda Baidoo v Alfreda Davis* Suit HI/180/07 Court of Appeal of Ghana, judgment of 12 May 2011: 'An incomplete record does not aid the delivery of justice to the parties.'

In *Makenete v Lekhanya NO and Others*,[38] the appellant failed to file the record of proceedings timeously. There was an application for the enrolment of the appeal, which was dismissed for flagrant failure to comply with Rule 3(7) and for failure to apply for condonation for non-compliance with that rule. In terms of Rule 3(7) of the Court of Appeal Rules, 1980,[39] the appellant was obliged to file with the Registrar the required copies of the record no later than three months after the filing of his notice of appeal. The appellant had cited, *inter alia*, an inability to obtain a transcription of the record.[40] Ackermann JA remarked that it had become clear that many practitioners were displaying a lamentably lax attitude to the rules of court, bordering on contemptuousness.[41] He stated that the attitude evinced that the rules of court were unimportant, could be disregarded at will, and that non-compliance would be overlooked or condonation granted as a matter of course and right.[42] The court expressed its frustration about non-compliance with the rules and said that practitioners could not rely on the mistaken impression and the misconceived idea that their disregard of the rules would be overlooked because of the prejudice that their clients might suffer.

This case illustrates the serious procedural and ethical implications of disregarding appellate rules and the judiciary's increasing intolerance for such conduct. The appellant's failure to file the record timeously – without seeking condonation – highlights a growing culture of procedural complacency among legal practitioners. Ackermann JA's stern rebuke underscores a pivotal lesson: the rules of court are not mere technicalities but essential safeguards for judicial efficiency and fairness. The court's frustration signals a shift away from leniency towards stricter accountability, warning that repeated non-compliance will no longer be excused on the basis of client prejudice. This reflects an important recalibration of judicial discretion – one that seeks to protect the integrity of the appellate process by placing professional responsibility above tactical leniency. The case thus serves as a cautionary tale, demanding a renewed culture of diligence and respect for procedural rules among legal practitioners.

The case of *Jerinah Goolam Essaney v Abraham Joseph and Others*[43] further illustrates the longstanding issue in question. In casu, there were many problems with the record, especially with the irregular reconstruction of the evidence, from the High Court judge's notes. Ultimately, the appeal was struck off with costs on an attorney–client scale. Similarly, in *Qhobela v Attorney General and Another*,[44] the record of proceedings was filed extremely late, which the court called flagrant non-compliance with the rules of court.[45] The appellant applied for condonation, but the court refused the condonation based on the degree of lateness in the filing of the record and the prolonged threat to the respondent's right to a final judgment.[46] The condonation application was dismissed with costs.

38 (No. 1) LAC (1990-1994) 127.
39 Court of Appeal Rules 10 of 1980.
40 *Makenete* (note 38) at 129B-D.
41 Ibid at 129F-G.
42 Ibid at 129F-H.
43 C of A (CIV) No. 12/2025 para 3.
44 LAC (1990-1994) 243.
45 Ibid at 244I-J.
46 Ibid at 245C-D.

Qhobela v Attorney General demonstrates the Court of Appeal's firm stance on upholding procedural discipline, particularly regarding the timely prosecution of appeals. The court's refusal to grant condonation, despite the application, underscores a critical implication: that an excessive delay in filing the record of proceedings not only undermines the rules of court, but also poses a serious threat to the respondent's right to finality in litigation.[47] We maintain, in line with the wisdom of Steyn P (as he then was), that finality is the key objective of litigation.[48]

By treating the delay as 'flagrant' non-compliance, the court reinforced the principle that justice delayed is justice denied – not only for appellants but also for respondents.[49] The dismissal of the condonation with costs sends a strong message that procedural rules are integral to the fair and efficient administration of justice, and that dilatory conduct will attract punitive consequences. The case serves as a decisive lesson that the right to appeal is not unfettered; it must be exercised within the bounds of lawful procedure and with respect for the rights of opposing parties.

In *Malefane v Mphana*,[50] the record filed was incomplete in material respects (there was no order and no judgment of the court *a quo*) despite the fact that the Registrar certified that the filed record was checked, certified, and constituted a correct copy of the proceedings in the court *a quo*.[51] The court condemned the carelessness and remarked that it was self-evident.[52] The court highlighted that counsel in this matter and others had complained bitterly from the bar about delays in the delivery of judgments and their transcription. The court noted that these concerns were valid.

The court even quoted Ackermann JA in *Letsie v DPP*,[53] where he stated that justice delayed is justice denied. The court added that there was no justification for a judicial officer not delivering reasons for a judgment or delaying these unduly.[54] However, the court stated that the profession itself must take part of the blame.[55] The court concluded that the court officials, the practitioners and the Bench are the foundation stones on which a respected system of justice is built. Should they fail to deliver products – in the form of orders and judgments – efficiently and without tardiness, confidence will wane and respect will diminish.[56] The court stated that practitioners, officials and judges must meet to appraise the situation and to ensure that they collectively take steps to address delays and inefficiency. The appeal was struck off the roll with costs.[57]

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47 See also *Lepule v Lepule and Others* LAC (2015-2016) 28 where the maxim of *interest reipublicae ut fini litim* (it is in the State's interest that there should be an end to litigation) was applied. This is another reason why there should be finality in litigation. See also *Joy to the World v Malefane* LAC (2015-2016) 563.

48 *Lesotho Brake and Clutch* (note 1) at 82G-H.

49 See *Letsie v Director of Public Prosecutions* LAC (1990-1994) 246.

50 LAC (1990-1994) 270.

51 Ibid at 272F-G.

52 Ibid at 274F.

53 Note 49 at 2581.

54 *Malefane v Mphana* at 275B-C.

55 Ibid at 274G-H.

56 Ibid at 275C-D.

57 Ibid at 275D-E.

Erasmus,[58] writing about the South African position on records of proceedings in review cases, puts it quite plainly: the record is essential because it allows both the applicant and the court to properly understand how a decision was made, and whether it was lawful. Without that record, he argues, the court simply cannot do its job, which is to ensure that decisions are made fairly and within the bounds of the law.[59] Interestingly, he also notes that the absence of a record does not stop a review from happening altogether; a review can still go ahead even if no formal record was kept.[60] Although Erasmus is referring specifically to reviews and not appeals, the basic principle remains the same in both contexts. Whether a court is reviewing a decision or hearing an appeal, having a proper record of what happened in the original proceedings is critical. It allows the court to check whether the process was fair, whether the law was properly applied, and, ultimately, whether justice was done.

Malefane v Mphana exposes the deeply entrenched systemic flaws in the administration of justice, where institutional negligence and professional complacency intersect to erode the integrity of appellate litigation. The filing of a materially incomplete record – omitting the very order and judgment appealed against – despite certification by the Registrar's office, reveals a troubling lack of diligence and accountability in court administration. The court's frank acknowledgement of the valid concerns raised by counsel regarding delays in judgment delivery and transcription further amplifies the broader implications: that inefficiency within the judiciary, if unaddressed, threatens public confidence in the justice system. Importantly, the court's insistence that blame is shared among court officials, legal practitioners, and the Bench signals a collective failure demanding a collective remedy. The striking-off of the appeal with costs and the call to 'clean the Augean stables' reflect both the gravity of the problem and the urgent need for introspection, coordination and reform across all pillars of the justice system.

In *Leribe Poultry Cooperative Society v Minister of Agriculture and Others*,[61] the record of proceedings was not filed timeously and it was defective. The court held that the failure to comply with the requirements for the proper prosecution of the appeal could not be attributed wholly and substantially to the appellant and the delays in filing the record and the defects were not serious.[62] It was further held that the substantive issues raised by the appeal were important, not only for the appellant, but for all co-operative societies and the Minister of Agriculture.[63] The condonation applications for the relevant breaches were accordingly granted, but the appellant was ordered to pay the costs thereof.[64] The court stated that practitioners were, in more than one instance, experiencing difficulties in obtaining typed orders from the Registrar's office as well as written judgments.[65]

58 Loggerenberg, DE *Erasmus: Superior Court Practice* (1994, Juta) at D1 – 710B – C.
59 *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC).
60 *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA).
61 LAC (1990-1994) 294.
62 Ibid at 294I-J.
63 Ibid at 294J-295A.
64 Ibid at 302F-G.
65 Ibid at 296I-J.

The court cautioned that the recurring issue of legal practitioners being unable to obtain typed orders and judgments does not, in the absence of an application for condonation, excuse the filing of an incomplete record.[66]

Leribe Poultry Co-operative Society highlights that while procedural breaches in filing the record may, in some instances, be excusable, they still demand proper justification through condonation applications. The court acknowledged systemic challenges – such as delays in obtaining typed orders and written judgments from the Registrar's office – but emphasised that these do not automatically excuse non-compliance. Importantly, the decision underscores that the gravity and public significance of the issues on appeal may influence the court's discretion in favour of condonation. This case illustrates that while leniency may be extended in light of institutional inefficiencies, it is not unconditional and must be sought through proper procedural channels. Leniency also reflects the court's attempt to balance procedural rigour with substantive justice.

Another case in which the late filing of the record was condoned due to the public importance of the subject matter of the appeal is *Lesotho Medical, Dental and Pharmacy Council and Another v Musoke*.[67] The court made it clear that the condonation was granted not because the parties satisfactorily explained the remissness, but because of public importance. The case illustrates that, in rare instances, the court may condone procedural non-compliance not because delays are adequately explained, but due to the compelling public importance of the issues at stake. This signals a judicial willingness to prioritise substantive justice in matters affecting broad societal interests. However, the case also serves as a warning: condonation on this basis is exceptional and does not excuse remissness. Practitioners must not assume that public interest alone will routinely cure procedural defects. In *Molapo v R*,[68] the absence of a proper record of proceedings was impeding the hearing of the appeal. The delay was largely due to the fault of the prosecution authorities and not the appellant.[69] There were no prospects that a proper record would be made available soon.[70] The principle that justice should not be delayed was applied.[71] The court decided the appeal with the available information. *Molapo v R* underscores the judiciary's commitment to preventing justice from being derailed by institutional inefficiencies, particularly those attributable to the prosecution. Despite the absence of a proper record, the court prioritised the principle that justice must not be delayed and proceeded to decide the appeal using the available information.

66 Ibid. See the South African case of *Phiri v S* Case No: CA 55/2015, where the court held as follows: 'This appeal was previously struck off the roll due to incomplete record of proceedings. It has now been re-enrolled, and the record is still incomplete. The missing portions of the record are the appellant's entire evidence including cross examination. The evidence of one state witness who was with the appellant and the complainant on the day of the incident is also missing from the record. There was no explanation from the appellant what steps were taken to obtain the complete the record or if the record could be reconstructed. This court is not able to deal with the appeal when the version of the appellant is not part of the record. The appeal should be removed from the roll and the appellant file the complete record for consideration of the matter.'

67 LAC (1995-1999) 346.

68 LAC (2000-2004) 23.

69 Ibid at 24G-J and 25A-D.

70 Ibid at 25C-D and 25H-I.

71 Ibid at 25E.

This reflects a pragmatic approach, where the court, in the face of systemic failure, opts to safeguard the appellant's right to timely justice rather than perpetuating delay. The case serves as a reminder that while accurate records are crucial, courts may adopt flexible measures to uphold fairness when state actors cause delays. In *Seate v R*,[72] Ramodibedi JA stated that regrettably, the problem of sloppy records had engaged the attention of the Court of Appeal for a long time, but seemingly to no avail.[73] He affirmed the stance of Gauntlett JA in *Motlatsi v DPP*,[74] that practitioners should be warned that the presentation of shabby and/or incomplete records of proceedings must attract adverse consequences (including personal costs orders against practitioners) in appropriate instances.[75] Notably, the court stated that the need for complete and proper records could be too strongly emphasised as the fate of litigation might very often turn on the quality of the record alone, which was a far cry from true justice.[76] The court further warned that the presentation of shabby and incomplete records reflected badly on the parties concerned and was an insult to the court itself.[77]

Seate v R underscores the ongoing and unresolved problem of poor-quality records in appellate litigation, condemned by the Court of Appeal as both a threat to justice and a sign of professional negligence. Ramodibedi JA's support for Gauntlett JA's call for personal cost consequences indicates growing judicial impatience and a desire to hold practitioners accountable. The court's focus on the quality of the record as a key factor in litigation outcomes reinforces its importance for fair adjudication. Furthermore, the court's statement that incomplete records insult the judiciary highlights the reputational and institutional damage caused by such practices. The case therefore serves as a clear warning: negligent conduct now bears serious consequences.

In *R v Lebina and Another*,[78] the court recalled several past warnings about unsatisfactory records of proceedings,[79] and stated that slovenly records bring the justice system into disrepute and may very often lead to miscarriages of justice.[80] *R v Lebina* reinforces the enduring concern about how slovenly records can damage the integrity of the justice system. The court emphasised that this was not a new or isolated issue but a persistent one that continued to undermine public confidence in judicial processes. The warning that such records may lead to miscarriages of justice highlights the grave consequences of procedural negligence – not merely administrative inconvenience, but potentially unjust outcomes. This case underlines the urgent need for systemic reform and professional accountability to safeguard both the quality of justice and the credibility of the courts.

Due to the persistent problem of defective records and the failure to file records timeously, the President and Justices of Appeal, in consultation with the Chief Justice and the

72 LAC (2000-2004) 215.
73 Ibid at 217C.
74 LAC (1995-1999) 652; 1999-2000 LLR-LB 23 (CA).
75 *Molapo v R* (note 68) at 217C-E.
76 Ibid at 217F.
77 Ibid. See also *Sarele v R* LAC (2017-2018) 361 at 362D-H.
78 LAC (2000-2004) 464.
79 Ibid at 467B-D. See also *R v Ts'osane* LAC (1995-1999) 635; 1999-2000 LLR-LB 78 (CA).
80 Ibid at 467H.

Registrar, issued a Practice Note in October 2000.[81] This Practice Note was intended to address, *inter alia*, the proper constitution and timely filing of records of proceedings. Paragraphs 4, 5 and 6 of the Practice Note deal specifically with these procedural requirements, while paragraph 7 provides in mandatory terms that no matter shall be enrolled for hearing in the upcoming session later than 31 January 2001, or otherwise not in compliance with paragraphs 4 to 6, unless a written application is made to the President showing good cause, and after written notice to all parties to the appeal. These provisions are essentially a reiteration of the requirements set out under Rules 5 and 7 of the Court of Appeal Rules.

The issuance of the Practice Note of 2000 by the apex court highlights the gravity and persistence of the problem surrounding defective and late-filed records. By reiterating and reinforcing the obligations under Rules 5 and 7 of the Court of Appeal Rules, the judiciary acknowledged that procedural non-compliance was undermining the administration of justice. Paragraph 7's strict cut-off times and requirements for application for leave on good cause shown reflect an attempt to restore procedural discipline. However, the continued prevalence of the issue suggests that Practice Notes, while necessary, are insufficient in the absence of institutional accountability and sterner enforcement mechanisms.

In *Rev Father Khang v Bishop Mokuku and Others NNO*,[82] the court cited *Pelea v R*[83] in maintaining that it was the duty of the attorney of the appellant to peruse the appeal record and to correct errors and shortcomings therein. The court further cited *Venter v Bophuthatswana Transport Holdings (Edms) Bpk*,[84] which held that practitioners who failed in their duty were at risk of punitive costs orders.[85] The court in *Lebeta v R*[86] stated that it was regrettably necessary to once again comment on the unsatisfactory state of the record of proceedings,[87] which had been criticised in many cases, including *Stella Kaka v Lesotho Bank and Others*.[88] In *Lebeta*, parts of the case were recorded in Sesotho and not translated into English, in breach of both the High Court Rules, 1980 and the Court of Appeal Rules.[89]

In granting the condonation application for the late filing of an appeal record, the Court of Appeal, in *National University of Lesotho and Another v Thabane*,[90] stated that the rules must be interpreted and applied in a spirit which facilitated the work of the court. In the criminal appeal of *Makhetha and Others v R*,[91] in a storm of irregularities, a number of cassette tapes of evidence were missing and various files relating to the trial could not

81 Court of Appeal Practice Note 9 of 2000.
82 LAC (2000-2004) 600.
83 LAC (2000-2004) 223.
84 1997 (3) SA 374 (A).
85 *R v Ts'osane* (note 79) at 603E-F.
86 LAC (2007-2008) 220.
87 Ibid at 221G-H.
88 1997-1998 LLR-LB 327 (CA) at 328.
89 High Court Rules 9 of 1980 (as amended by Rule 2 of the High Court (Amendment) Rules 2006). See Rule 58(4) of the Court of Appeal Rules 182 of 2006; Rule 5(5), which states that the record shall be in English; *Ranthithi and Another v R; R v Ranthithi and Others* LAC (2007-2008) 245 at 245F.
90 LAC (2007-2008) 476.
91 LAC (2009-2010) 159.

be found in the offices of the DPP or the Registrar of the High Court.[92] The failure to safeguard the cassettes and the transcribed records of evidence was deplored.[93]

The court stated that it was not the first occasion on which cassettes have been lost or, perhaps, unlawfully removed from the custody of officials entrusted with their care.[94] The court emphasised that the responsible officials of all the courts of Lesotho must ensure that the records of proceedings and cassettes are preserved and kept in a completely secure place.[95] The loss of such material brings the administration of justice in the Kingdom of Lesotho into disrepute.[96] The court added that there was no doubt that a proper record of proceedings should be made available to a prospective appellant in a criminal appeal to the Court of Appeal within a reasonable time of noting the appeal.[97]

In *Takalimane v Serobanyane*,[98] the lower court's written judgment was not in the record and the court had to manage without it. The court held that this was very inconvenient for the Appeal Court and prejudicial to the parties who were obliged to argue the appeal without reasons for the judgment.[99]

A written judgment of the court *a quo* is a crucial part of an appeal record. In *Lelimo v Letsie and Others*,[100] the court stated that the appeal was one of several in which an order was made at the conclusion of the hearing in the court below, and a written judgment was produced a matter of days before the hearing of the appeal. The court highlighted the considerable inconvenience caused to it and the prejudice to the litigants, whose heads of argument were prepared without them seeing the written judgment.[101] In *Makibi and Another v Makibi*,[102] the Court of Appeal deprecated the deficiency of records of proceedings with no written judgment or order reflecting the High Court's decision and urged trial courts to fulfil their mandate properly. The court stated that it is not uncommon for there to be no written judgments in the High Court of the Kingdom of Lesotho. In such circumstances, it becomes difficult for litigants to lodge appeals properly.

92 Ibid at 163H-J. See also *Mothobi and Others v DPP* C of A (CRIM) No. 04/2019 paras 3 and 7. The record of proceedings was generally not in order.
93 Ibid at 164I.
94 Ibid at 164I-J.
95 Ibid at 164I-J and 165A.
96 Ibid at 165A.
97 Ibid at 165B. See also section 12 the Constitution of Lesotho, 1993: '3. When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgement a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.'
98 LAC (2011-2012) 222. See also LAC (2009-2010) 159 and LAC (2015-2016) 342.
99 Ibid at 222I. Further, in *Mensah v Adjudicator of the Teaching Service Commission and Others* LAC (2005-2006) 468 at 471G-I, the court criticised the failure of the High Court judge to furnish reasons for his order. It noted that this was not a novel occurrence and endorsed the remarks in *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A) at 27 where such conduct was described as an 'unacceptable procedure'.
100 LAC (2011-2012) 44.
101 Ibid at 47F-H.
102 LAC (2013-2014) 350.

The efficient preparation of the record is essential for the proper functioning of the Court of Appeal.[103] Accordingly, if the Rules on record preparation and filing are needlessly breached, an appropriate order of costs against the offending party will be warranted.[104] The court stated that it was the responsibility of the presiding judge to ensure that the Registrar reduced the court's order to writing. The court added that the parties could not fully prepare their cases without reasons, and the Appeal Court was required to know the reasons in order to properly bring a fully informed mind to bear on the question whether the judge was right.[105] The court added that it reflected adversely on the presiding judge's concern for standards of care, responsibility and efficiency, which the public,[106] particularly the litigants, were entitled to expect from the highest court of the land.[107] In 2024, in *Commissioner of Police and Others v Lepoqo*,[108] the issue of the late filing of the record of proceedings was still on the table.

The recurring problem of incomplete, deficient or untimely records of proceedings in Lesotho's appellate system reveals both institutional and individual failures that seriously threaten the quality and integrity of justice. These failures include missing cassettes, untranslated Sesotho transcripts, missing judgments and orders, and failure by both court officials and counsel to fulfil their procedural duties. The implications are far-reaching: litigants are forced to argue appeals without crucial written reasons, and appellate courts are burdened with resolving disputes based on fragmented or unreliable material.

Such dysfunction undermines the right to a fair appeal, delays justice and diminishes public confidence in the judiciary. Worse still, it fosters a perception of indifference on the part of key institutions tasked with upholding legal standards. From these failures critical lessons arise. Attorneys are expected to be vigilant in reviewing and correcting appeal records, and must not rely on certification by court officials alone. The responsibility for a complete and accurate record is shared by counsel, court officials and judicial officers alike. Practitioners who neglect this duty risk adverse costs orders, while judicial officers who fail to produce timely written judgments are a poor reflection of the standard of care expected from the High Court.

These judgments underscore that rules of procedure are not mere formalities but essential safeguards of justice. The system can only function with diligence, cooperation and accountability from all actors involved. Without such reform and shared responsibility, the administration of justice risks further erosion with regard to both efficiency and legitimacy.

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103 *Maphathe v Mafeteng Property Group (Pty) Ltd* C of A (CIV) No. 26/2018 para 23.
104 Ibid.
105 Ibid at 351B-E. See also *Rats'iu v Principal Secretary for the Ministry of Forestry and Others* LAC (2017-2018) 356 at 358C-D, where the court expresses the same sentiments in the following words: '*This made our job quite frustrating and difficult to carry out* … prejudice to the applicant as he *had to prepare and file grounds of appeal in darkness*' (our emphasis).
106 See Code of Ethics of Judges 50 of 2024, sections 4(1), 22(1), 24 and 25(2).
107 Ibid at 352F-G.
108 C of A (CIV) No. 36/2024 para 40.

5. Conclusion

The persistent problem of late, incomplete and defective records of appeal in Lesotho reveals a systemic malaise that threatens the integrity, efficiency and fairness of the appellate process. From as early as *Lesotho Electricity Corporation v Forrester* to more recent decisions such as *Seate v R*, the Court of Appeal has consistently condemned the degradation of procedural standards, warning practitioners, condemning institutional failures, and striking matters off the roll or imposing punitive costs. These cases expose a multifaceted breakdown: a judiciary beset by administrative inefficiencies, legal practitioners demonstrating procedural complacency, and a court registry consistently unable to fulfil its duties with diligence. More concerning is that this culture of laxity persists despite repeated judicial admonitions.

While the courts have occasionally exercised discretion in favour of substantive justice – particularly in matters of significant public interest – such indulgence remains the exception, not the rule. The judicial decisions surveyed affirm a growing judicial intolerance for procedural neglect and signal an urgent call for reform. At its core, this issue is not merely procedural; it is constitutional, touching on the right to a fair trial, access to justice, and the duty to uphold the rule of law. The time has come for coordinated action that confronts the inertia, cultivates professional accountability, and restores confidence in the appellate system.

6. Recommendations

To effectively tackle the ongoing crisis surrounding the preparation, filing and management of records of proceedings in the Lesotho Court of Appeal, urgent and comprehensive systemic reform is essential.

First, institutional modernisation must be prioritised. The government must fulfil its constitutional obligation to support the judiciary by investing in modern, secure, and technologically advanced recording systems, including real-time digital transcription and electronic case management platforms. Outdated manual methods have proven to be entirely inadequate and unsafe, leading to systemic delays and inaccuracies that undermine the courts' dignity and effectiveness.

Secondly, professional accountability mechanisms need to be reinforced. Legal practitioners, who are mainly responsible for submitting accurate and complete records, should face stricter judicial scrutiny and personal cost orders for negligent preparation or failure to properly review records. The culture of complacency and misleading certifications of record accuracy and completeness by legal practitioners must be broken down by imposing tangible consequences for procedural defaults.

Third, the Registrar's office must be strengthened and equipped to fulfil its role as the keeper of court records. This includes adequate staffing, thorough training on record management, and clear accountability lines for lost, incomplete, or defective records. Certification of records must not be a mere formality but a result of diligent verification against primary court materials.

Fourth, there must be judicial emphasis on written judgments and court orders at the trial level. High Court judges should consistently provide written reasons.

Failure to produce judgments within a reasonable timeframe should initiate internal judicial disciplinary measures where appropriate.

Finally, these reforms must be implemented not piecemeal, but holistically and with urgency. As long as record mismanagement persists, the constitutional guarantees of fairness and effective access to appellate justice will remain dangerously hollow.

How to cite:

Bokang Moshoeshoe, Monaheng ES Rasekoai and Mathalea Ntaote 'The Systematic Failure Surrounding Records of Proceedings in the Lesotho Court of Appeal' (2025) 5 *Turf Law Journal* 42-58.

Received: 13 November 2024, Accepted: 26 January 2025, Published: 15 May 2025, Doi: https://doi.org/10.62726/tlj.v5.48

Registration of Health Professionals in the United Kingdom and Botswana: A Comparative Analysis of the Overarching Principles

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Abstract

This article assesses the laws governing the registration of health professionals in Botswana and compares them to those in the United Kingdom (UK). It discusses the legal framework concerning the overarching functions of regulatory bodies and the governance arrangements in both jurisdictions. In the UK, the registration of professionals has advanced significantly since the 18th century, while it remains in its early stages in Botswana. The primary intention of the law is to protect the public as users of health services, as such provisions represent a public good. The article examines several leading cases in health registration and emphasises the need to safeguard the public without disadvantaging professionals. The primary sources of law in the UK and Botswana are explored, alongside the healthcare regulation laws of other countries, including those in the Southern African Development Community.

Keywords

health professionals, registration, health regulation, practice licensing, health law, comparative law

1. Introduction

1.1 Problem statement

Health care professional services constitute a Human Resource for Health building block of a health care system, according to the World Health Organization (WHO) Framework of Health Systems.[1] Similarly, Regulatory Frameworks constitute a Governance/ Stewardship building block of the same framework.[2] As key components of the health system, it is emphasised that assuring the public of a qualified, ethical and consistent professional workforce through clearly defined regulatory provisions is a fundamental role that countries must fulfil. Countries such as the UK and Botswana that are being

1 Manyazewal, T 'Using the World Health Organization Health System Building Blocks through Survey of Healthcare Professionals to Determine the Performance of Public Healthcare Facilities' (2017) *Archives of Public Health* 75.

2 Ibid.

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compared here, must provide a registration framework for professionals. The framework must have a common platform that assesses the professionals. In comparing Botswana and the UK, this article presents the overarching principles of the registration of professionals. These principles: having clear legislation, setting educational requirements, determining common disciplinary standards and providing redress when there are lapses, aim to ensure safety.

Without clear registration frameworks, inconsistencies in patient care can arise, which may lead to a lack of trust in the health care system. Licensing procedures and requirements differ in several European Union (EU) countries, with a possibility of non-uniformity in some countries.[3] The status of the registration laws in the UK and Botswana is presented, and lessons are drawn from these nations.

1.2 Health profession registration in 2025 and beyond

Much has been said about the need for regulation. Conover indicates that regulation is a significant and costly hidden tax.[4] The article argues that it has both advantages and disadvantages. Its benefits include controlling who provides care to ensure that the public receives safe services. Among its challenges are the high costs associated with compliance with regulatory requirements. This article presents common themes in the case law of both countries. An assessment of the case law regarding registration reveals common decisions: the importance of maintaining confidence in the professions, protecting the public, and ensuring the safety of the health industry. It has been maintained that health profession regulation is influenced by the relationship between society, government, and the professions; the growth of health profession regulation; the internationalisation of health profession regulation; and the pressures of labour and skill-mix reform on health profession regulation.[5] It can therefore be inferred that health profession regulation through registration is advancing.

As the public health system advances with unlimited access to information, professional regulation must meet increased expectations. These public expectations require responsive and consistent regulatory frameworks and court decisions. In addition to heightened expectations, health professionals, educational institutions, and professional regulators must be accountable to the public in all processes. Advancements in human rights over the past two decades and the reduction of paternalism by professionals have contributed to the amplified voice of the public. This article assesses experiences from these two nations and presents an opportunity to identify commonalities and lessons. In professional regulation, particularly the mandatory registration of professionals to practise, proponents of registration have argued that the benefits of registration far outweigh the deleterious effects of not registering. One article indicates that registration exists under the

3 Kovacs, E, Schmidt, AE, Szocska, G, Busse, R, McKee, M & Legido-Quigley, H 'Licensing Procedures and Registration of Medical Doctors in the European Union' (2014) 14(3) *Clinical Medicine* 229.

4 Conover, CJ 'Health Care Regulation: A $169 Billion Hidden Tax' (2004) *Policy Analysis* 527.

5 Walshe, K 'Regulating Health Professionals' in Dugdale, P(ed) Patient Safety First (Routledge 2020) 144.

statutory function to protect the public interest.[6] The notion of the public interest will be discussed as an important impetus for professional registration.

With regard to health professions, the registrants (health professionals) deal with clients at their lowest point of need, when they request health services. Hence, it is imperative that the skills, education and calibre of the professionals are assured by a well-laid registration process.

2. The legislative frameworks for health profession registration in the UK and Botswana

2.1 Legislation

According to section 1(1B) of the UK's Medical Act of 1983, the overarching functions of the General Medical Council are:

> (a) to protect, promote and maintain the health, safety and well-being of the public.
>
> (b) to promote and maintain public confidence in the medical profession, and
>
> (c) to promote and maintain proper professional standards and conduct for members of that profession.

Likewise, section 4(1) of the Botswana Health Professions Act 17 of 2001 sets the primary objectives of the Botswana Health Professions Council as:

> (a) to promote the highest standards in the practice of health care in Botswana; and
>
> (b) to serve as a safeguard in protecting the welfare and interests of the public of Botswana in the practice and delivery of health care.

The common feature of professional regulation laws in the two nations is that the laws often stipulate that a person should not practise in a jurisdiction unless he or she is registered with a competent body. Provisions are made for maintaining a register of professionals, registering them in different categories, and instituting criteria for registration, including the categorisation of where these practitioners qualified. These provisions are common to the Acts governing chiropractors, nurses, midwives and dentists in the UK. Similarly, section 7 of the Botswana Nurses and Midwives Act 1 of 1995 provides for registration, maintaining a register, and penalties for those who practise without being registered or who contravene ethical standards. Greenberg[7] indicates that registration and investigation, when there is concern about a doctor, are used to ensure public safety.

Statutory professional self-regulation (SPSR) is the modality of regulation for health professionals in many jurisdictions, including Botswana and the UK. The main advantage

6 Leslie K, Demers C, Steinecke R & Bourgeault, IL 'Pan-Canadian Registration and Licensure of Health Professionals: A Path Forward Emerging from a Best Brains Exchange Policy Dialogue' (2022) 18(1) *Healthcare Policy* 17.

7 Greenberg, D *Doctors' Regulation* (Westlaw Practice Notes 2020).

of SPSR is that the professionals themselves set the expected standards of care. Often, laws are enacted to guide what self-regulation should occur. In the UK, the Medical Act, 1983 and the Dentists Act, 1984 are two such statutes that enable the self-regulation of medical doctors and dentists respectively. In terms of the Health and Social Care Act, 2008, a total of ten self-regulatory councils are given oversight by the Professional Standards Authority, a regulator of health professionals' regulators. In Botswana, the Nurses and Midwives Act 1 of 1995 and the Botswana Health Professions Act 17 of 2001 established two semi-autonomous regulatory bodies that use SPSR. These respectively regulate nurses, including midwives, and more than 25 health professions including doctors, dentists, pharmacists and physiotherapists. The Botswana Health Professions Act repealed the Medical, Dental and Pharmacy Act 10 of 1967; the updated Act allowed for inclusion of other professions presenting them as regulated health professions. These professions included the allied health and associated professions, such as physiotherapy, optometry and chiropractors. There are more than 25 professions, as detailed in Schedule B of the Act. The Botswana Nurses and Midwives Act repealed the Nurses and Midwives Act 43 of 1964, to regulate the nursing and midwifery professions.

2.2 Health profession registration laws: Institutional framework

There is a clear difference between the institutional frameworks of the regulatory councils in Botswana and the UK. In the UK, the regulatory bodies are independent statutory bodies, given powers by their relevant Acts. They are financed by the subscription fees of members.[8] Section 3 of the General Optical Act, 1989 establishes the General Optical Council, a regulatory body that regulates opticians as a body corporate. All the other regulatory bodies have juristic personalities, making them independent. The regulatory bodies have the power to appoint committees that have specific functions; some of the committees are statutorily required and established in terms of the statute. For example, the General Medical Council's Investigation Committee investigates matters of fitness to practise, and section 35D of the Act establishes the Medical Practitioners' Tribunal Service (MPTS), which adjudicates issues of fitness to practise.

The Botswana Health Professions Council and the Nursing and Midwives Council of Botswana function under a precarious arrangement. While the bodies are constituted by the members of the professions,[9] the Councils are fully funded by the government of Botswana through the Ministry of Health, and their Secretariats come from the Ministry.[10]

2.3 Overarching roles of the law

In both the UK and Botswana, the laws regulating the health professions, in relation to registration, aim to ensure public safety. In the UK, the laws use 'impairment of fitness to practise' as the criterion to de-register health care professionals. The laws provide for

8 World Health Organization 'Health Systems and Policy Monitor: United Kingdom England: Regulation' (2017).

9 Nurses and Midwives Act, 1995, s 3 and Botswana Health Professions Act 17 of 2001, s 3.

10 Botswana Ministry of Health Registration of Professionals <https://www.gov.bw/accreditation-professionals/registration-private-health-professionals> accessed 19 February 2025.

committees that conduct the assessments to determine impairment of fitness to practise. For example, the UK's Nursing and Midwives Order of 2001 provides for the Nursing and Midwifery Council's Conduct and Competence Committee and a similar body in the General Medical Council is the Medical Professional Tribunal. After establishing impaired fitness to practise, both panels are required to undertake a proportional process to determine the appropriate sanction.[11] This concept is not enshrined in the Botswana laws. Section 14 of the Health Professions Act provides for disciplinary measures and allows the Council to:

> enquire into any complaint, charge or allegation of improper or disgraceful conduct of a professional nature brought against any practitioner, and if it is satisfied that such complaint, charge or allegation has been proved, it may impose such penalty as it considers appropriate.

Such penalties include a reprimand, suspension or the cancellation of registration.

3. Case law

3.1 Case law in the United Kingdom

The courts have decided cases on the registration of health professionals in the UK, providing common principles. In *General Medical Council v Chandra*,[12] the Court of Appeal assessed Dr Chandra's plea to be restored to the medical register, after he had been struck off the register for professional misconduct. The court held that, in considering registration or restoration to the register, the Medical Fitness to Practise Tribunal must determine if the practitioner can practise safely and whether remediation has occurred in his or her conduct. The same is expected when initially registering the professional.

Similarly, in a case of restoration to the nursing register, *Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council and Paula Grant*,[13] the Council appealed against a decision of the first respondent, the Nursing and Midwifery Council, that the second respondent, a registered nurse and midwife, was guilty of misconduct but that her fitness to practise was not impaired. The nurse was investigated and a hearing was held by the Nursing and Midwifery Council's Conduct and Competence Committee. The charges were that the nurse failed to assist a junior colleague, subjected that colleague to bullying and harassment for reporting her, and failed to provide appropriate care to patients on more than two occasions. The committee found that the charges were proved and amounted to misconduct. The committee referred to the judgment in *Cohen v General Medical Council*,[14] and found that the nurse's attitude had improved and that she had addressed her poor performance, so her fitness to practise was unimpaired.

11 Hodson, N 'Regulatory Justice Following Gross Negligence Manslaughter Verdicts: Nurse/Doctor Differences' (2019) *Nursing Ethics* 250.

12 *General Medical Council v Chandra* (2018) EWCA Civ 1898.

13 *Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council and Paula Grant* (2011) EWHC 927 (Admin).

14 *Cohen v General Medical Council* (2008) EWHC 581 (Admin).

The Council appealed under section 29(4)(b) of the National Health Service Reform and Health Care Professions Act, 2002, arguing that the committee's decision was unduly lenient. The Council contended that the committee had misinterpreted the decision in Cohen and failed to consider the need to regard public interest when determining whether fitness to practise was impaired. The court ruled in favour of the Council, stating that the committee had not mentioned the significance of broader public interest considerations or the necessity of giving substantial weight to protecting the public, maintaining public confidence in the profession, and upholding proper standards of conduct and behaviour. The law is therefore clear that the overarching goals of the Act take precedence in registration matters.

The main aim of the Acts, ensuring public safety, was a major factor in other UK cases. *Davies v Health Care Professions Council*[15] buttressed the importance of the public interest principle – that the main objective of registration is to ensure that the decisions of regulatory bodies protect the public and that professionals deliver safe care. *Adeogba v General Medical Council*[16] had earlier indicated that, in making their decisions, a regulatory tribunal must be guided by the main statutory objectives of the regulator and that the regulator's default position is being a representative of the public interest. *Professional Standards Authority v Health and Care Professions Council and Ajeneye*,[17] posited that the purpose of sanctions is not only to punish the individual, but to maintain the standards of health professionals. This was reiterated in *Ghaffar*,[18] where the court held that the primary objective of registration or sanctions is to protect the public from the potential risks posed by the registrant.

It does not always go to the side of punishment or sanction and judgements can pronounce non-punitive remedies In fact, Courts have also allowed registrants to be permitted registration on presentation of the improvement of the practitioner, as shown in *McDermott v Health and Care Professions Council*.[19] Such observation was also presented in *Khan v General Pharmaceutical Council*.[20] The court held that Mr Khan's conduct did not relate to his professional performance, and that no patient had been, or was likely to be, put at risk. The court held that the tribunal had fairly noted several features of the case which militated against the removal of his registration, such as his genuine acknowledgement of fault and the positive reports of his response to the requirements of the community payback order. Public confidence and safety are thus paramount factors in registration and fitness to practise.

In *R (on the Application of Patel) v General Medical Council*,[21] the appellant contested the General Medical Council's decision not to consider his primary medical qualification

15 *Davies v Health and Care Professions Council* (2016) 1 EWHC 1593 (Admin).
16 *Adeogba v General Medical Council* (2010) EWCA Civ 162.
17 *Professional Standards Authority v Health and Care Professions Council and Ajeneye* (2010) EWHC 1237 (Admin).
18 *Health and Care Professions Council v Ghaffar* (2014) EWHC 2723 (Admin).
19 *McDermott v Health and Care Professions Council* (2017) EWHC 2899 (Admin).
20 *Khan v General Pharmaceutical Council (Scotland)* (2016) UKSC 64.
21 *R (on the application of Sailesh Patel) v General Medical Council* (2012) EWHC 2120 (Admin).

as an 'acceptable overseas qualification', in terms of section 21B(2) of the Medical Act, 1983. He had studied his medical degree via distance learning but had completed most of his training attached to facilities in the UK. To ensure credible overseas qualifications, the General Medical Council (GMC) had set out a criterion in the definition of 'acceptable overseas qualification' that:

> [the qualification] must not have involved a programme of study where more than 50% of that study (compared to the standard duration of the qualification) has been undertaken outside the country that awarded the qualification.[22]

In this case the appellant had contravened this provision having completed more than 50% period of study in 2010 outside the country of award. Subsequently, the appellant's qualification was not recognised when he completed it in 2012. The overarching need for public safety played a role in the judgment. Furthermore, the decision of the GMC to review the criteria and include the above criterion was viewed as a means to ensure public safety.

In *Das v General Medical Council*,[23] the Privy Council heard an appeal by a general medical practitioner whose registration had been suspended following an investigation into his fitness to practise. An investigation into the doctor's professional skills had revealed that the practitioner was incompetent in many aspects, to the extent that the panel concluded that his clinical proficiency was seriously deficient. The practitioner did not appear at the GMC's hearing of the Committee of Professional Performance, and appealed the decision to endorse the suspension in his absence as a contravention of the provisions of Schedule 1, Article 6 of the Human Rights Act 1998, which provides for the right to natural justice. The evidence submitted showed that the practitioner had received several invitations to attend the hearing. In dismissing the appeal, the Privy Council observed that the evidence presented about his professional deficiencies was clear and detailed, and showed that his performance could be remedied only by retraining and that his suspension was necessary to protect the public.

In *Sandler v General Medical Council*,[24] pertaining to registration or deregistration, Lord Walker of Gestingthorpe summed up the rationale of the law regarding any sanctions: it is not to punish the professional whose professional performance is defective, but to improve standards and, in the process, to protect the public from risk. The same was held in *Dad v General Dental Council*,[25] where a dentist had his registration suspended for several violations of the Road Traffic Act, 1988 – driving while disqualified and reckless driving. His appeal was allowed and the court held that his suspension from practice should be withheld for two years, allowing ample opportunity for the appellant to demonstrate his ability not to re-offend. The principle of public interest and patient safety was upheld in *Dad* and taking judicial ground of *Ziderman v General Dental Council*.[26] The rationale in *Ziderman* was that 'disciplinary proceedings against a professional who has been convicted

22 Ibid.
23 *Das v General Medical Council* (2003) UKPC 75.
24 *Sadler v General Medical Council* (2003) UKPC 59.
25 *Dad v General Dental Council* (2000) 1 WLR 1538.
26 *Ziderman v General Dental Council* [1976] 2 All ER 334.

of a criminal offence by a court of law is not to punish him a second time for the same offence but to protect the public who may come to him as patients and to maintain the high standards and good reputation of an honourable profession'.[27]

3.2 Case law in Botswana

Cases have challenged the institutional arrangement of regulatory councils by the government, in particular Attorney General *Locus Standi* and representation for the Councils. This means that, because Attorney General is not supposed to appear for the Councils, they are not government entities. In *Kgarebe v Attorney General*,[28] an obstetrician and gynaecologist appealed against her removal from the register and instituted a claim against the Attorney-General as a representative of the Council. In all the proceedings, the Attorney-General was cited as the respondent, even though the action was not objected to. Wallia J observed that the *locus standi* of the parties is fundamental to due process, and without it, the proceedings would be invalidated; the judge also stated that *locus standi in judicio* is a matter of law, and it cannot be conferred by consent.

The court held that the Attorney-General is appointed under section 51 of the Constitution and in terms of section 51(3) as the principal legal adviser to the government; the council is not an organ of the government and its members are not necessarily public officers. The court held that the council is not higher than or in the same category as statutory bodies constituted in the relevant statutes to regulate the affairs of various professions, such as the Nurses' and Midwifery Council of Botswana, the Veterinary Surgeons' Council and the Engineers' Registration Board. The case was dismissed with costs, but it clarified that the councils are independent of the government.

Similarly, *Ramasu and Another v Nurses and Midwifery Council of Botswana and Ors*[29] concerned two nurses who were suspended from the register of nurses for alleged sub-standard obstetric care. As in *Kgarebe*, the Nurses' and Midwifery Council of Botswana was represented by the Attorney-General, and the case was lost on technicalities, without its merits being examined. The main issue was that the Attorney-General should not have represented a semi-autonomous body, such as the Nurses' and Midwifery Council. The arm's-length oversight in the government's financing of the health profession councils has thus given rise to issues of legal identity.

Case law in Botswana has also examined the need to observe the public interest in the functioning of the councils. In *Boalotswe v Botswana Health Professions Council and Another*,[30] the appellant questioned the Council's decision to decline his registration as a specialist maxillo-facial surgeon. Howie JA, in passing judgment, indicated that registration is important, especially because the government funds it, and the question about an aggrieved applicant not being registered is also paramount as registrants are expected to provide services:

27 Ibid.
28 *Kgarebe v Attorney General* (2012) BLR 730 (HC).
29 *Dyina Ontiretse Ramasu and Joshua Motlhobogwa v Nursing and Midwifery Council of Botswana and Others* Case Number MAHGB-000500-19 of 25 May 2020.
30 *Boalotswe v Health Professions Council and Another* (2018) 3 BLR 175 (CA).

> [I]t is also in the public interest that a registration applicant having the requisite qualifications and the potential to be of significant benefit to the public should not be thwarted by procedural irregularities that would ordinarily be remedied by way of judicial review.[31]

Hence, in the registration of health professionals and their de-registration, when their fitness to practise is in question, it is also vital to consider the inherent public interest that is derived by having professionals who are registered to practise and not denying the public access to these professionals.

In *Verma v Attorney General*,[32] the Court of Appeal heard a case in which foreign qualifications in optometry were questioned by the Botswana Health Professions Council, which led to the non-renewal of an optometrist's registration. The remedy that was sought was premised on section 94 of the Botswana Health Professions Act, which requires that the qualifications must allow the professional to be registered in the country where the qualification was obtained. The evidence from the qualifications body in India indicated that the diploma in ophthalmic assistance (which the appellant had) was actually the same as the qualification required in terms of Schedule B to the Act, Optometry. The court also held that section 9 of the Act does not authorise the council to remove a registrant from the roll on the grounds that he or she was erroneously registered, but a registrant could be removed on grounds that registration was obtained by fraudulent means. The council's reliance on section 9 was held to be *ultra vires* the Act and was set aside.

In *Bhagat v Botswana Health Professions Council and Another*,[33] the Court of Appeal was presented with an appeal by a doctor who was denied registration as a cardiologist. Section 9(4)(a) of the Botswana Health Professions Act was key in the case. The court held that on a proper interpretation of section 9(4)(a) of the Act, evidence of registration as a cardiologist in the UK was not a requirement for the appellant's registration as a cardiologist in Botswana. Evidence that his qualification entitled him to practise as a cardiologist in the UK was all that was required, and the evidence presented satisfied the court that this was the case. The appeal was upheld and the council's decision was quashed.

The same section of the law was crucial in *Boalotswe v Botswana Health Professions Council and Another*,[34] where an appeal was made by a dentist who was qualified as a Master of Clinical Stomatology. The appellant had approached the council for registration as an oral maxillo-facial surgeon and was turned down. The case was dismissed on the grounds that his qualification did not entitle him to practise in the country in which the said qualification was obtained (China); the evidence indicated that the appellant had to write and pass a licentiate examination over and above his qualification to be able to practise in China. The case is quite similar to the *Bhagat* case but it yielded a different result. Howie JA observed that the presentation of the case may be subject to different interpretations. The main difference was that, in the *Bhagat* matter, the appellant did not have to do an additional examination to be entitled to practise in the UK.

31 Ibid.
32 *Verma v The Attorney General* (2009) 2 BLR 218 (CA).
33 *Bhagat v Botswana Health Professions Council and Another* (2018) 2 BLR 32 (CA).
34 *Boalotswe v Health Professions Council and Another* (2018) 3 BLR 175 (CA).

4. Comparing the registration of health professionals in Botswana and the UK

4.1 The Professional Standards Authority in the UK

In the UK, the Professional Standards Authority for Health and Social Care is a regulator of regulators established under section 25 of the National Health Service Reform and Health Care Professions Act 2002. The Authority oversees the statutory bodies that regulate health care professionals, reviews their performance, and assesses how they are protecting the public. In addition, the authority scrutinises the regulators' decisions about whether professionals on their registers are fit to practise and can appeal these decisions if it is of opinion that they fail to protect the public.[35] According to section 29(4) of the Act,

> Where a relevant decision is made, the Authority may refer the case to the relevant court if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.
>
> Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient–
>
> (a) to protect the health, safety and well-being of the public;
>
> (b) to maintain public confidence in the profession concerned; and
>
> (c) to maintain proper professional standards and conduct for members of that profession.[36]

The Authority polices the regulators and requests judicial reviews of the regulators' decisions. It also sets the standards with which the regulators must conform. The regulators have the over-arching responsibility of public safety and well-being. The laws of the UK thus provide a second layer of public safety protection.

In Botswana, the registration of health professionals is conducted by the Botswana Health Professions Council (BHPC) and the Nursing and Midwifery Council of Botswana (NMCB). The two councils have generally similar arrangements. The process involves an initial application and a payment to be entered onto the relevant register, and an appeal process if the registration is not successful. The BHPC and the NMCB keep registers of professionals according to the Schedules of professions.

According to section 9 of the Botswana Health Professions Act:

> (1) A person shall not practise as a medical practitioner, dentist, pharmacist or intern, or as a member of an allied health profession unless he is registered as such in the appropriate register in accordance with section 11, and has obtained a certificate of registration …
>
> (2) An application for registration in subsection (1) shall be made to the Council in writing, accompanied by–
>
> (a) the applicant's identity and such proof of the qualifications on which the applicant relies;

35 Professional Standards Authority (2020) 'Mandate of Professional Standards Authority' <www.professionalstandards.org.uk/h> accessed 12 December 2020.

36 National Health Service Reform and Health Care Professions Act 2002 [CAP 17].

(b) the applicant's certificate of good character and standing …;

(c) a sworn declaration of oath …; and

(d) any other information as the Council may require.

Similarly, regulation 3 of the Nurses and Midwives (Registration) Regulations, 2011[37] provides for applications for registration and the issuing of certificates of registration. Regulation 7 also provides for the annual renewal of practising certificates. Furthermore, the regulations allow the council to refuse applications to register, if the applicant fails to meet the requirements specified in the regulations, has been convicted of an offence, or is found to be unfit to practise by the council. Registration can also be suspended for unfitness to practise or unprofessional conduct. The council is also empowered to revoke the certificate of registration where a nurse or midwife is convicted of an offence, or if there is reason to believe that it is in the public interest to do so.

4.2 Aspects of the registration of health professionals in the UK and Botswana

There are very important commonalities in relation to the registration of health professionals in the UK and Botswana. The statutes define what qualifications are required for the registration of professionals. Provision is made for the recognition of qualifications from local institutions and further scrutiny and criteria are needed for the acceptance of qualifications from outside the two countries. The UK's Dentists Act, 1984 provides for a 'recognised overseas diploma' and the UK's Medical Act, 1983 provides for an 'acceptable overseas qualification'; these allow the councils to register professionals from other countries.

In the UK, the GMC also provides criteria for qualifying candidates from the EU and other countries, in terms of section 17. The same principles are seen in the Botswana laws. According to section 9(4) of the Botswana Health Professions Act:

> Qualifications from a university or other institution outside Botswana shall not be accepted as qualifications for registration unless–
>
> (a) the qualification entitles the holder thereof to practise the relevant profession in the country in which such university of institution is situated; and
>
> (b) the Council is satisfied that the possession of such qualification indicates a standard of professional education not lower than that required by the Council for practice of such a profession in Botswana.

Similarly, section 7(2) of the Botswana Nurses and Midwives Act gives the council the power 'to approve, subject to inspection, schools of nursing and institutions where student nurses and midwives, and enrolled nurses are trained'. Further, the Act obligates citizens qualifying in Botswana to register within 90 days of qualification.

In the UK, fitness to practise is a requirement in all the regulatory bodies' statutory instruments; however, it is not clearly agreed what fitness to practise is. According to the GMC's Fitness to Practise Guidance:

37 Nurses and Midwives Registration Regulations, 2011.

A question of fitness to practise is likely to arise if:

> a doctor's performance has harmed patients or put patients at risk of harm …
>
> a doctor has shown a deliberate or reckless disregard of clinical responsibilities towards patients …
>
> a doctor's health is compromising patient safety …
>
> a doctor has abused a patient's trust or violated a patient's autonomy or other fundamental rights …
>
> a doctor has behaved dishonestly, fraudulently or in a way designed to harm or mislead others …[38]

Other bodies, such as the Nurses and Midwives Council, limit fitness to practise to skills, knowledge, health and character attributes that allow nurse to perform their duties effectively. The Health Care Professions Council, the General Dental Council and the General Optical Council seem to define fitness to practise by these four attributes predominantly, making the GMC's definition the broadest. The Botswana Health Professions Act requires one to have a good character and standing in order to be registered with the Botswana Health Professions Council. Furthermore, the Botswana Nursing and Midwifery Council is authorised by regulation 9 of the Nursing and Midwifes Registration Regulations to remove a registrant who is unfit to practise from the register.[39] The characteristics of unfitness include physical and mental incapacity demonstrated by a medical practitioner. Other characteristics indicating a lack of fitness to practise (as highlighted by the UK laws), such as dishonest behaviour, are legislated for in the subsidiary legislation of the Botswana Health Professional Conduct Regulations.[40]

The requirement of a state of good health by the UK regulators is also subject to the Equality Act, 2010 as the Act prohibits discrimination. This includes curbing of regulators setting of registration criteria that are biased to a person's characteristics, such as disability. However, self-disclosures to the regulator about one's disability are necessary if there is a potential safety problem for the public. In *R (AR) v Chief Constable of Greater Manchester Police*,[41] police disclosure was seen as contravening the right to private life in Article 8 of the Human Rights Act, 1998. Regulators use disclosed information but do not use it as the main reason for not registering an applicant.[42] In addition, the police have a discretion whether to disclose or not, and they are guided by the Statutory Disclosure Guidance Act, 2015.[43] The disclosed information is used in tandem with other information to form an

38 General Medical Council 'The Meaning of Fitness to Practise' (2014) <https://www.gmc-uk.org/-/media/documents/dc4591-the-meaning-of-fitness-to-practise-25416562.pdf> accessed 11 December 2020.

39 Nurses and Midwives Registration Regulations, 2011, reg 9.

40 Botswana Health Profession Council Professional Conduct Regulations, 1988, reg 28.

41 *R (AR) v Chief Constable of Greater Manchester Police* (2018) UKSC 47.

42 Gomez, D *The Regulation of Healthcare Professionals: Law, Principle and Process* (Sweet & Maxwell 2019) 159.

43 England Home Office (2015) 'Statutory Disclosure Guidance' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/452321/6_1155_HO_LW_Stat_Dis_Guide-v3.pdf> accessed 12 December 2020.

opinion. In the UK, the regulators provide for the requirements for registration, including good character, in guiding documents. The Department of Health has called for the litmus test of character to be a requirement.[44] Consequently, the Professional Standards Authority published documentation highlighting the common factors that regulators should use in assessing character.[45] The guide highlights four factors that bring the character of an applicant into doubt. It highlights that an applicant or registrant may have problems of character if he or she has been proven to, or has the potential to, behave:

> in such a way that puts at risk the health, safety or wellbeing of a patient or other member of the public;
>
> in such a way that his/her registration would undermine public confidence in the profession;
>
> in such a way that indicates an unwillingness to act in accordance with the standards of the profession;
>
> in a dishonest manner.[46]

Regulators assess character through a series of questions that are asked in applications. Requests are made for disclosures of criminal convictions, civil proceedings and sanctions that would otherwise not be allowed to be disclosed under the Rehabilitation of Offenders Act, 1974. The Professional Standards Authority guide also recommends that regulators should not only rely on certificates of good standing and character from an applicant's peers, but should have a clear framework for establishing good character. The same burden of establishing good health and character applies to applications made in terms of the Botswana Regulatory Council's processes.

UK case law has defined certain attributes relating to health profession registration and fitness to practise. Gomez observed that courts should look at the same standards of character when assessing applications for registration or meting out sanctions,[47] as held in *Council for Regulation Healthcare Professionals v General Dental Council and Fleishmann*.[48] However, as seen in *Mulla v Solicitors Regulation Authority*,[49] it was reiterated that striking off an established practitioner and declining registration because of a newly qualified entrant's character assessment are clearly focused on public safety as a priority. However, a court has observed that there ought to be a distinction between the two scenarios. *Doherty v Nursing and Midwifery Council*[50] involved a nurse who was involved in a drink-drive offence within her three-year registration retention cycle. The Nursing and Midwifery Council took her

44 Secretary of State for Health *Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century* (Department of Health 2007).

45 Professional Standards Authority 'Common Approach to Good Character' (2008). <https://www.professionalstandards.org.uk/docs/default-source/publications/policy-advice/common-approach-to-good-character-2008.pdf?sfvrsn=72c67f20> accessed 12 December 2020.

46 Ibid.

47 Gomez (note 44) 77.

48 *Council for the Regulation of Health Care Professionals v General Dental Council and Fleischmann* (2005) EWHC 87 (Admin).

49 *Mulla v Solicitors Regulation Authority* (2010) EWHC 3077 (Admin).

50 *Doherty v Nursing and Midwifery Council* (2017) EWCA Civ 1344.

conviction into account when considering the renewal of her registration application, as opposed to considering it as an independent fitness to practise issue. The council declined her renewal, saying that her behaviour was incompatible with being a safe nurse. The Court of Appeal held in favour of appellant and ruled that the regimes of registration/de-registration and fitness to practise are different; the one has a yes or no outcome, while the other has a continuum of remedies. The court held that striking a nurse off the register rather than imposing a sanction, such as suspension and rehabilitation, is not in the interests of justice, as striking off means the applicant would have to re-apply for registration, which has a defined waiting period. Suspension of permission to practice and rehabilitation of the registrant allow for more interrogation of the crime and an assessment of the character features involved. It may not have a waiting period after sanction has been served.

With regard to fitness to practise, in the UK, there are differences in the approaches to fitness to practise but, as Gomez observes, the common feature is the presence of a panel that decides whether fitness to practise is impaired.[51] Matters of fitness to practise often affect the registration of a practitioner. The names of the panels that assess and decide fitness to practise differ; some are referred to as fitness to practise committees and others are referred to as professional conduct committees. *Council for the Regulation of Healthcare Professionals v General Medical Council and Ruscillo,*[52] established that committees must assess matters in detail, their role must be inquisitorial and fact-finding, and their procedures or processes must be exhaustive.

The fitness to practise part of the laws in the UK and those in Botswana differ. In the UK, the fitness to practise processes of regulators differ.

4.3 Retention of professionals on registers

In both Botswana and the UK, registered professionals can renew their membership by paying a fee and fulfilling subsequent provisions to ensure that they are continually up-to-date with professional practice standards. All professional bodies in the UK enforce continuing professional development (CPD). In Botswana, the registration of health professionals under the Health Professions Act and the Nurses and Midwives Act is renewed annually and CPD points are awarded for ongoing training by development platforms for the two councils. In the UK, the GMC oversees revalidation exercise where the competencies of doctors are reassessed periodically to ensure that they have the required skill sets. Botswana does not have revalidation exercises to re-assess professionals for competency.

4.4 Professional misconduct and registration or de-registration

Professional misconduct is one aspect of regulation that affects fitness to practise. In fact, sanctions for professional misconduct are among the most serious, often leading to de-registration. There is no absolute definition of professional misconduct in the UK, with the principle being considered as a fitness to practise matter. With effect from 1 November 2004, the GMC's disciplinary procedures were reformed by the Medical Act

51 Gomez (note 44) 77.

52 *Council for the Regulation of Healthcare Professionals v General Medical Council and Ruscillo* (2004) EWHC 527 (Admin).

(Amendment) Order, 2002.[53] The concepts of 'serious professional misconduct', 'seriously deficient performance' and 'seriously impaired health' were replaced by a unified concept of impaired fitness to practise.[54] This approach is broadly seen in other professions.

It can be argued that the UK laws had an ambiguous term for professional misconduct and replaced it with another broad term, fitness to practise. The legal definition of misconduct was proffered in *Howd v Bar Standards Board*.[55] The court found that, on a literal interpretation, any breach of a professional code, however trivial, would constitute professional misconduct. However, the court held that this could not be the correct approach:

> [C]onsistently authorities have made clear that the stigma and sanctions attached to the concept of professional misconduct across the professions generally are not to be applied for trivial lapses and, on the contrary, only arise if the misconduct is properly regarded as serious … the concept of professional misconduct carries resounding overtones of seriousness, reprehensible conduct which cannot extend to the trivial.[56]

The Botswana Code of Professional and Ethical Conduct for Nurses and Midwives defines misconduct as 'unacceptable or irresponsible behaviour especially by a professional'.[57] The Botswana Health Professions Act also provides for disciplinary proceedings against a professional who has committed 'improper or disgraceful conduct of a professional nature'.[58] Removal from the register is one of the sanctions, based on the seriousness of the misconduct, that the two councils can impose.

In the UK, the leading cases on professional misconduct sanctions in relation to health profession registration are *Meadow*[59] and *Bawa-Garba*,[60] both of which involved the GMC. In *Meadow* a renowned professional, Sir Meadow, had given evidence in a case where Ms Clark was charged in relation to the deaths of her children (*R v Clark*). The paediatrician gave evidence that had a huge impact on the case, leading to the conviction and incarceration of Ms Clark. It later emerged that Sir Meadow's evidence was wrongly presented, and that he had provided statistical conclusions that were not within his ambit. Fresh evidence presented later showed that Ms Clark was innocent.

In *Bawa-Garba*, a doctor was convicted of gross negligence manslaughter after the death of a baby under her care. The court concluded that she failed to act prudently, her level of care was judged to be exceptionally poor, and she was convicted of manslaughter.

In both cases, the doctors then appeared before the Medical Practitioners' Tribunal Services (MPTS) and were charged with serious professional misconduct, with the sanction of removal from the register. Bawa-Garba was later restored to the register after

53 Medical Act (Amendment) Order 2002 (SI 2002/3135).
54 *General Medical Council v Meadow* (2006) EWCA Civ 1390.
55 *Howd v Bar Standards Board* (2017) EWHC 210.
56 Ibid para 51, per Lang J.
57 Nurses and Midwives (Professional Ethics and Practice) Regulations, 2014.
58 Botswana Health Professions Act, 2001, s 14(1).
59 *General Medical Council v Meadow* (2006) EWCA Civ 1390.
60 *General Medical Council v Bawa-Garba* (2018) EWHC 76 (Admin).

an appeal. Several commentaries on the case have presented varying opinions. One paper observed the challenges of transparency, public confidence, and concerns that, without the benefit of research, neither the courts nor the professional tribunal can credibly claim to have expertise in what the public thinks.[61] Another paper observed inconsistencies in decisions about gross negligence manslaughter; the author compared three cases in the UK and opined that a code must be implemented to assess such cases.[62]

In *Meadow*, the court held, giving expert evidence does not make doctors immune to prosecution and sanction by a regulatory body. However, in view of the gross professional misconduct, the court held that a misinterpretation of clinical facts does not warrant removal from the register.

In *Bawa-Garba* the council appealed the MPTS's decision to remove the doctor from the register to the Court of Appeal. The court held that the MPTS should re-evaluate Dr Bawa-Garba andconsider *Bijl v General Medical Council*,[63] where it was held that the competency of a professional does matter significantly when considering their permanent removal from the register. It was clear that Dr Bawa-Garba was a competent doctor who presented no material danger to the public, and her future service to society was in the public interest.

The decisions of disciplinary committees in relation to removal from the registers of regulatory bodies can be appealed to the Privy Council, as provided for by section 29 of the Dentists Act, 1984, for example. In *Preiss v General Dental Council*,[64] on acquittal of a dentist from sanction of de-registration for gross negligence, is was held that serious professional misconduct does not require moral improbity; something more is required than a degree of negligence, enough to give rise to civil liability, but not calling for the contempt that inevitably attaches to the disciplinary process. In *Ghosh v General Medical Council*,[65] the court emphasised that the powers of the Privy Council may not be limited as previously presented. Therefore, while it was observed from *Libman v General Medical Council*[66] the findings of a professional disciplinary committee should not be altered unless they are disturbingly out of line with the evidence to indicate with reasonable certainty that the evidence was misread. Therefore, the Privy Council can direct the regulatory bodies in the line of censure, and as Ghosh determined, the case and deviation will be the main guidance.

5. Public interest

Public interest is not limited to regulating health professionals. It is seen across all public administration processes, such as controlling fuel and electricity prices. Such control aims

61 Case, P & Sharma, G 'Promoting Public Confidence in the Medical Profession: Learning from the Case of Dr. Bawa-Garba' (2020) *Medical Law International* 71.

62 Amara, FD 'The Cases of Rose (Honey Maria) [2017] EWCA Crim 1168, Bawa-Garba (Hadiza) [2016] EWCA Crim 1841, and JM and SM [2012] EWCA Crim 2293: A Critical Analysis of the Disordered State of the Law of Involuntary Manslaughter' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4920229> accessed 15 February 2024.

63 *Bijl v General Medical Council* (2001) UKPC 42.

64 *Preiss v General Dental Council* (2001) UKPC 36.

65 *Ghosh v General Medical Council* (1982) UKPC 38.

66 *Libman v General Medical Council* (1972) AC 217.

to ensure prices do not increase so much that the public cannot afford fuel and electricity. Regulation or rule-making is a key policy and a legal initiative that assists in demarcating political and economic roles.[67] The public interest must be maintained at all costs.

The regulations emphasise the public safety aspect; regulation 3(d) of Botswana's Nurses and Midwives Disciplinary Regulations, 2011 provides that anyone who

> during the course of his or her practice as a nurse, enrolled nurse or midwife
>
> (i) acts carelessly,
>
> (ii) acts incompetently,
>
> (iii) acts improperly,
>
> (iv) assaults or batters a patient, client or colleague,
>
> (v) provides services that are not appropriate for the patient's wellbeing…
>
> commits an offence.

The regulations further prohibit a nurse from acting outside his or her scope. This approach protects the public by heeding the over-arching objective of ensuring public safety.

According to the *Webster Legal Dictionary*,[68] the term 'public interest' means a notion depicting that 'the general welfare and rights of the public are to be recognized, protected, and advanced'. The public interest value proposition provided by self-regulating health professions has been questioned, with Canada given as an example. One article argues that there is a trade-off between self-regulating professionals' interests, the state agenda and the public interest in general.[69] In addition to regulating a market, public interest is tied to human rights and there is an increasingly business-focused definition of the public interest that is coupled with patients' rights. In recent decades there has been a significant shift in public interest narratives, with an emphasis on limiting harm to the consumers of professional services, rather than benefiting the public, more broadly, as defined in the dictionary entry.

It is clear that the public interest is echoed in all the laws of health profession regulation in the UK and Botswana. Section 38 of the UK's Medical Act, as quoted in *Krippendorf v The General Medical Council*,[70] provides that 'on giving a direction for suspension under section 36A in respect of any person, the Committee on Professional Performance "*if satisfied that to do so is necessary for the protection of members of the public or would be in the best interests of that person, may order that his registration in the register shall be suspended forthwith*"'.

67 Levi-Faur, D, Kariv-Teitelbaum, Y & Medzini, R 'Regulatory Governance: History, Theories, Strategies, and Challenges' (2021) *Oxford Research Encyclopedia of Politics* <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1430>9 accessed 12 May 2024.

68 Merriam Webster Online Dictionary, available at <https://www.merriamwebster.com/dictionary/interest#legalDictionary> accessed 12 May 2024.

69 Adams, TL 'Professional Self-Regulation and the Public Interest in Canada' (2016) 6(3) *Professions and Professionalism* 1587.

70 *Krippendorf v The General Medical Council (General Medical Council)* [2000] UKPC 45.

A similar rendition of the provisions appears in section 14(3) of Botswana's Health Professions Act:

> The Council may order
>
> (a) the suspension from practice of any practitioner in respect of whom an enquiry is pending or being held, or against whom criminal proceedings are pending or being brought, pending the final outcome of the enquiry or proceedings; or
>
> (b) that the continued practice of any practitioner pending the outcome of any enquiry shall, in the interests of the public or the practitioner, be subject to such conditions and requirements as the Council considers necessary or desirable.

Public interest is prioritised to an effect that the registration of a practitioner can be given with conditions.

In South Africa and Namibia, similar laws can be noted. Section 2(1) of South Africa's Health Professions Act 56 of 1974 states that some of the objectives of the Council are:

> to serve and protect the public in matters involving the rendering of health services by persons practising a health profession; and
>
> to exercise its powers and discharge its responsibilities in the best interests of the public and in accordance with national health policy determined by the minister; and
>
> to be transparent and accountable to the public in achieving its objectives and when performing its functions and when exercising its powers.

Similarly, in Namibia, section 5(b) of the Medical and Dental Act 10 of 2004 states that one of the objects of the Act is:

> to communicate to the Minister information on matters of public interest acquired by it in the course of the performance of its functions in terms of the Act.

In the South African statute, public interest is taken a notch higher. The Health Professions Act 56 of 1974 emphasizes the council's duty to act in the public interest and to be transparent to both the profession and the general public in achieving its objectives. Such a mandate of responsibility to the public and transparency shows the importance of the public as a key stakeholder in the laws concerning the registration of professionals.

6. Conclusion

The principles of health profession registration in Botswana and the UK aim to protect the public interest. Fitness to practise, professional conduct, the evaluation of competencies and qualifications are important to ensure that the public receives safe care. The governance structures of the councils differ in the two countries: the Botswana statute gives the Minister of Health oversight of the councils, while in the UK, the Professional Standards Authority has the authority to evaluate decisions of the councils and even appeal them in court. Botswana could consider introducing an oversight authority to evaluate the

regulators' decisions. It accords an independent adjudication with a possibility of judicial action taken up by the authority, without involving the aggrieved party, being a registrant or a member of the public.

How to cite:

Patrick M Masokwane 'Registration of Health Professionals in the United Kingdom and Botswana: A Comparative Analysis of the Overarching Principles' (2025) 5 *Turf Law Journal* 59-77.

Received: 21 September 2024, Accepted: 31 March 2025, Published: 23 April 2025, Doi: https://doi.org/10.62726/tlj.v5.42

An Examination of the Legal Framework for Parties' Rights when Mortgaging Land under Nigerian Property Legislation

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Abstract

The conveyancing of rights in Nigeria is complex because of the multiple land tenure systems, which exist under the uniform principles of the Land Use Act 1978. Parties to a conveyancing matter have certain rights and duties to fulfil in creating an enforceable mortgage deed. These include certainty of title, insurance, leasing, custody of title deeds, consolidation of mortgages and possession. These are the preliminary covenants that a mortgage deed must consider. This article looks at the construction of the mortgage deed on land in Nigeria, discusses parties' rights and obligations, and assesses the legal and judicial attitudes to them in determining parties' rights and obligations. The doctrinal approach was adopted, using primary and secondary sources. Statutes and case law were analysed as primary sources, and textbooks, journal articles, and conference proceedings were analysed as secondary sources. Parties' rights and obligations, both at common law and in statutes apply to the mortgaging of land in Nigeria. Also, compliance with these rights and obligations is necessary to enforce mortgages through the various methods recognised in Nigerian law. The seamless enforcement of the mortgage deed is crucial for using land for productive purposes and generating capital. The parties' solicitors should ensure that clauses are included in the mortgage deed to protect the parties and to avoid costly litigation. The consent clause and the definition of a holder in the Land Use Act 1978 should be amended.

Keywords

covenants, deemed grants, mortgage deed, title, right of redemption

1. Introduction

The rights and obligations of mortgage parties are crucial to creating and enforcing mortgages in Nigeria. In *Santley v Wilde*,[1] Lord Lindley defined mortgage as the transfer of legal or equitable titles as security for the discharge of a loan or fulfilling an obligation upon the promise that the title would be redeemed when the debt is repaid, or the obligation is discharged. The transferor of interest is the mortgagor, while the person to

1 (1899) Ch D 474.

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whom the interest is transferred is the mortgagee. The debt over which the property is transferred is the mortgaged sum. In law, the mortgage relationship is usually between two parties (the mortgagor and the mortgagee). A third party may, however, come into the arrangement as a head lessor who may give or confirm the transfer of the title as guarantor of the debt security.[2] Sometimes, the borrower may differ from the mortgagor. In that case, the mortgagor must be a party to the borrowing transaction.

In Nigeria, the mortgage relationship is regulated by a plethora of laws, which often lead to conflict and confusion, particularly at the point of enforcement. A learned commentator has averred that the problem can be attributed to both received English Law and multiple ethnic nations in the country, with diverse customs, values, and orientations impacting the pre-existing customary laws.[3]

The plural nature of laws in Nigeria makes the administration of laws complex: there are about 250 ethnic groups that have varying customary laws, a Federal Capital Territory, 36 states, and 774 local governments. In *AG Federation v AG Abia and 35 Others*,[4] the Nigerian Supreme Court affirmed the powers of the three tiers of government to make laws subject to the powers of the Federal Government as stated in the Second Schedule of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Therefore, each tier has regulatory laws and rules governing various matters.[5] Laws regulating mortgage relationships are scattered among the many statutes of the federation and states, the customary laws (which have been arguably categorised to include Sharia law), in addition to the inherited English statutes, the common law and doctrines of equity in England on 1 January 1900. The multiple land tenures (customary tenure, inherited doctrine of estates and state-controlled tenure under the Land Use Act 1978) operated, which were the incidents of the plural laws continue with modifications when the Land Use Act[6] (LUA) was enacted. The mortgage system, which is a product of English law, operates under these laws. Therefore, the parties and their solicitors must be aware of the legal labyrinth that may frustrate the parties' achievement of a contractual relationship.

Most studies conducted under the Nigerian legal system focus on creating mortgages and enforcing mortgage contracts. This article looks at the preliminary rights of the parties to a mortgage, which must be settled at the point of concluding the mortgage contract, to relieve practitioners and courts of the burden of litigation when the matters become issues at the point of enforcement. This article examines the preliminary rights of parties to the mortgage of land under the extant legal regime. The objectives are to explore the construction of mortgage deeds on land, discuss the rights of parties to land mortgage under the extant legal regime and make recommendations for sustaining land security in Nigeria.

2 Oniekoro, FJ *Mortgages in Nigeria: Law and Practice* (Chenglo Ltd 2007) 1.
3 Agbede, IO *Themes on Conflict of Laws* (Revised Edition, Princeton and Associates Publishing Co Ltd 2018).9.
4 (2024) LPELR-62576 (SC).
5 Cap C23, LFN 2004, Second Schedule, Part II.
6 1978, Cap L5, LFN 2004.

The study adopted the doctrinal method of research, which relied on primary and secondary sources of information. The primary sources included statutes such as the LUA, the Conveyancing Act,[7] the Property and Conveyancing Law,[8] the Land Use Act (Title Documentation) Regulations,[9] the Mortgage and Property Law of Lagos State (as amended),[10] the Mortgages and Foreclosure Law,[11] and the Insurance Act 2003,[12] and case law. The secondary sources included textbooks, journal articles, newspaper articles and internet sources. The information gathered from the sources was subjected to contextual analysis.

2. Construction of the mortgage deed

A mortgage deed is a document evidencing the agreement between the parties to transfer interest in land as security for the discharge of a debt or other purposes. It is subject to redemption after the loan has been paid or when an obligation has been fulfilled.[13] As an agreement, it must meet the basic conditions for creating a formal contract in Nigeria, which are regulated by principles inherited as part of the law received on 1 January 1900.[14]

A contract is defined as a promise or a set of promises the law will enforce.[15] It is an agreement between two or more persons to make promises binding. Its features include an offer, acceptance, consensus ad idem, the capacity of the parties, consideration and privity of contract.[16] Commenting on the need for the parties to benefit from the contract, Lord Haldane in *Dunlop Pneumatic Tyres Ltd v Selfridge*[17] stated that:

> My Lords, in the Law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as for example, under a trust, but it cannot be conferred on a stranger to a contract *in personam* to enforce the contract.[18]

The implication is that only a party can act legally to enforce the contract, not a beneficiary of its outcome.[19] Exceptions to this rule, according to Sagay, include the assignment of contractual responsibilities, novation and agency.[20] In *Tulk v Moxhay*,[21] the plaintiff, who has several plots of land, transferred his interest by selling a plot to Elms, who had an agreement with the seller to preserve it in its existing condition. Upon several transfers, the plot was conveyed by sale to the defendant, who, despite being aware of the restriction

7 Cap 41, Law of England Act, 1881.
8 Cap 100, Law of Western Nigeria, 1959.
9 Regulations of Lagos State, 2012.
10 Law 17 of Lagos State, 2012 (as amended).
11 Law 17 of Ekiti State, 2020.
12 Cap 117, LFN 2004.
13 Oniekoro (note 2) 1.
14 Ibid 9.
15 Treitel, GH *Law of Contract* (5th Ed., Sweet & Maxwell Ltd 1979) 1.
16 Sagay, IE *Nigerian Law of Contract* (2nd Ed., Spectrum Books 2007) 8.
17 (1915) AC 847.
18 At 853.
19 Sagay (note 17) 489.
20 Ibid.
21 (1848) Ch 774 LJ 83.

imposed on land use, planned to erect a house on it. An injunction was procured to stop the proposed building. It was granted based on a restrictive covenant on the land. However, developments at common law require that a mere notice of such covenant can no longer prevent the purchaser from using the plot for the restricted purpose. The vendor must retain some other land in the neighbourhood to take care of the interest protected by the restrictive covenant.[22]

The position in the preceding paragraph applies in Nigeria by virtue of the received English law. For example, mortgage statutes such as the Conveyancing Act (CA),[23] which is a received law and the Property and Conveyancing Law[24] (PCL) contain the provisions. Section 104(1) of the PCL states:

> A covenant and a bond and an obligation or contract under seal made ..., binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant, bond, or obligation.

The CA and the PCL provisions apply in most parts of Nigeria. The CA regulates conveyancing, including mortgages, in Nigeria, except in Southwestern Nigeria, where the PCL is in use. Recently, Lagos State, which previously used the CA, promulgated the Mortgage and Property Law (MPL) (as amended),[25] while Ekiti State, a former PCL state, now uses the Mortgages and Foreclosure Law (MFL).[26] These statutes retain the operation of these covenants by the continued use of the provisions of the former statutes for general conveyancing. The MPL and the MFL have created statutes dealing with mortgage law only with innovation and principles compliant with the LUA and do not provide for the comprehensive conveyancing rules and principles contained in the older laws. It is contended that the CA and the PCL operate in other conveyancing practices in Lagos and Ekiti States, except on mortgage. Hence, various covenants at common law, the CA and the PCL, continue to determine land conveyancing practices, including mortgage agreements, unless such rules are excluded by the new mortgage statutes or varied by the deed.

The case law on this aspect of the Nigerian system is still developing, which could result from the low volume of transactions on land use as mortgages compared to developed common-law jurisdictions. Because the extant mortgage statutes derive from the CA, with a few modifications, the case law relied on is to be found in inherited pre-1900 common-law sources.[27]

3. Legal framework for parties' rights

Parties to mortgages must settle the contract by stating the implied and express rights necessary for implementing and enforcing mortgages at the creation of mortgage deeds.

22 Sagay (note 17) 495.
23 Cap 41 Act of England 1881.
24 Cap 100, Law of the Western Region of Nigeria, 1959.
25 Law 17 of Lagos, 2012.
26 Law of Ekiti State, Nigeria, 2020.
27 Nigeria received English legal system comprising the statutes of general application, common law and doctrines of equity in force in England as at 1 January 1900.

These are statutory rights that are preliminary to the commencement of the mortgage relationship. These rights pertain to security insurance, the creation of leases and sub-letting, the custody of the deeds of mortgage, the right of entry and possession, and the profits from the security.[28] These rights are distinguishable from those of enforcement powers because they are rights and obligations required during the life of the mortgage, while enforcement rights are final remedies obtainable by the parties. While a mortgagee has enforcing rights of recovery of the funds, possession, employment of the receiver, specific performance, foreclosure and sale of the security, a mortgagor has other relief, the most important of which is the equity of redemption.

3.1 Mortgage insurance

Mortgage insurance protects the lender when the mortgagor fails to promise to repay the loan or fulfil an obligation. Both parties have rights and obligations regarding the insurance of the mortgaged land. The mortgagee ensures that the mortgaged security is protected from deterioration, which gives the mortgagee assurance that the loan will be repaid.[29] Hence, the mortgagee is immensely interested in the safety of the security. Although the mortgagor has the primary duty to insure the security, the mortgagee may do so if the duty is neglected.[30] The CA[31] provides that:

> (1) A mortgagee, where the mortgage is made by deed, shall by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):
>
> (ii) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money …[32]

This statutory provision indicates that the security can be insured if (a) it is a legal mortgage, (b) the insurance is against fire, (c) the insurance is made after the due date of the deed, and (d) premiums paid by the mortgagee can only be charged on the security. The provision is common to the PCL and the MPL with minor variations.

Although both parties have the right to insure the security, the mortgagee often performs the task and later asks the mortgagee for reimbursement.[33] Where the mortgagee has the power to insure the security, the insurance policy should be limited to the amount stipulated in the agreement or two-thirds of the fund required for repairs or restoration in

28 CA, s 19; PCL, s 123; MPL, s 35.
29 Oniekoro (note 2) 122.
30 Cap 41, Act of England; PCL, s 123(1) (ii) CA, s 19(1)(ii); MPL, s 35(1) (ii).
31 Section 19(1)(ii).
32 PCL, s 123(1)(ii).
33 Oniekoro, FJ *Mortgages in Nigeria: Law and Practice* (note 2) 123.

the case of destruction.[34] Hence, the mortgagee may not obtain insurance for an exorbitant amount above the agreed amount or the sum reasonably needed to restore the property if it is destroyed. This legal position appears reasonable because the premium for such insurance, where the mortgagee does it, will be charged to the security. Furthermore, an unnecessarily high premium will block the mortgagor's redemptive right.

Under some circumstances, the mortgagee could make the insurance, or if it is done on behalf of the mortgagor in line with the law, it would be valid. These circumstances include where: (a) there exists an agreement that excludes insurance between the parties; (b) the mortgagor takes over the insurance, or it is done on his behalf in line with the contractual deed; and (c) the mortgage agreement does not give any direction as to the insurance.[35] Any insurance done by the mortgagee contrary to this provision will be invalid.

Mortgage statutes in Nigeria have similar provisions on the disbursement of insurance money received from the insurer for loss incurred by fire accidents. The laws provide that the disbursed sum shall be applied to the reinstatement of the mortgaged property by the mortgagor with the mortgagee's consent.[36] The insurance money received may be applied to restore the loss or damage to the security.[37] These statutes permit the mortgagee to disburse the insurance proceeds towards the discharge of the mortgage sum outstanding.[38]

The consent of either party and the law on maximum benchmarks and the purposes for the insurance must be fully complied with. However, where the policy is taken on behalf of the mortgagee, he is entitled to the benefits, notwithstanding that the mortgagor pays the premiums.[39] Suppose the insurance is taken out in the name of the mortgagor. In that case, the latter is entitled to the benefits, except as otherwise provided for under a special contract or the provisions of the statute. In *Lewis v Whitely,*[40] it was held that where the law indicated that any insurance policy taken out by the mortgagor was for the mortgagee's benefit, any payment made to the mortgagor under the policy had to be held in trust for the mortgagee. In *Halifax Building Society v Keighley*,[41] both parties agreed that the mortgagee could insure the premises against fire accidents while the mortgagor had to pay the premium. The mortgagor, based on the agreement, insured the security, and the mortgagor also insured it with another insurance company in his name. When the premises were damaged by fire, each insurer paid their share of the loss for which they were responsible. The action to recover the insurance proceeds from the mortgagor failed because the court decided it was made for the mortgagee's benefit. This action would have succeeded if the parties in the mortgage deed had not excluded section 23(3) of the CA. The implication of this is that as soon as parties to an agreement seek to exclude a statutory provision by introducing an alternative clause, the provision made by the statute can no

34 Ibid.
35 CA, s 23(2); PCL, s 130(2); MPL, s 42(1).
36 CA, s 23(3); PCL, s 130(3); MPL, s 42(3); MFL, Ekiti State, s 33(d).
37 Ibid.
38 Ibid.
39 Smith, IO *Nigerian Law of Secured Credit* (Ecowatch Publications Ltd 2001) 54.
40 (1866) LR 2 Eq 143 at 149.
41 (1931) 2 KB 248 at 255.

longer avail any of the parties. Section 23(3) of the CA states:

> All money received on an insurance effected under the mortgage deed or under this Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

The payment of insurance proceeds to the beneficiary raises the question of whether the proceeds could be spent on reinstating or repairing the mortgaged property or whether they can be used to discharge outstanding mortgage money. Under the extant mortgage statutes, a mortgagee may insist that all the proceeds due, except otherwise provided by the statutes, be used to discharge money due under the contract, except as otherwise provided by statute or any special contract.[42] However, section 66 of the Insurance Act[43] requires that insurance money paid to the beneficiary should be expended solely on reinstating or repairing the property and forbids its being used to liquidate or reduce the mortgage debts. Section 66(2) and (3) state as follows:

> (2) The insurance money payable under subsection (1) of this section shall be paid out and expended towards rebuilding, reinstating or repairing of the house or other building so burnt down, damaged or destroyed by fire, unless–
>
> (a) the party or parties claiming such insurance money shall within 60 days after the claim is agreed, give security to the satisfaction of the insurer that the insurance money shall be paid out and expended as stated herein: or
>
> (b) the insurance money is, at the time, settled and disposed of and among all the parties entitled as the insurer may determine with the approval of the Court on the application of the insurer or any of the interested parties.
>
> (3) Notwithstanding the provisions of subsection (1) of this section, the insurer shall have the right to elect whether to reinstate the house or building damaged or destroyed by fire, or to pay the insured for the loss suffered but not exceeding the insured sum.

The import of these subsections is that a beneficiary of insurance money is obligated to expend the money on reinstating or repairing the mortgaged property where it is located, and the money cannot be unilaterally used to liquidate the mortgage debt unless a court order is sought and obtained. This is contrary to the provisions of the CA, the PCL, and the MPL analysed above, which allow the mortgagee to decide whether to repair the burnt building or use the proceeds to discharge the debt.[44]

The power of insurance is central to the operation of an efficient mortgage. Failure to insure the security when the contract does not forbid it may compromise its condition, with dire consequences for the mortgagee.[45]

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42 Smith (note 40) 56.
43 Cap 117, LFN 2004.
44 See ss 23(2) and (3); 130(2) and (3); 42(2) and (3) of the CA, the PCL and the MPL, respectively.
45 Essien, E *Law of Credit and Security in Nigeria* (2nd Ed., Toplaw Publishments 2012) 199.

3.2 Leasing and sub-leasing

3.2.1 Parties' rights and obligations

3.2.1.1 Right of the mortgagor

The mortgagor's power to create a lease could be attributed to the possessory right the mortgagee often left with him. This power of the mortgagor is donated by the mortgagee, who does not want to come to possession due to stringent requirements that the law has set for the mortgagee in possession. In *Corbett v Plowden*,[46] Lord Selborne held that the power of mortgage which the mortgagor has can be withdrawn by the mortgagee as he has the power to evict the lessee from the leased premises or to demand rent from the lessee upon the issuance of notice. Under the mortgage contracts, the security in land is transferred to the legal mortgagee, alongside the right of possession. In *Kasumu v Baba Egbe*,[47] the court held that the legal estate that resides in the mortgagor could be transferred to the mortgagee immediately after the contract, even when the mortgagor is not in default. An equitable mortgagee does not have this right on the equitable principle of *quod non habet*. The right of possession, which becomes exercisable upon the perfection of the mortgage deed, entitles the mortgagee to exercise leasing powers. However, as shown when the right is not exercised, the mortgagor may continue to exercise it on the mortgaged property.[48]

Hence, under the statutes, any party in possession can create a valid lease.[49] The mortgagor has the right to conclude a lease, and collect rent and profits of any land while in possession, provided the mortgagee who possesses the superior right to the mortgaged property has not indicated his intention to take possession.[50] Section 18(1) of the Conveyancing Law states:

> (1) A mortgagor of land while in possession shall as against every incumbrancer, have power to make from time to time building leases of the mortgaged land or any part thereof for any term not exceeding ninety-nine years.

3.2.1.2 Right of the mortgagee

In terms of section 18(2) of the CA, section 121(2) of the PCL and section 33(2) of the MPL, a legal mortgagee in possession has a right to create leases, which is superior to all previous encumbrances, if any, and the mortgagor. The mortgagee's power to lease emanates from either the statutes or the contractual deed. A legal mortgagee's right to make binding mortgages in this regard stems from his possession of the legal estate. A mortgagee, because of the nature of the mortgage relationship under the common law, the doctrine of equity and statutes, is entitled to the possession of the mortgaged land. Hence, he has the superior right to lease the security over all others.

46 (1884) 25 Ch D 678, 681.
47 (1956) 3 All ER 266.
48 CA, s 18; PCL, s 121; MPL, s 33; MFL, s 34.
49 Ibid.
50 PCL, s 121(1). See also CA, s 19; MPL, s 33(1).

However, the mortgagee may not take possession because of the problems connected to the legal requirement that he account for the profits made, as imposed by equity. In such a situation, the mortgagor remains in possession and, therefore, has the power to grant a lease.[51] Leases granted under the mortgage deed, or the statute, are binding on the mortgagor as if both the mortgagor and the mortgagee were parties to it.[52] However, in *Iron Trade Employers Ins. Ass. v House Investors*[53] the mortgagee had a right to restrict the mortgagor's grant of leases by insisting on the condition of his consent to make such a lease effective. This is the position under the Nigerian mortgage statutes.

3.2.2 Conditions for granting a valid lease

In creating binding leases for mortgaged land in Nigeria, the mortgagee must comply with the conditions set by the mortgage statutes operating in the various states of the Federation.[54] These are that leases must: (a) commence within 12 months of their execution; (b) be granted at the best rent possible; (c) contain an agreement for the payment of rent and a stipulation of the conditions upon which the lessor may re-enter possession in the case of the failure of the lessee not paying the rent 30 days after it is due; (d) contain a promise that the lessee will improve the buildings, repair the buildings or building purposes; (e) deliver a counterpart lease executed to the mortgagee within one month based on the priority of mortgages. These conditions safeguard the mortgagor's interests, especially where the mortgagee is in possession and grants leases. It may prevent fraudulent dealings on the part of the mortgagee or any connivance between the mortgagee and the lessee, the purpose of which is to have an adverse effect on the financial state of the mortgagor.

3.2.3 Leasing before mortgage

Leases created by the mortgagor as the owner or holder of the mortgaged property prior to the mortgage or after are valid. A lease granted before the mortgage is created, even when it extends to the mortgage period, remains binding on the mortgagee and any other person who purchases the mortgaged property from the mortgagee.[55] The court held in *Gomez v Williams*[56] that the mortgagee is also not entitled to rent from a pre-mortgage lease.

However, when a lease is created after the mortgage, unless the mortgagee's consent is sought and obtained, the lease is not binding on the mortgagee. Although either the mortgagor or the mortgagee in possession can create a lease, where the mortgagor creates a lease without the knowledge of the mortgagee, it was held in *Dudley & District Society v Emerson*[57] that the lease is not binding on the mortgagee, and he can, therefore, proceed to eject the lessee from the property or demand that the rent from the lease be paid to him upon the service of a notice.

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51 Essien, E *Law of Credit and Security* (2nd Ed., Toplaw Publishments Ltd 2012) 194.
52 Ibid.
53 (1937) 1 Ch 313.
54 CA, s 18; PCL, s 121; MPL, s 33; MFL, s 90.
55 Oniekoro (note 2) 128.
56 (1972) NMLR 149.
57 (1949) 1 Ch 707.

A learned commentator contended that the mortgagee's entitlement to rent in this scenario is borne out of the common-law provision, which makes the owner of the legal estate the owner of the property subject to equity of redemption because possession follows the law. But this is in opposition to the position of equity as held in *Turner v Walsh*[58] which sees the mortgagor as the owner of mortgaged property subject to the encumbrance of the mortgagee. While in possession, the mortgagor can create a valid lease and cannot be compelled to give an account of the rents collected. The lease created by the mortgagor, if done without the approval of the mortgagee and a subsequent purchaser who buys from the mortgagor, remains valid and binding between the mortgagor and the lessee based on the doctrine of estoppel.[59] However, in *Chatsworth Properties Ltd v Effiom*,[60] a lease without the concurrence of the mortgagee was not binding on the mortgagee; where he served a notice demanding rent from the lessee, he was deemed to have accepted it, which makes the lease binding.

Despite the ample provisions that both parties are free to lease the mortgaged property in accordance with statutes, it appears that the Landlord and Tenant Law[61] of various states forbids the mortgagee from creating a lease. The law, however, applies mostly[62] to residential premises, while mortgagees are free to grant agricultural and building leases while in possession.

Understanding the lease rules in mortgages will reduce friction in the operation, enforcement and discharge of the contract. It also sheds light on the fate of the third parties to the agreement, such as the lessee of the mortgagor, without the concurrence of the mortgagee and the purchasers of the mortgaged security from the mortgagee. Apart from the rights of the mortgagor and the mortgagee to determine clauses in the deed, mortgage statutes in Nigeria make detailed provisions for the mortgage lease, thus repositioning land as the engine of commercial transactions in Nigeria.

3.2.4 Leasing under the Land Use Act 1978

The LUA, which is Nigeria's main land statute, does not indicate if a mortgagee in possession needs the governor's consent to grant leases. Sections 21 and 22 of the LUA require the governor's consent when the holder alienates his right of occupancy through mortgage, transfer of possession, assignment or sublease. The LUA defines a 'holder' as:

> a person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly passed or has validly passes on the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sub-lessee or sub-underlessee.[63]

Therefore, the mortgagee is excluded from the definition of a 'holder'. This suggests that the mortgagee is not a holder of an occupancy right and does not require the governor's

58 (1909) 2 KB 484.
59 Evidence Act 2011, s 170; *Alabi v Adeniji* (1962) All NLR (Pt 2) 754.
60 (1971) 1 WLR 144.
61 Cap 75, Rivers State, 1999, s 16(3)(f), etc.
62 Ibid, s 1(4).
63 Section 51.

consent to grant leases. According to Essien,[64] this exclusion raises further legal issues. First, the definition of 'holder' is clearly 'in relation to a right of occupancy' and the mortgagee does not fall within the conception of a 'holder' of a right: he is, according to the statute, an incumbrancer of the right. However, while the definition of the 'holder' excludes a 'sub-lessee or sub-underlessee', the sub-lessee is under an obligation to seek the consent of the governor (and also the approval of the holder of the statutory right of occupancy) to create a sub-underlease.[65] The exclusion of the mortgagee means that he is not a person entitled to a right of occupancy under the LUA and, therefore, does not need any governor's approval to grant a lease. As the grant of a lease requires the approval of the governor, it may be argued that any lease granted by a person not entitled to the right is null and void since it seeks to confer or vest in the lessee an interest in or right over land.[66] Section 26 of the LUA adds that: 'Any transaction or any instrument which purports to confer or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void.' The section forbids the transfer of land to anyone or the vesting of land in anyone without the approval of the governor. A strict construction of the section means that any lease created by the mortgagee is not competent in law.

However, in view of the express provisions of mortgage statutes allowing mortgagees in possession to grant leases, the above argument may not be acceptable. It has been argued, on the contrary, that based on the rule of interpretation of *expressio unius est exclusio alterius*, the express mention of leasing by sub-lessees and the deliberate omission of leasing by mortgagees can only presuppose that mortgagees do not need the governor's consent to create leases.[67] This submission by the learned commentator appears plausible; more importantly, the governor's consent obtained for the mortgage itself, which gives him possession, should be enough to clothe him with the power to exercise the right to lease, which, after all, is not a final enforcement remedy terminating a mortgagor's right to the land or transferring it from him.[68]

In some situations, the mortgagee may not take possession because of the strict duties to account imposed by equity, and so the mortgagor remains in possession and, therefore, can grant leases. In *Chatsworth Properties Ltd v Effiom*,[69] the court held that the mortgagor's action can be controlled by the mortgagee by insisting on its consent for the lease to be valid. This ensures that the property is well-preserved and enables the mortgagee to control the security.

3.3 Custody of title deeds

Much of Nigeria's land has no title deeds because land rights are held under customary law. However, with the creation of mortgages on land, title documents must be generated

64 Essien (note 46) 196.
65 LUA, s 23(1).
66 Ibid, s 26.
67 Essien (note 46) 196.
68 Ibid.
69 (1971) 1 WLR 144.

during the transaction, evidencing the right being mortgaged. The absence of adequate land documents makes the use of land as the subject of a mortgage difficult. The reason for this land management gap is that most rural and urban lands are still held in terms of customary land tenure, while a few others are held under the received English Law on Doctrine of Estates. Thus, dual tenures that operated before the LUA continued unabated through sections 34 and 36, which allowed the sustenance of their incidents of the customary tenure and doctrine of estates.[70]

3.3.1 Keeping custody of titles deed at common law

Under the common law, the first legal mortgagee of freehold land has a right to the custody of title deeds. Also, the first legal mortgagee by an assignment of lease is also entitled to title documents, because the entire interest of the mortgagor has been transferred.[71] In a mortgage by sub-demise, the custody of the title document should be with the mortgagor, who still holds reversionary interests, unless the mortgage deed contains a special device to that effect.[72]

3.3.2 Keeping custody under the statutes

In states where the PCL applies, title custody can be given to a mortgagee by sub-demise, unlike the situation at common law. Legal chargees of a charge by deed expressed to be by way of a legal mortgage are also entitled to title documents even though no interest is transferred.[73] In applicable states, a first legal chargee is entitled to title deeds.[74] It, therefore, makes no difference under the PCL whether the mortgage is by freehold, lease or sub-demise instead of by assignment, because the mortgagee is still entitled under the statute to the custody of the title deed.[75]

The situation under the MPL of Lagos State is very similar; the only exception is that it does not provide for the transfer of the freehold, as is the case in the PCL. Instead, it includes the mortgage of a statutory right in land by demise of legal charge or statutory charge, by which a first mortgagee shall be entitled to title documents.[76] In the mortgage of leasehold, a mortgagee of a whole interest is also entitled to title documents, like the first mortgagee.[77] Under the MPL, the mortgagee of the statutory right is by demise or by a charge, while the leasehold is by sub-demise and a charge.[78] Even if the mortgage is of a statutory right of occupancy or lease, the mortgagee still has a right to keep title deeds.

The first legal mortgagees have priority over others in keeping title deeds under the received law (by assignment), the PCL, and the MPL. Subsequent legal mortgagees do not

70 Otu, MT *Customary Land Tenure in Nigeria: Law and Practice* (Princeton & Associates 2022) 134.
71 Essien (note 46) 188.
72 Waldock, CHM *The Law of Mortgages* (2nd Ed., Sweet & Maxwell 1950) 23.
73 PCL, ss 17 and 108(1).
74 PCL, s 108(1) proviso.
75 Ibid, s 109(1) proviso.
76 MPL, s 15(1) proviso.
77 Ibid, s 16(1) proviso.
78 Ibid, s 16(2).

have this right. However, the second and subsequent legal mortgagees and charges under the PCL and the MPL may obtain title deeds if the first legal mortgagee has not exercised this right.[79] The essence of the custody of title deeds residing in the first legal mortgagee is to notify subsequent mortgagees of the encumbrance on the property as the mortgagor no longer has any title to give. This may prevent the mortgagor from raising further funds based on the security of the same property.

An equitable mortgagee has no right to title deeds since he has only an equitable right in the security. The mortgage agreement may stipulate the right for the mortgagor.[80] In *Four-Maids Ltd v Dulley Marshal Properties Ltd*,[81] it was held that since an equitable mortgage arising by title deposit gives the equitable lender possession of the deeds until the loan is repaid, he is entitled to the custody of the deeds. The rationale for this decision may be the fact that an equitable mortgagee by deposit of title deeds has a contractual lien on the deeds.

The LUA does not provide custody of deeds for legal and equitable mortgages. An examination of the Act, however, reveals that it is not a mortgage statute as it merely sets principles for land use and control under the governor's power.[82] Also, the LUA does not repeal the pre-existing mortgage statutes which operate subject to its provisions. Where the LUA does not provide direction, the pre-existing practices under the mortgage statutes operate, hence the custody of the deeds as provided for under the CA and the PCL, which are pre-existing statutes that operate in their respective jurisdictions. In the same vein, the MPL and the MFL, which postdate the LUA, uphold the custody of the deed rules under the CA and the PCL respectively. The LUA does not exhibit any intent to displace these provisions. The right to custody of the deeds belongs only to the mortgagee.

The first legal mortgagee has priority over and above subsequent legal mortgagees on the same security. However, the priority of latter legal mortgagees who have custody of the deed must be determined by the court.[83] Also, the possession of titles by the mortgagee prevents a fraudulent mortgagor from using the same mortgaged property to obtain funds from third parties by sale or by the creation of subsequent mortgages without the mortgagee's knowledge. The capacity to use the power of sale, to appoint a receiver or to request a foreclosure depends on the priority of the mortgagee and the custody of title deeds.

3.4 Consolidation of mortgages

Consolidation is a right of the mortgagee who has two or more mortgages vested in the same mortgagor. The mortgagee may consolidate these to ensure that none of the mortgages is redeemed unless the others are also redeemed.[84] It is an equitable remedy to safeguard

79 Ibid.
80 Essien (note 46) 190.
81 (1957) Ch 317 at 320.
82 Section 1.
83 Chianu, E *Law of Securities and Bank Advances (Mortgage of Land)* (3rd Ed., Ambik Press 2017) 263.
84 Megarry, R & Wade, HWR *The Law of Real Property* (5th Ed., Stevens 1984) 92.

the financial position of the mortgagee. It is a clear example of situations where equity may restrict rather than extend the mortgagor's right. The purpose appears to be to protect the mortgagee from financial loss if the security of a mortgage is insufficient to defray the debt. Even if each property has enough value to defray the debt, the mortgagee is still allowed to consolidate.[85] The conditions under which mortgages can be consolidated are discussed in the following paragraphs.

The first condition is that the right be reserved in the mortgage contract. Section 17 of the CA mandates that, after its passage, the mortgagee's power of consolidation should be reserved expressly in the various deeds or, at least, in one of them.[86] Hence, the power of consolidation subsists in all other mortgage laws used in Nigeria unless such is reserved as indicated in their various provisos.

The second condition is that the mortgages' redemption date must have passed. Since consolidation is an equitable remedy, it cannot override the redemptive right on the due date.[87] This condition appears to prevent a situation where a mortgagee insists that the other mortgage that is due cannot be redeemed until the one that is not yet due is redeemed.

Thirdly, the mortgages must be concluded by the same mortgagor. Equity will not allow any consolidation if the mortgagors are not the same. No right of consolidation will arise if the mortgages were originally concluded by different mortgagors, even though they were later united in one mortgagor.[88]

Finally, simultaneous unions of mortgages and equities in a mortgagee must exist. This means that at least two or more mortgages should be vested in a mortgagee, and both redemption equities reside in different mortgagors. [89] The mortgages must have been created by the same mortgagee, or the interests in the mortgages to be consolidated must have been vested in the same mortgagee,[90] Once this situation subsists, it does not matter that equities of redemption have subsequently been vested in different persons.[91] An exception to this rule is where consolidation is based on an express contractual right to consolidate and not merely on the equitable doctrine. In such a case, a purchaser's interest is inferior to that of the mortgagor, except where the subsequent loans were known to the mortgagee.

3.5 Entry into possession

In *Ocean Accident & Guarantee v Ilford Gas Co*,[92] it was held that a legal mortgagee has the right of entry into possession of the mortgaged security. This right can be exercised after the mortgage deed has come into operation. The right can only be waived by the parties. In *Birch v Wright*,[93] it was held that a legal mortgagee can assume possession of the security at the commencement of the contract. However, this right entails that the mortgagee should

85 Ibid.
86 Law of Property Act 1925, s 93; PCL, s 115; MPL, s 28; MFL, s 92.
87 Taiwo, A *The Nigerian Land Law* (Princeton & Associates 2016) 147–148.
88 *Sharp v Richards* [1909] 1 Ch 909.
89 *Pledge v White* (1896) AC 187, 198.
90 Oniekoro (note 2).
91 Megarry & Wade (note 85) 922.
92 (1905) 2 KB 493.
93 (1786) 1 TR 378, 383.

account for the funds collected while in possession.[94] The rationale for this is the rule that prevents the mortgagee from acting unfairly.

The question that may arise is what happens when certain encumbrances on the property forbid the mortgagee from entry into possession. In this situation, as held in *Harlock v Smith*,[95] where physical possession is impossible due to encumbrances such as existing leases binding on the mortgagee, the mortgagee can take over the receipts of rents and profits by notifying the lessees in possession to pay rent to him henceforth.

Through this arrangement, the lessees become responsible for the mortgagee. The possession of security may be taken for several reasons. These are captured in *Four-Maids Ltd v Dudley Marshal (Properties) Ltd*[96] to include when the mortgagee (a) exercises the right as a legal mortgagee; (b) ensures proper management of the property and uses the resources accruing from it to reduce the loan and the interest; (c) protects the security from waste and vandalisation or makes repairs; and (d) ensures that the mortgagor pays the outstanding indebtedness. The right of entry into possession is, therefore, both a pre-enforcement and an enforcement right because it can be exercised at the commencement of the mortgage contract and when the mortgagor has broken the covenant to repay in order to realise the mortgage.

The possession may also be assumed if the mortgagee's primary focus is the payment of interest and not the mortgage sum and where the property is of immediate commercial value.[97] However, in *Young v Abiina*,[98] the mortgagee was very careful in taking possession because of the many pitfalls involved in doing so. Rather, as in *Chapman v Smith*,[99] the mortgagee may prefer the situation where the mortgagor retains possession, or constructively reserves the right of possession as a trustee or donee of a power of attorney to collect rents from the tenant put in possession by the mortgagor.

In some situations, however, the mortgagee has no option other than to take possession which is his inalienable right under the mortgage. When in possession, the mortgagee can take any of the following actions.[100] First, as decided in *Chapman v Smith*,[101] the mortgagee can create a lease that is binding on the mortgagor, and can collect rents and profits from tenants in possession upon the service of the appropriate notice on those tenants. Second, as in *Roby v Maisey*,[102] the mortgagee can eject anybody in the property who constitutes or is constituting a clog on his right. Finally, the mortgagee may extinguish the redemption right of the mortgagor where he remains in possession after the legal due date of 12 or more years.[103]

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94 Megarry & Wade (note 85) 913.
95 (1895) 1 Ch D 516. See also the Landlord and Tenant Law of various states eg Cap L4, Kwara State, s 3(4).
96 (1957) Ch 317, 320. See also *Western Bank v Schindler* (1976) 3 WLR 341, 347.
97 Oniekoro (note 2) 146.
98 (1940) 6 WACA 180; *Olumo v Adewale* (1964) NMLR 17.
99 (1907) 2 Ch 97.
100 Oniekoro (note 2) 148.
101 (1907) 2 Ch 97.
102 ER vol. 108, 1228.
103 Limitation Law of Western Region, Nigeria, s 13, or 16 years in other states. See the Limitation Law, ss 23 and 27.

However, a mortgagee who takes a possessory right under the legal mortgage must be ready to live with the consequences of his actions, which are quite unpalatable. Hence, the mortgagee is often cautious about assuming possession. One issue is the legal implications of the mortgagee's possession of the security. First, the mortgagee must strictly and prudently account for rents and other profits received from the mortgaged security or that ought to have been received. The liability to strictly account applies to any benefit received as a result of being in possession. The rationale for the courts' intervention on behalf of the mortgagor is to ensure that equity prevails in protecting the mortgagor, who obviously is a weaker party, from being unfairly and unjustly treated.

The court in *Aderoku v UAC*[104] saw the act of taking over the '*res*' and still compelling the payment of the outstanding funds as unconscionable. Allowing this will make the courts unresponsive and unconcerned as to the plight of the mortgagor and will promote the power of the mighty over the weak. Hence, in *Hughes v Williams*,[105] the court mandated the mortgagee in possession to exercise due diligence in collecting rents and profits because an account would be given of what was collected and what would have been collected, but could not be achieved due to the mortgagee's negligence or wilful default. Second, the mortgagee in possession must pay occupational rent and give a proper account for the extra period spent on the property after defraying the loan with interest. In *Aderoku*[106] the mortgagee was in possession when the mortgage was made in 1921 and remained in possession until 1937, even when the mortgage sum was paid in 1935. The mortgagee was mandated to render an account that ought to have accrued for the whole period in possession.

Finally, the court held in *Saunder v Hooper*[107] that while in possession the mortgagee is responsible for repairs. Although the costs of such repairs to the property will normally be set off from the rents and profits collected, the mortgagee is answerable for the maintenance if the property falls into disuse. However, for repairs which are not excessive or could be attributed to permissive waste, the mortgagee is entitled to reimbursement. In *Nigerian Loan & Mortgage Ltd v Ajetunmobi*,[108] the mortgagor accessed a loan to complete a building. He later abandoned the building. This compelled the mortgagee to take over and complete the building. The mortgagee later claimed both the mortgaged sum and the cost of completing the building. It was held that the equity of redemption of the mortgagor could not be extinguished by the improvement made by the mortgagee to the building.

An equitable mortgagee has no right to take possession. However, it has been contended that as equity comes to the aid of the lessee of a lease of term ordinarily void for not being made by deed. Where part-performance could be pleaded, the rule in *Walsh v Lonsdale*[109] could prevail to allow an equitable mortgagee to take possession, just like a legal mortgagee, in appropriate circumstances.[110]

104 (1941) 7 WACA 39.
105 (1918) 118 NE 914 (Mass).
106 (1941) 7 WACA 39.
107 (1843) 6 Beav 246.
108 (1944) 17 NLR 136.
109 (1882) 21 Ch D 9.
110 Oniekoro (note 2) 153.

Entry into possession is both a pre-enforcement and an enforcement remedy because the mortgage of a legal interest may enter the property at any time. The right may also be exercised by the mortgagee when the mortgagor has failed to pay the mortgage sum and it is in the mortgagee's interest to ensure the payment of the loan and interest.[111] Therefore, it is a useful remedy, especially for a mortgagee whose concerns are safeguarding the security from damage and deterioration and securing the payment of the debt with interest.

4. Conclusion

This article discussed the preliminary rights of parties to mortgages. These were identified as leasing and subletting the mortgage security, insurance, consolidation, taking custody of title deeds, and entry into possession. The mortgagor has the power of lease,[112] but in exercising it, the concurrence of the mortgagee must be sought for the lease to be binding. While a mortgagee is not regarded as a holder under the LUA, the mortgagee's lease is still binding due to the nature of the rights of the mortgagee as an incumbrancer.[113]

The power of insurance is available to both parties, subject to the important control that insurance should be created only against fire accidents. Also, the premium paid should be charged to the mortgaged property.[114] The insurance should, therefore, strictly be against fire damage. This has serious implications for the mortgagee: other risks such as floods, physical damage etc are exempted.

The right to the custody of the deeds is central when many legal mortgages are imposed on the same property. This is a very useful aid in establishing the priority of the mortgages. It also prevents fraud on the part of the mortgagor who, knowing that his legal interest is already conveyed in mortgage(s), could proceed to the outright sale of the property or the creation of further incumbrances on the demised property to defraud a third party without notice.

The right of entry to possession is peculiar to the mortgagee, who has the power under the mortgage statutes to do so unless the parties in the mortgage deed waive it. However, due to the stringent rules that equity has placed on the mortgagee, the right is rarely exercised unless it is necessary to protect the property.

The consolidation of mortgages helps mortgagees recoup their funds from a mortgagor with whom they have multiple mortgages on different securities. It also prevents the mortgagor from discharging one mortgage without attending to others.

5. Recommendations

Based on the discussion in this article, recommendations are made to protect the rights of the parties to mortgages under Nigerian property legislation.

The provisions of mortgage statutes and the Insurance Act regarding the application of insurance proceeds must be harmonised. While extant mortgage statutes are unanimous in allowing proceeds to be used to repair the damaged security or discharge the mortgagor's

111 Essien (note 46) 191.
112 See CA, s 18(1); PCL, s 122(1) and MPL, s 33.
113 Essien (note XX) 196.
114 PCL, s 123(1).

debt, section 66 of the Insurance Act provides that the proceeds should be expended only on repairing the damaged security. It is recommended that the mortgage laws that emanate from State Houses of Assembly should be amended in line with the Insurance Act, which is an Act of the National Assembly. This will allow for the easy practice of mortgages throughout the federation as most lending institutions operate nationwide.

Furthermore, both parties (mortgagor and mortgagee) have rights to create leases under the mortgage statutes. However, the LUA, Nigeria's foremost land statute, appears to oppose the mortgagee's right to create leases. It does not recognise the mortgagee as a holder who has the capacity to transfer legal interest. This contradiction comes to the fore when others whose interests are derived from the governor's consent, including a sub-lessee, can access the governor's assent for a lease. In the interim, the position of Essien should apply:[115] since the mortgagee is a creation of the governor's assent, though his right is a mere incumbrance, his action as a lessor should be valid in law. This is necessary for the protection of the *res*. Although this research is unaware of any litigation in this area in the Nigerian courts, it is suggested that section 51 of the LUA should be amended to enlarge the definition of the 'holder' to include the mortgagee.

The title deed is a very important document in mortgage transactions. It must be in proper custody of the mortgagee, while a copy of the title deed must be accessible and verifiable in the land registry. The documentation of land in Nigeria leaves much to be desired. Despite the enactments of land registration laws in each state of the federation and the Federal Capital Territory, Abuja, most urban and rural lands lack adequate documentation.[116] This can be traced to the principle of deemed grants under sections 34 and 36 of the LUA, allowing continued incidents of customary tenure. It is suggested that the LUA be amended so as to compel deemed grantees to register the land they occupy either as holders or occupiers immediately to create records of such holdings. In addition, land registries across the nation should be equipped with infrastructure and personnel to transform into digital registries which stakeholders can access. This will promote the integrity of the title deeds kept by mortgagees.

Both parties have possessory rights to the mortgaged land. However, barring the need to protect the *res*, the mortgagee seldom exercises this right. Continuing this practice is recommended.

Finally, mortgages are consolidated for the benefit of the mortgagee who has multiple mortgages with a mortgagor. This statutory creation is salutary and assists in realising the mortgage. This provision should not be disturbed.

How to cite:

Busari M Salawu 'An Examination of the Legal Framework for Parties' Rights when Mortgaging Land under Nigerian Property Legislation' (2025) 5 *Turf Law Journal* 78-95.

115 Essien (note 46) 196.

116 Imhanobe, SO *Legal Drafting & Conveyancing* (3rd Ed., Temple Legal Consult 2010) 283.

Received: 25 January 2025, Accepted: 10 February 2025, Published: 9 May 2025, Doi: https://doi.org/10.62726/tlj.v5.59

Revisiting Vaccine Mandates and Human Rights in South Africa

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Abstract

Vaccine mandates have consistently sparked intense controversy in discussions about human rights. The issue gained significant visibility during the COVID-19 pandemic, which impacted the entire world in 2020. Countries responded spontaneously and differently to the pandemic; there was no one-size-fits-all approach. Each nation considered its legal framework while designing appropriate responsive measures. Imposing vaccine mandates became one of the most popular strategies in the fight against the pandemic. Like many other countries, South Africa implemented a range of restrictive measures, including lockdowns. Public institutions, such as universities, enforced vaccine mandates for those wishing to access their premises. This raised numerous questions regarding the constitutionality of such mandates. A principal question was whether vaccine mandates complied with the Constitution of South Africa, 1996. Are vaccine mandates a justifiable limitation on human rights in terms of section 36 of the Constitution? This article examines the balance between public health imperatives and individual freedoms, interrogating the proportionality and necessity of such measures. It raises critical issues regarding the interpretation of the right to bodily integrity, the right to freedom of religion, and the right to equality. The broader societal and legal ramifications of vaccine mandates also highlight the tensions between the state's obligations to protect citizens and its duty to uphold constitutional values.

Keywords

vaccine mandates, human rights, bodily integrity, religion, conscience

1. Introduction

The COVID-19 pandemic, which was declared a global health emergency by the World Health Organisation (WHO) in March 2020, fundamentally reshaped the global approach to public health crises. Governments worldwide adopted unprecedented measures such as lockdowns, travel restrictions, and vaccination drives to curb the virus's spread and mitigate its devastating health and socio-economic impacts. South Africa was no exception, responding swiftly by invoking the Disaster Management Act to implement nationwide lockdowns and enforce public health guidelines. Despite these measures, vaccination campaigns encountered considerable resistance, highlighting the complex interplay between public health imperatives and individual rights in the country.

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Unlike some nations that legislated compulsory vaccinations, South Africa refrained from instituting a national vaccine mandate. Instead, specific institutions, including universities and private-sector employers, imposed their own mandates to regulate access to premises and safeguard public health.[1] This decentralised approach sparked extensive public debate about the legality and constitutionality of vaccine mandates, particularly considering the fundamental rights enshrined in the Bill of Rights of the Constitution, 1996. South Africans are constitutionally guaranteed the rights to bodily integrity (section 12), freedom of religion and belief (section 15) and privacy (section 14).[2] The imposition of vaccine mandates raises questions about whether such measures constitute a reasonable and justifiable limitation of these rights under section 36 of the Constitution, which permits rights to be limited only when necessary and proportionate in an open and democratic society.[3]

Historical and societal factors also inform the resistance to vaccine mandates in South Africa. Decades of systemic inequality, mistrust in governmental institutions, and pervasive misinformation have contributed to high levels of vaccine hesitancy.[4] This hesitancy has manifested in fears about vaccine safety, suspicions about governmental motives and concerns about personal autonomy. These issues, compounded by logistical challenges in vaccine distribution, particularly in rural and under-resourced areas, have hampered vaccination efforts and exacerbated public health disparities.[5]

Globally, vaccine mandates have been a polarising issue, with countries adopting varying approaches based on their legal frameworks and socio-political climates. For instance, countries like Austria and Greece implemented strict vaccine mandates, while others like the United States enforced mandates selectively, targeting specific sectors such as healthcare and education.[6] In contrast, South Africa's more cautious approach reflects its commitment to balancing public health imperatives with the constitutional principles of individual freedom and human dignity. South Africa adopted a careful and measured strategy in managing public health crises, ensuring strict health measures were implemented while respecting constitutional rights such as individual freedom and human dignity. This approach aimed to protect public health without unnecessarily infringing on personal liberties. However, this approach has not shielded it from the ethical and legal dilemmas accompanying vaccine mandates.

The South African legal framework offers a unique lens through which to examine these dilemmas. The Constitution explicitly safeguards against arbitrary intrusions on individual freedoms, requiring that any limitation of rights must be supported by a 'law of

1 Calitz, T 'Constitutional Rights in South Africa Protect against Mandatory COVID-19 Vaccination' (2021) 1 *STJ* <http://www.scielo.org.za/pdf/stj/v7n1/35.pdf> accessed 20 April 2023.
2 Constitution of the Republic of South Africa, 1996.
3 Moodley, K 'Why COVID-19 Vaccines Should be Mandatory in South Africa' (2021) <https://theconversation.com/why-covid-19-vaccines-should-be-mandatory-in-south-africa-165682> accessed 10 December 2024.
4 Machingaidze S & Wiysonge CS 'Understanding COVID-19 Vaccine Hesitancy' (2021) 27(8) *Nature Medicine* 1338.
5 Karim & Kruger (note 3) 533.
6 Moodley (note 6).

general application' and must be demonstrably reasonable and necessary.[7] In the absence of such legislation, institutional vaccine mandates have been criticised for lacking uniformity and potentially infringing on constitutional protections. This has given rise to significant legal and ethical questions, including whether such mandates can be justified in the absence of enabling legislation and whether they align with the broader principles of equity and justice enshrined in South African law.

This article investigates the constitutionality of vaccine mandates in South Africa, focusing on their compliance with constitutional provisions and broader implications for public health policy and human rights. By analysing the legal frameworks governing vaccine mandates, including relevant case law and constitutional principles, this study seeks to illuminate the delicate balance between protecting individual freedoms and safeguarding public health in the context of a global pandemic. Furthermore, it considers the socio-political factors that shape public discourse on vaccine mandates, offering insights into how South Africa can navigate these challenges to achieve equitable and effective public health outcomes.

2. Conceptual framework

2.1 Vaccine mandates

A vaccine mandate refers to a governmental or institutional policy requiring individuals to receive vaccinations to access certain rights, benefits or opportunities, such as employment, education or public spaces.[8] It is rooted in public health law and represents an exercise of state power to safeguard public health, often justified under the principle of *salus populi suprema lex* (the welfare of the people is the supreme law).[9] These mandates are typically framed as a response to infectious diseases, especially those that significantly threaten public health. Implementing a vaccine mandate often triggers legal, ethical and social debates, particularly regarding its compatibility with fundamental rights and freedoms.[10]

The implementation of vaccine mandates involves a legal balancing act between public health objectives and individual freedoms.[11] Implementing vaccine mandates requires balancing the government's duty to protect public health with individuals' constitutional rights, such as bodily autonomy and freedom of choice. Courts assess whether mandates are reasonable, necessary and proportionate to the public health risk.[12] In many jurisdictions, including South Africa, this balance is grounded in constitutional frameworks that protect fundamental rights such as bodily integrity, religious freedom, and dignity.[13] For instance,

7 Karim & Kruger (note XX) 533.
8 Gostin, LO *Public Health Law: Power, Duty, Restraint* 3 ed (University of California Press 2000).
9 Ibid.
10 Gostin, LO & Wiley, LF 'Governmental Public Health Powers During the COVID-19 Pandemic: Stay-at-home Orders, Business Closures, and Travel Restrictions' (2022) 323(21) *Jama* 2137.
11 Malone, K & Hinman, A 'Vaccination Mandates: The Public Health Imperative and Individual Rights' (2003) 338(20) *Law in Public Health Practice* 339.
12 Ibid.
13 Mike, JH 'Carrots, Vaccines and Sticks: Critical Reflection of Compulsory Vaccination from a Human Rights Perspective' (2022) 3(1) *Rutgers International Law & Human Rights Journal* 47.

section 36 of the Constitution permits the limitation of rights, provided such limitations are reasonable, justifiable and necessary in an open and democratic society. The courts must assess whether vaccine mandates are proportionate to the public health risks they address and whether less restrictive measures could achieve the same goal.[14]

Vaccine mandates often spark ethical debates about autonomy, informed consent and social responsibility.[15] The principle of autonomy emphasises an individual's right to make decisions about their own body, while informed consent ensures that individuals understand the risks and benefits of vaccination.[16] At the same time, social responsibility underlies the moral duty to protect others, particularly vulnerable populations, from preventable diseases. Vaccine mandates thus raise complex ethical questions about balancing individual freedoms with the collective good, especially when vaccine hesitancy or misinformation influences public perceptions.[17]

Vaccine mandates must consider practical challenges, such as vaccine accessibility, public trust and enforcement mechanisms. Equity is a significant concern, as mandates may disproportionately affect marginalised groups who face barriers to vaccination due to socio-economic factors or systemic inequalities.[18] Governments and institutions implementing mandates must ensure the fair distribution of vaccines, transparent communication about their necessity, and mechanisms for addressing legitimate objections, such as those based on medical, religious or conscientious grounds.[19] Ultimately, the success of a vaccine mandate depends on its design and implementation, and the extent to which it garners public trust and cooperation.[20]

2.2 How are vaccine mandates treated internationally?

Vaccine mandates have been a significant and often contentious issue at the international level, particularly in the wake of the COVID-19 pandemic. Countries have approached vaccine mandates in a variety of ways, reflecting differences in political, social and cultural contexts, as well as the varying public health needs and priorities. In general, international bodies such as the WHO do not have the authority to impose vaccine mandates but offer guidance and recommendations to help shape national policies.[21] For example, during the pandemic, the WHO strongly advocated for equitable access to vaccines, but it left the

14 Ibid.
15 Olick, RS, Shaw, J & Yang, YT 'Ethical Issues in Mandating COVID-19 Vaccination for Health Care Personnel' (2021) 96(12) *Mayo Clinic Proceedings* 2958.
16 Ibid.
17 Ibid.
18 Canning, AG et al 'Ethics and Effectiveness of US COVID-19 Vaccine Mandates and Vaccination Passports: A Review' (2022) 22(2) *Journal of Research in Health Sciences* 546.
19 Ghedamu, TB & Meier, BM 'Assessing National Public Health Law to Prevent Infectious Disease Outbreaks: Immunization Law as a Basis for Global Health Security' (2019) 47(3) *Journal of Law, Medicine & Ethics* 412.
20 Ibid.
21 Odone, A, Dallagiacoma, G & Vigezzi, GP 'Vaccine Mandates in the COVID-19 Era: Changing Paradigm or Public Health Opportunity? Comment on "Convergence on Coercion: Functional and Political Pressures as Drivers of Global Childhood Vaccine Mandates"' (2022) 12(1) *International Journal of Health Policy and Management* 7616.

decision about whether to mandate vaccination in the hands of individual governments. This allowed countries to implement different approaches based on local conditions.[22]

In many Western countries, vaccine mandates were introduced for specific sectors, such as healthcare workers, teachers and government employees, in an effort to curb the spread of COVID-19.[23] For instance, the European Union (EU) and countries like the United States, Canada and Australia implemented strict vaccine mandates for certain groups, arguing that the mandates were essential for protecting public health and maintaining healthcare system capacity.[24] These countries often balanced mandates with options for testing or exemption based on medical or religious grounds. The legal and ethical implications of such mandates led to debates about individual freedoms versus collective responsibility, with some arguing that the mandates were an infringement on personal rights and freedoms, while others saw them as necessary for the greater good.[25]

In other parts of the world, vaccine mandates were either less strictly enforced or they met with more resistance (eg USA and Canada).[26] In some developing countries, where access to vaccines was more limited or logistical challenges hampered distribution, the emphasis was placed on voluntary vaccination campaigns rather than on strict mandates.[27] For example, in many parts of Africa, the focus was on providing vaccines through initiatives like COVAX, a global initiative aimed at ensuring equitable vaccine distribution.[28] Mandates in these regions faced difficulties due to limited vaccine access, vaccine hesitancy and challenges related to public health infrastructure. In some countries, government efforts focused more on raising awareness and promoting voluntary participation rather than enforcing mandates.[29]

Vaccine mandates have also been subject to international diplomacy and trade considerations.[30] For example, the EU initially set up rules requiring travellers from certain countries to be vaccinated or to present a negative COVID-19 test result to enter the region.[31] These requirements were also implemented in other parts of the world to manage the risk of virus transmission across borders. In this context, mandates have influenced travel, tourism and trade relationships between countries, particularly where

22 Ibid.
23 Politis, M et al 'Healthcare Workers' Attitudes Towards Mandatory COVID-19 Vaccination: A Systematic Review and Meta-analysis' (2023) 11(4) *Vaccines* 880.
24 Ibid.
25 Ayman, Y & Ulloa, L 'Ethical and Legal Debates on Vaccine Infodemics' (2024) 16(1) *Cureus* 1, 10.
26 McCoy, CA 'Adapting Coercion: How Three Industrialized Nations Manufacture Vaccination Compliance' (2019) 44(6) *Journal of Health Politics, Policy and Law* 823.
27 Wouters, OJ et al 'Challenges in Ensuring Global Access to COVID-19 Vaccines: Production, Affordability, Allocation, and Deployment' (2021) 397(10278) *The Lancet* 1023.
28 Ibid.
29 Deal, A et al 'Defining Drivers of Under-immunization and Vaccine Hesitancy in Refugee and Migrant Populations' (2023) 30(5) *Journal of Travel Medicine* 84.
30 Labonté, R & Gagnon, ML 'Framing Health and Foreign Policy: Lessons for Global Health Diplomacy' (2010) 6(1) *Globalization and Health* 1.
31 Bastani, H et al 'Efficient and Targeted COVID-19 Border Testing via Reinforcement Learning' (2021) 599(7883) *Nature* 108.

some countries adopted a more aggressive stance on vaccination, while others were slower to adopt vaccine rollouts or were more resistant to mandating vaccines.[32]

Vaccine mandates have underscored broader international debates on health sovereignty, human rights and governance.[33] While the WHO and other international bodies have emphasised the need for global cooperation and equitable access to vaccines, the enforcement of mandates highlights the tension between global public health goals and national autonomy. International responses to mandates reflect a complex balance between respecting individual rights and promoting public health, with countries taking varied approaches depending on their political systems, legal frameworks and public attitudes toward vaccines.[34] The global handling of vaccine mandates continues to shape how nations approach future health crises and the role of international institutions in coordinating responses.[35]

2.3 World Health Organisation

The WHO has consistently emphasised the importance of vaccination as a critical tool in controlling infectious diseases, particularly during the COVID-19 pandemic.[36] The WHO has taken a measured and non-interventionist stance regarding vaccine mandates. It recognises the complexities surrounding vaccine mandates, including ethical, legal and logistical considerations, and instead focuses on promoting equitable access to vaccines, public education and voluntary uptake.[37]

From the start of the COVID-19 pandemic, the WHO advocated for the safe and equitable distribution of vaccines globally.[38] The WHO strongly supported initiatives like COVAX, aimed at ensuring that vaccines reached all countries, particularly lower-income nations that might otherwise struggle with supply.[39] While the WHO pushed for widespread vaccination to combat the pandemic, it did not call for mandatory vaccination on a global scale.[40] The WHO encouraged countries to develop strategies that would maximise vaccine coverage through a combination of public health campaigns, education

32 Grépin, KA et al 'Evidence of the Effectiveness of Travel-Related Measures During the Early Phase of the COVID-19 Pandemic: A Rapid Systematic Review' (2021) 6(1) *BMJ Glob Health* 4537.

33 Ogugua, JO, et al. 'Ethics and strategy in vaccination: A review of public health policies and practices' (2024) 11(1) *International Journal of Science and Research Archive* 883-895.

34 Jecker, N.S., 'Achieving global vaccine equity: The case for an international pandemic treaty' (2022) 95(2) *The Yale Journal of Biology and Medicine,* 271.

35 Ibid.

36 French, J et al 'Key Guidelines in Developing a Pre-emptive COVID-19 Vaccination Uptake Promotion Strategy' (2020) 17(16) *International Journal of Environmental Research and Public Health*, 5893.

37 Al-Amer, R et al 'COVID-19 Vaccination Intention in the First Year of the Pandemic: A Systematic Review' (2022) 31(1) *Journal of Clinical Nursing* 62.

38 Md Khairi, LNH, Fahrni, ML & Lazzarino, AI 'The Race for Global Equitable Access to COVID-19 vaccines' (2022) 10(8) *Vaccines* 1306.

39 Nhamo, G et al 'COVID-19 Vaccines and Treatments Nationalism: Challenges for Low-income Countries and the Attainment of the SDGs' (2021) 16(3) *Global Public Health* 319.

40 Ibid.

and, where appropriate, vaccination requirements for specific groups (eg healthcare workers), rather than blanket mandates for entire populations.[41]

The WHO's position on vaccine mandates is rooted in its broader principles of respect for human rights and informed consent.[42] The WHO has emphasised the importance of ensuring vaccination campaigns are accompanied by adequate information and transparency.[43] The WHO acknowledges that mandates can effectively increase vaccine coverage, especially in specific high-risk sectors like healthcare, but it also emphasises that these mandates should be accompanied by policies that address vaccine hesitancy and misinformation.[44] According to the WHO, mandates should be seen as part of a larger, more comprehensive public health strategy, which includes engaging communities, improving vaccine access and fostering trust in vaccines.[45]

During the pandemic, the WHO was careful not to impose its will on sovereign nations with regard to mandates.[46] It recognised that each country faces unique challenges, such as cultural attitudes, legal systems and healthcare infrastructure, which shape how mandates might be received or enforced.[47] For instance, in some countries, vaccine mandates were implemented for healthcare workers and other key sectors, but the WHO refrained from issuing any directive requiring mandatory vaccination for the general population.[48] Instead, the WHO focused on providing guidance on best practices for vaccination campaigns and managing vaccine distribution fairly and efficiently.[49]

The WHO has also highlighted the need for ongoing dialogue between governments, public health experts and civil society when discussing vaccine mandates.[50] It emphasises that mandates should not be the sole approach to increasing vaccination rates, but rather part of a broader framework that includes public engagement, access to vaccines and addressing misinformation.[51] This holistic approach ensures that vaccine mandates, when implemented, respect public trust and human rights while achieving public health objectives. Ultimately, the WHO sees the decision to implement vaccine mandates as a national issue, guided by the principles of equity, public health, and respect for individual autonomy.[52]

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41 Tuckerman, J, Kaufman, J & Danchin, M 'Effective Approaches to Combat Vaccine Hesitancy' (2022) 41(5) *The Pediatric Infectious Disease Journal* 243.

42 Reiss, DR & Karako-Eyal, N 'Informed Consent to Vaccination: Theoretical, Legal, and Empirical Insights' (2019) 45(4) *American Journal of Law & Medicine* 357.

43 Ibid.

44 Bardosh, K et al 'The Unintended Consequences of COVID-19 Vaccine Policy: Why Mandates, Passports and Restrictions May Cause More Harm Than Good' (2022) 7(5) *BMJ Global Health* 8684.

45 Larson, HJ et al 'Addressing the Vaccine Confidence Gap' (2011) 378(9790) *The Lancet* 526.

46 Ginsburg, T & Versteeg, M 'The Bound Executive: Emergency Powers During the Pandemic' (2021) 19(5) *International Journal of Constitutional Law* 1498.

47 Brinkerhoff, DW 'Accountability and Health Systems: Toward Conceptual Clarity and Policy Relevance' (2004) 19(6) *Health Policy and Planning* 371.

48 Ibid.

49 Ibid.

50 Kieslich, K 'Addressing Vaccination Hesitancy in Europe: A Case Study in State–Society Relations' (2018) 28(3) *European Journal of Public Health* 30.

51 Ibid.

52 Mike (note 16) 47.

2.4 Cases from other countries and regions

The approach to vaccine mandates has varied significantly across different countries and regions, influenced by local public health priorities, legal frameworks and societal attitudes towards vaccination.[53] In the EU, for example, several countries have implemented or considered vaccine mandates in response to the COVID-19 pandemic, while others have opted for alternative strategies.[54] These differences highlight the diverse ways in which governments balance the need for public health protection with individual freedoms. By examining cases from the EU and other regions, we can understand how vaccine mandates have been enacted and the factors that shape their success or challenges.[55]

In *Vavřička and Others v The Czech Republic*,[56] the European Court of Human Rights held that mandatory vaccination laws, including those that require children to be vaccinated to attend school, are legitimate and do not violate the Convention. The court held that such mandates serve a legitimate aim of protecting public health and are proportionate to the threat posed by vaccine-preventable diseases. The court decided that governments have some flexibility (a "margin of appreciation") in protecting public health, including mandatory vaccinations. This means each country can choose suitable measures based on its own needs. The goal is to safeguard the wider population from health risks.[57]

In *Grzelak v Poland*,[58] the European Court of Human Rights upheld Poland's vaccination mandate, emphasising that the country had a legitimate aim in enforcing vaccination laws, particularly to protect public health. The court noted that vaccination policies were not disproportionate and that the refusal to grant an exemption was justified to prevent the spread of contagious diseases.[59]

3. The constitutional and statutory framework in South Africa

3.1 The human rights affected by vaccine mandates

3.1.1 Religion

Religious and conscientious objections lie at the heart of debates over vaccine mandates, reflecting a broader tension between individual autonomy and collective welfare. In South Africa, these objections draw on constitutional guarantees of freedom of religion, belief and conscience, enshrined in section 15 of the Constitution. These rights protect individuals' ability to live according to deeply held beliefs, fostering a pluralistic society where diverse worldviews are respected. However, such freedoms often clash with public

53 Attwell, K & Hannah, A 'Convergence on Coercion: Functional and Political Pressures as Drivers of Global Childhood Vaccine Mandates' (2022) 11(11) *International Journal of Health Policy and Management* 2660.

54 Ibid.

55 Da Silva, JA 'Mandatory COVID-19 Vaccines Versus Personal Freedoms: An Imperfect Balance' (2022) 37(4) *Oman Medical Journal* 378.

56 *Vavřička and Others v The Czech Republic* [GC] – 47621/13, <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-209039%22]}> accessed 17 November 2023.

57 Ibid.

58 *Grzelak v Poland* (2010) 7710/02.

59 Ibid.

health imperatives, particularly in emergencies like the COVID-19 pandemic, where vaccine mandates are deemed critical to curbing the spread of disease.[60]

Some conceptualise conscience as a cognitive faculty akin to intellect and will, serving to discern moral truths and guide ethical decision-making.[61] According to this view, freedom of conscience becomes paramount, akin to a moral compass directing one's actions towards perceived moral truths.[62] For many, this compass may oppose actions that they perceive as incompatible with their moral or spiritual beliefs, including mandatory vaccinations. Similarly, religious objections often stem from theological doctrines that may view medical interventions such as vaccinations as inconsistent with divine principles or the sanctity of the human body.[63]

In South Africa, these objections gained prominence during the implementation of COVID-19 vaccine mandates. Religious organisations such as the International Federation of Christian Churches voiced strong opposition, arguing that mandates infringe upon constitutionally protected freedoms of belief and worship.[64] Similar debates on conscientious objections to vaccine mandates have unfolded globally, with comparisons drawn between approaches in the USA and Europe.[65] Ethical concerns form the basis of these debates, balancing the need to safeguard public health with the risk of compelling individuals through mandatory measures.[66]

3.1.2 Limitation of the right to religion and conscience

Balancing the right to religious and conscientious objections with vaccine mandates requires a nuanced approach that considers individual freedoms, public health imperatives and ethical principles. While the Constitution upholds religious freedom, this right may be subject to limitations in certain circumstances, as seen in restrictions imposed during the COVID-19 pandemic, where law enforcement intervened in gatherings that contravened lockdown regulations, including religious services. Such interventions sparked debates about the equitable treatment of religious institutions compared to other sectors permitted to operate during restrictions.[67] In January 2020 law enforcement acted against a gathering

60 Gostin, L *Global Health Law* (Harvard University Press, 2021)

61 Leach, D 'Transcendent Professionalism: Keeping Promises and Living the Questions' (2014) 89(5) *Academic Medicine* 699.

62 Symons, X 'Two Conceptions of Conscience and the Problem of Conscientious Objection' (2017) 43(4) *J Med Ethics* 245.

63 Currie, I & De Waal, J *The Bill of Rights Handbook* 6 ed (Juta 2016).

64 Mudzuli, K 'Religious Leaders Reject Covid-19 Restrictions Allowing 50% Church Capacity if Fully Vaccinated' (2022) <https://www.iol.co.za/pretoria-news/news/religious-leaders-reject-covid-19-restrictions-allowing-50-church-capacity-if-fully-vaccinated-892c58cf-dcdd-499d-a56f-33d9b543d8ef> accessed 10 December 2024.

65 Madera, A 'Mandatory Vaccination Conscientious Objections: A Comparative Analysis between the US and the European Approach' (2023) <https://www.boe.es/biblioteca_juridica/anuarios_derecho/abrir_pdf.php?id=ANU-E-2023-10012900188> accessed 21 November 2023.

66 Giubilini, A et al 'Vaccine Mandates for Healthcare Workers Beyond COVID-19' (2023) 49(3) *Journal of Medical Ethics* 211.

67 Fritz, E 'What Has Kant Got to Say about Conscientious Objection to Reproductive Health in South Africa?' (2023) <https://onlinelibrary.wiley.com/doi/full/10.1111/dewb.12416> accessed 21 November 2023.

of approximately 250 individuals who defied regulations by assembling for a church service in Sebokeng.[68] Two leaders of the church were apprehended for violating level 3 lockdown regulations. Rev Kenneth Meshoe, the leader of the ACDP, expressed unhappiness, stating that it was unjust for churches to be prohibited from operating, while casinos, restaurants, movie theatres and shopping malls were permitted to open.[69] The restriction on churches should have been proportionate and evidence based. If similar or riskier activities were permitted while churches were closed, this raised concerns about unfair discrimination and an arbitrary application of regulations. However, if the restrictions were based on scientific evidence and public health considerations, they could be justified under the limitations clause. A more balanced approach would have been to apply uniform safety measures across all sectors rather than prohibiting religious gatherings outright while permitting commercial activities.

3.1.3 Justifiability of vaccine mandates as a limitation on the right to religion and conscience

In navigating the intricacies of COVID-19 vaccine mandates in South Africa, the lens of religious and conscientious objections adds further complexity to the discourse, prompting considerations of individual liberties, public health imperatives and ethical principles. Debates surrounding vaccination often evoke contentious viewpoints, yet avenues for common ground emerge when accountability for advocating harmful vaccination principles is upheld, whether by governmental bodies, employers or religious institutions.[70]

Historically, conflicts over infectious diseases have underscored the delicate balance between safeguarding personal and collective conscientious beliefs and addressing public health imperatives. Instances of discrimination and violations of individual freedom in vulnerable communities, such as racially motivated immunisation or forced sterilisation, serve as poignant reminders of the nuanced ethical considerations at play.[71]

International human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), enshrine the right to freedom of thought, conscience and religion, emphasising the significance of volition in religious and conscientious beliefs.[72] While religious freedom is upheld as an impartial standard, legal regulations must still be acknowledged in religious contexts.[73]

In South Africa, the debate over mandatory COVID-19 vaccination intersects with constitutional and moral issues. While the European Convention on Human Rights

68 Ibid.

69 Bhengu, C 'From Church Gatherings to Alcohol – 5 Lockdown Rules, that've Left You P**Sed' (2021) <https://www.timeslive.co.za/news/south-africa/2021-12-23-from-church-gatherings-to-alcohol--5-lockdown-rules-thatve-left-you-psed/> accessed 22 November 2023.

70 Estelle, E 'Mandatory Vaccine Policies Will Survive a Constitutional Challenge – Legal Expert Halton Cheadle' (2021) <https://www.dailymaverick.co.za/article/2021-11-10-mandatory-vaccine-policieswill-survive-a-constitutional-challenge-legal-expert-halton-cheadle/> accessed 22 November 2023.

71 Parmet, WE *Populations, Public Health, and the Law* (Georgetown University Press 2009) 112.

72 Article 18(2) of the ICCPR.

73 Torfs, R 'Religion and State in Belgium' (2015) 17(1) *Insight Turkey* 99.

(ECHR) recognises limitations on the right to physical integrity for the protection of health,[74] South African courts have yet to rule on compulsory vaccinations. Religious objections to vaccine mandates have sparked legal challenges, with religious organisations contesting mandates as violations of constitutional guarantees of religious freedom.[75]

The tension between religious freedom and public health imperatives is evident in cases such as *Mohamed and Others v President of the Republic of South Africa*,[76] which was heard in the North Gauteng High Court on 30 April 2020. The applicants, Muhammed Bin Hassim Mohamed, Anas Mohammed Chothia and the Saadiqeen Islamic Centre, sought a declaration that the COVID-19 regulations that prohibited religious gatherings were overbroad, excessive and unconstitutional. The applicants argued that the regulations violated their right to freedom of religion, movement and association.[77] The court held that the COVID-19 regulations that prohibited religious worship in places of worship were a reasonable and justifiable limitation on the rights to freedom of religion, movement and association, as they were implemented to limit the spread of the coronavirus. The court emphasised that the COVID-19 pandemic was a disaster, calling for drastic and urgent measures, and that the government had done all it could in a short time to issue the regulations concerning the lockdown.[78] The court dismissed the application.[79] Similarly, in *Minister of Health of the Province of the Western Cape v Goliath and Others*,[80] the court mandated tuberculosis treatment for the surviving respondents, even against their will. These verdicts illustrate that the public interest can outweigh individuals' right to bodily and psychological integrity in certain situations.[81]

The ethical and legal landscape surrounding vaccine mandates is complex and multi-faceted. While proponents argue for the ethical justification of mandates based on minimising harm and maximising public health benefits, critics raise concerns about coercion, discrimination and unintended consequences. Understanding the cultural, ethical and legal implications of vaccine mandates is crucial in striking a balance between individual autonomy and the public good.

Examining the potential impact of vaccine mandates on bodily integrity requires a nuanced consideration of ethical, legal and cultural factors. While some argue for the ethical justification of mandates in promoting public health, others caution against potential harms and the erosion of core principles of public health ethics. Ultimately, finding a balance between individual autonomy and public health imperatives is essential in navigating the complex terrain of vaccine mandates.

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74 See Arts 3 and 15 of the European Convention on Human Rights, read together with *Pretty v United Kingdom* (1997) 24 *HRR* 423.

75 Flescher, A 'How Well Do Religious Exemptions Apply to Mandates for COVID-19 Vaccines?' (2023) 14(5) *Religions* 569.

76 *Mohamed and Others v President of the Republic of South Africa and Others* 2020 (5) SA 553 (GP).

77 Ibid at para 15.

78 Ibid at para 75-77.

79 Ibid at para 79.

80 *Minister of Health v Goliath* 2009 (2) SA 248 (C).

81 Ibid at para 61-63.

3.1.4 Bodily integrity

Section 15 of the Constitution guarantees the right to freedom of conscience, religion, thought, belief and opinion. This includes the freedom to express one's beliefs publicly or privately, including religious practices in state or state-supported institutions, provided that they adhere to regulations established by relevant public authorities. The convergence of these rights becomes apparent in situations where individuals make decisions about their bodies based on their religious or conscientious convictions. For example, the right to religious freedom and conscience might influence choices regarding reproductive health, medical treatments or engagement in medical procedures, showcasing the intricate interplay between personal convictions and bodily autonomy. Overall, the Constitution acknowledges and safeguards both the right to freedom of conscience, religion, thought, belief and opinion, and the right to bodily integrity, emphasising the significance of individual autonomy, decision-making and the expression of beliefs within the framework of human rights and legal safeguards.

In examining the intersection of vaccine mandates and human rights in South Africa, the right to bodily integrity is a critical aspect to consider. This fundamental right asserts an individual's autonomy and control over their own body, safeguarding them from unwanted interference or intrusion by external forces.[82] It emphasises the principle that every person has the authority to make decisions about their body, including medical treatments and procedures, without coercion.

In the South African context, the tension between individual autonomy and the broader public good becomes pronounced when assessing the implications of vaccine mandates on bodily integrity. The Constitution upholds the right to physical integrity, affirming every individual's prerogative to make decisions about their health, including the acceptance or refusal of vaccines.[83] Section 12(2) of the Constitution underscores the right to bodily and mental well-being, granting individuals the autonomy to maintain control over their bodies and make informed choices about medical interventions.[84]

A notable legal precedent illustrating the significance of bodily integrity is *Stransham-Ford v Minister of Justice and Correctional Services and Others*.[85] In this landmark case, the court ruled in favour of a terminally ill patient's right to choose their medical care, including the option to refuse treatment or seek euthanasia under specific circumstances. This decision emphasised the importance of respecting patients' autonomy and their right to make decisions about their own bodies.[86] The right to bodily integrity extends beyond healthcare settings, encompassing informed consent for any procedure that affects one's body. Cases like *Castell v De Greef*[87] highlight the significance of informed consent in medical interventions, emphasising the need for patients to control their treatment decisions.

82 Fenwick, H & Kerriga, K *Civil Liberties and Human Rights* (Routledge 2017).
83 Adegbite, O.B 'Vaccine Hesitancy, Mandatory Covid-19 Vaccination and the Right to Personal Autonomy in Nigeria: A Constitutional Analysis' (2021)1(2) *UCC Law Journal* 239.
84 Section 12 of the Constitution.
85 *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP).
86 Ibid.
87 *Castell v De Greef* 1993 (3) SA 501 (C).

In the discourse about vaccine mandates, Nienaber emphasises the pivotal nature of the right to bodily integrity in healthcare contexts.[88] The author argues that forced treatment contradicts this fundamental right and underscores the ethical duty to respect patient autonomy. Nienaber contends that individuals should have the final say in their medical care, and their decisions to refuse treatment should stand unless compelling reasons justify intervention.[89] The right to bodily integrity plays a crucial role in shaping discussions around vaccine mandates and human rights in South Africa. It underscores the importance of respecting individuals' autonomy and decision-making authority over their bodies, particularly in healthcare settings. As the country navigated the complexities of vaccine mandates during the COVID-19 pandemic, it had to ensure a balance between public health imperatives and fundamental human rights.

3.1.5 Limitation of the right to bodily integrity

In the areas of human rights and governmental regulations, it is widely recognised that the right to bodily integrity, among others enshrined in the Bill of Rights, can be subject to limitations or restrictions in certain circumstances.[90] However, such curtailments must be justified and regulated to ensure accountability and adherence to constitutional principles. Section 36 of the Constitution serves to safeguard individual rights by stipulating the conditions under which limitations on rights can be deemed lawful.[91]

Section 36 delineates that rights in the Bill of Rights may only be limited by law of general application, and such limitations must be reasonable and justifiable in an open and democratic society. This assessment considers several factors, such as the nature of the right, the reason for the limitation, how far the limitation extends, and how well it serves its intended purpose. Section 36 mandates the exploration of less restrictive means to achieve the intended purpose of the limitation.[92]

A significant legal precedent illustrating the application of section 36 is *Harksen v Lane*.[93] The case revolved around Glen Harksen, an insolvent individual who challenged the constitutionality of certain Insolvency Act provisions[94] on the grounds of discrimination.[95] In this case, the Constitutional Court established a two-step procedure for determining whether a statute or other provision improperly discriminates. The applicant had to prove in the first phase that the law makes distinctions between individuals or groups of individuals. In the second phase, the court had to decide if this kind of differentiation amounted to unfair discrimination.[96]

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88 Bailey, K & Nienaber, A 'The Right to Physical Integrity and Informed Refusal: Just How Far Does a Patient's Right to Refuse Medical Treatment Go' (2016) 9(2) *South African Journal of Bioethics Law* 472.
89 Ibid.
90 Ibid.
91 Ibid.
92 Ibid.
93 *Harksen v Lane* 1998 (1) SA 300 (CC).
94 Insolvency Act 24 of 1936.
95 *Harksen v Lane* at Paragraph 28.
96 Ibid.

While South African courts have yet to rule on compulsory vaccinations, they have addressed issues related to the limitation of rights, particularly the right to bodily integrity. *S v Orrie*[97] involved two brothers who were charged with two counts of murder, housebreaking to commit murder, and robbery with aggravating circumstances. The legal issues in this case concerned the admissibility of evidence obtained by taking blood samples from the accused.[98] The court considered the right to bodily integrity in the context of the reasonableness of taking fresh blood samples and the admissibility of evidence obtained in violation of an accused's constitutional rights.[99] The court's principles included considering whether the admission of the evidence obtained in violation of an accused's constitutional rights would render the trial unfair or detrimental to the administration of justice, as stipulated in section 35(5) of the Constitution.[100]

The court also considered the rule that the admission of evidence obtained in violation of an accused's constitutional rights would render the trial unfair, and found guidance in recent Canadian cases, keeping in mind the similarities between section 35(5) of the Constitution and its Canadian counterpart.[101] The court held that, although it amounted to a limitation of the accused's bodily integrity, drawing blood without the accused's consent was a minimal infringement of that right. The court also held that the limitation was justified in the circumstances, as it was necessary to procure potential evidence and thus in the interests of justice and sanctioned by legislation.[102]

In *Minister of Health v Goliath*[103] the respondents had all been diagnosed with XDR-TB, which was resistant to 'first-line drugs' and certain other drugs. They were all contagious and had failed to comply with the voluntary treatment regimen prescribed for them.[104] The Minister of Health applied for an order compelling the surviving respondents to be detained in a specialist tuberculosis hospital for treatment.[105] The respondents, in turn, claimed that their detention represented a violation of their rights in terms of section 12 of the Constitution, including their rights to freedom and security of the person and bodily integrity.[106] The court considered various factors, including the Minister of Health's duty to prevent and control the spread of communicable diseases; that the respondents were capable of spreading the disease, but had failed to adhere to the voluntary programme; and the toxicity and associated side effects of the drugs necessary to treat XDR-TB.[107] Judge Griesel ruled, based on these considerations, that the detention and treatment of the respondents, although a breach of their section 12 rights, were both necessary and mandated by section 7(1)(d) of the National Health Act because of the public interest.[108]

97 *S v Orrie and Another* 2005 (1) SACR 63 (C).
98 Ibid.
99 Ibid at para 14-16.
100 Ibid.
101 Ibid at para 23.
102 Ibid at para 21.
103 *Minister of Health v Goliath* 2009 (2) SA 248 (C).
104 Ibid at paras 16 and 17.
105 Ibid at paras 5 and 6.
106 Ibid at para 14.
107 Ibid at para 27.
108 Ibid.

These cases examined the balance between individual rights and the public interest in compelled medical procedures or treatments. These cases highlight the complex interplay between individual autonomy and societal welfare in the legal framework. In the international sphere, the United States Supreme Court's decision in *Winston v Lee*[109] provides further insight into the balancing of individual rights and state interests. The case addressed the constitutionality of surgical intrusion into a suspect's body for evidence, emphasising the need to weigh privacy and security expectations against society's interest in obtaining evidence.

Legislative provisions such as section 7(1)(d) of the National Health Act offer guidance on circumstances where treatment may be administered without consent, particularly in cases posing severe public health or safety risks.[110] The application of such provisions, as seen in *Minister of Health v Goliath*,[111] emphasises the imperative of balancing individual rights with broader public health objectives.

3.1.6 Justifiability of vaccine mandates as a limitation on the right

In navigating the complex terrain of human rights and governmental intervention, South Africa must uphold the principles of accountability, proportionality and respect for individual dignity.[112] Adhering to constitutional provisions and legal precedents allows the country to balance protecting individual rights and promoting the common good, particularly during public health emergencies like the COVID-19 pandemic.[113]

In the South African constitutional landscape, the justifiability of limitations on the right to bodily integrity, as delineated in section 36 of the Constitution, has been the subject of extensive legal analysis and judicial scrutiny. The right to physical integrity, enshrined in section 12(2)(b) of the Constitution, serves as the cornerstone for jurisprudence surrounding patient autonomy and the prerogative to refuse medical treatment. In evaluating the permissibility of limitations on rights, the courts play a pivotal role in assessing the proportionality and reasonableness of such constraints, emphasising the imperative of justifiability within the constitutional framework.

A significant procedural framework, exemplified in *S v Zuma*,[114] underscores the meticulous approach adopted by South African courts in adjudicating issues of rights limitations. This seminal case, marking the Constitutional Court's inaugural ruling in 1995, challenged a provision of the Criminal Procedure Act[115] that imposed a reverse onus on defendants in criminal cases. The court's decision, declaring the provision unconstitutional, emphasised the foundational principle of fair trial rights enshrined in the interim

109 *Winston v Lee* 470 US 753 (1985).
110 Section 7(1)(d) of the National Health Act 16 of 2003.
111 *Minister of Health v Goliath* (note 103).
112 Botha, H 'Human Dignity in Comparative Perspective' (2009) 20(2) *Stellenbosch Law Review* 171.
113 Hodge Jr, et al 'COVID's Constitutional Conundrum: Assessing Individual Rights in Public Health Emergencies' (2020) 88(1) *Tenn Law Review* 837.
114 *S v Zuma and Others* 1995 (4) BCLR 401 (SA).
115 Criminal Procedure Act 51 of 1977.

Constitution, laying the groundwork for subsequent jurisprudence safeguarding individual rights in criminal proceedings.[116]

The interpretative process delineated in *S v Zuma* underscores the intricate balancing act undertaken by courts when confronted with conflicting rights and societal interests. While South African courts have yet to address the issue of mandatory vaccinations, their jurisprudence on section 12 illuminates the nuanced approach taken in reconciling individual liberties with broader public welfare concerns.[117]

In *Minister of Safety and Security and Another v Gaqa*,[118] the court grappled with the delicate balance between law enforcement imperatives and individual rights in the context of a criminal investigation. The case, which concerned the surgical removal of a bullet lodged in a suspect's leg, exemplifies the complex interplay between constitutional rights and state obligations. Through a meticulous analysis of relevant legal provisions and constitutional principles, the court ultimately sanctioned the surgical intervention, citing the state's constitutional duty to investigate crimes and the paramount importance of preserving crucial evidence in serious criminal cases.

Drawing on precedent from both domestic and international jurisprudence, particularly the US Supreme Court's ruling in *Winston v Lee*,[119] the court emphasised the contextual nature of rights limitations, highlighting the need for a case-by-case assessment to strike a delicate balance between individual privacy rights and societal interests in law enforcement and justice.

In issuing its final order, the court in *Minister of Safety and Security and Another v Gaqa*[120] emphasised the exceptional circumstances of the case and the compelling state interest in securing evidence vital to the administration of justice, thus justifying the temporary intrusion on the respondent's rights in the pursuit of broader societal objectives.

4. Application of the Constitution to vaccine mandates

The application of the Constitution to vaccine mandates raises important constitutional issues, particularly about the balance between individual rights and public health concerns.[121] The Bill of Rights guarantees fundamental freedoms such as the right to life,[122] bodily integrity[123] and the right to make decisions about one's own health and well-being.[124] These rights are not absolute. Section 36 of the Constitution allows for the limitation of rights under certain circumstances, provided that the limitation is reasonable

116 *S v Zuma* at para 20.
117 Karim, SA and Kruger, P 'Which Rights? Whose Rights? Public Health and Human Rights Through the Lens of South Africa's COVID-19 Jurisprudence' (2021) 11(1) *Constitutional Court Review* 533.
118 *Minister of Safety and Security and Another v Gaqa* 2002 (1) SACR 653 (C).
119 470 US 753 (1985).
120 2002 (1) SACR 653 (C).
121 Karim, SA and Kruger, P 'Which Rights? Whose Rights? Public Health and Human Rights Through the Lens of South Africa's COVID-19 Jurisprudence' (2021) 11(1) *Constitutional Court Review* 533.
122 Section 11 of the Constitution.
123 Section 12 of the Constitution.
124 This right falls under the right to health care, which is enshrined in s 27 of the Constitution.

and justifiable in a democratic society. Therefore, any vaccine mandate must be carefully scrutinised to ensure that it does not unjustifiably infringe on personal freedoms.

The state may justify the imposition of vaccine mandates on the grounds of protecting public health. In the context of a pandemic or infectious disease outbreak, the government has a responsibility to safeguard the health and safety of its citizens.[125] This responsibility is enshrined in section 27 of the Constitution, which guarantees access to health care services, and gives the state the authority to take measures to prevent the spread of diseases. Public health measures, including vaccination campaigns, may be seen as necessary to protect vulnerable populations and maintain the functioning of society. In this context, vaccine mandates can be seen as a justifiable limitation of individual rights if they are proportionate, rational and supported by scientific evidence.[126]

The constitutional right to equality must be considered in the context of vaccine mandates.[127] Discrimination against individuals based on their decision not to take the vaccine could arise if mandates are implemented in a way that unfairly impacts certain groups. For example, if exemptions are not allowed for individuals with valid medical or religious reasons, this could lead to unequal treatment.[128] Any vaccine mandate must ensure that it does not disproportionately affect specific groups and that reasonable accommodations are made for those unable to receive the vaccine. The mandate must also ensure that it does not lead to the social exclusion or stigmatisation of unvaccinated individuals.[129]

The implementation of vaccine mandates must align with the principles of human dignity and personal autonomy.[130] Section 10 of the Constitution guarantees the right to human dignity, which includes the right to make decisions about one's own body. While the state may regulate public health to protect the broader community, it must ensure that the mandates respect individuals' dignity. This means that any policy or law mandating vaccines must be accompanied by robust measures to educate the public about the benefits of vaccination, to address concerns, and to provide a fair process for exemptions.[131] The constitutional framework requires a careful balance between individual rights and collective responsibilities, ensuring that any limitation on personal freedoms is justified, proportionate and fair.[132]

125 Gostin, L and Berkman, B 'Pandemic Influenza: Ethics, Law, and the Public's Health' (2007) 59(1) *Admin Law Review* 121.

126 Flood, CM, Thomas, B and Wilson, K 'Mandatory Vaccination for Health Care Workers: An Analysis of Law and Policy' (2021) 193(6) *Canadian Medical Association Journal* 217.

127 Section 9 of the Constitution.

128 Smith, M and Emanuel, E 'Learning from Five Bad Arguments Against Mandatory Vaccination' (2023) 41(21) *Vaccine* 3301.

129 Maneze, D et al. 'Mandatory COVID-19 Vaccination for Healthcare Workers: A Discussion Paper' (2023) 138(1) *International Journal of Nursing Studies* 104389.

130 Badal-Faesen S 'Moral Permissibility of Mandatory COVID-19 Vaccinations Amongst Healthcare Workers in South Africa' (Doctoral thesis, 2022).

131 Moodley, K 'The Ethics Behind Mandatory COVID-19 Vaccination Post-Omicron: The South African Context' (2022) 118(5-6) *South African Journal of Science* 1.

132 Ibid.

5. Conclusion and recommendations

The debate about vaccine mandates in South Africa involves complex legal, ethical and public health considerations. While every right in the Bill of Rights can be limited under the law of general application, no such law imposes vaccine mandates. The South African Human Rights Commission has asserted that mandating COVID-19 vaccination would not infringe upon the right to bodily integrity, given the exceptional circumstances of a pandemic.

Section 36 of the Constitution allows for restrictions in the interests of public health. As COVID-19 presented a significant public health risk, mandatory vaccination could be justified to protect the broader community. Yet, the imposition of vaccine mandates must be balanced against individual rights, particularly those of bodily integrity, religion and conscience. Navigating this balance requires clear and comprehensive legislation explicitly addressing vaccine mandates, ensuring transparency and accountability. Prioritising alternative measures, such as incentives and education campaigns, is crucial before resorting to mandatory vaccination. Such an approach aligns with South Africa's constitutional values, which prioritise individual autonomy and rights, especially for vulnerable populations.

The dynamic nature of public health threats requires ongoing evaluation and adaptation of strategies. Governments should proactively assess evolving evidence to ensure that measures remain proportionate, and evidence based. A comprehensive review of existing laws is recommended to address the absence of legislation explicitly limiting rights through vaccine mandates and ensuring compatibility with constitutional principles.

Moving forward, rigorous human rights oversight and inclusive discussions are imperative in implementing vaccine mandates. Societies must engage in respectful dialogue that acknowledges diverse perspectives while seeking common ground in the interest of public health and individual freedoms.

Considering the potential limitations on rights, especially the right to bodily integrity, legislative measures should be explored to temporarily restrict these rights during pandemics. Any such legislation must adhere to the principles of necessity, proportionality and legitimacy, providing a balanced approach that upholds constitutional principles while safeguarding public health.

In the complex interplay between public health imperatives and constitutional rights in South Africa, several recommendations can be made.

Firstly, comprehensive legislation must be enacted, explicitly addressing vaccine mandates and delineating transparent conditions for their imposition, ensuring justifiability, proportionality and temporariness. Prioritising alternative measures, such as incentives and educational campaigns, is crucial in upholding individual autonomy and rights, particularly for marginalised communities.

Secondly, the continuous evaluation and adaptation of strategies are essential, given the dynamic nature of public health challenges. The proactive assessment of evolving evidence and circumstances is necessary to ensure that measures remain proportionate and evidence-based. A thorough review of existing laws is also needed to address the current vacuum in legislative frameworks, ensuring compatibility with constitutional principles, including the right to bodily integrity.

Thirdly, in the context of pandemics, legislative measures should be explored to temporarily limit rights, provided that they adhere to the principles of necessity, proportionality and legitimacy. By striking a delicate balance between public health imperatives and individual rights, these measures aim to uphold constitutional principles while safeguarding public health.

Lastly, a nuanced, inclusive and rights-centric approach is essential, fostering dialogue and collaboration between various stakeholders to develop policies and strategies that are both effective and respectful of individual rights. This inclusive approach will help to build trust, to promote understanding, and to ensure that the voices of marginalised communities are heard, and that their concerns are addressed in the development and implementation of vaccine mandates.

How to cite:

Slungu J Thobela 'Revisiting Vaccine Mandates and Human Rights in South Africa' (2025) 5 *Turf Law Journal* 96-114.

Received: 26 June 2025, Accepted: 1 October 2025, Published: 17 October 2025, Doi: https://doi.org/10.62726/tlj.v5.73

The Land Question, Economic Collapse and the Right to Development in Zimbabwe

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Abstract

The latter part of the post-colonial period in Zimbabwe – from the late 1990s to the late 2000s – witnessed the collapse of the economy, with dire consequences for the livelihoods of the majority of the impoverished and distressed black population. The context necessitates, from a right to development point of view, an enquiry into the entitlement to redistributive justice with respect to the guarantee for the equal enjoyment of the common heritage for the attainment of socio-economic freedom. This article revisits two decades of recession in Zimbabwe, to unearth the core and peripheral causes thereof, which centred on the deeply antagonistic land question that was ignored, and the blame shifted to political leadership as the cause of the country's decline into a failed state. While the radicalism that accompanied the land repossession left severe socio-economic repercussions, it is argued that even in the absence of the repossession exercise, the economy was programmed to crash in the face of competing interests. The planned crash of the Zimbabwean economy was a means of undermining the independence project and thwarting the land restitution claim that constituted the basis of the Lancaster House settlement that ended the liberation struggle against oppressive white minority rule. With the economy steadily recovering as a result of the productive use of the land by the black population, we argue that the land repossession in Zimbabwe fulfilled a legitimate right to development expectation.

Keywords

right to development, land restitution, economic collapse, radical socio-economic transformation, Zimbabwe

1. Introduction

The latter part of the post-colonial period in Zimbabwe from the late 1990s to the late 2000s witnessed the severe collapse of the economy, with dire consequences for the livelihoods of

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the distressed black population.[1] Following the controversial political transition that took place in 2017, it is crucial to revisit and assess what might have changed. This requires, from a right to development point of view, an enquiry into the aspect of redistributive justice that concerns entitlement to the common heritage for the realisation of socio-economic and cultural development. In international human rights law, development is regarded as a vehicle for attaining greater freedoms and as a human right – formulated as the right to development, guaranteed to every individual and to all peoples. The liberation of Zimbabwe from colonial rule is viewed as an opportunity to redress the political and socio-economic situation by adhering to the normative commitments and ensuring policy certainty on the standards imposed by the right to development.

In this article, we revisit the path to the two decades of stagflation with the aim of identifying the core and peripheral causes thereof, which centred largely on the deeply antagonistic land question that was ignored, with political leadership being fronted as the cause of the country's decline into a failed state.[2] While the radicalism that accompanied land repossession in early 2000 left severe socio-economic repercussions, it is argued here that even without the repossession exercise, the economy had been programmed to crash, to undermine the independence project and to thwart the land restitution claim that constituted the basis of the Lancaster House settlement that ended the liberation struggle against oppressive white minority rule.

Mlambo notes that Zimbabwe's acquisition of independence in 1980 was 'full of promise and hope that the future would be one of economic prosperity, political freedom and a generally decent livelihood for all'.[3] Indeed, the political economy of Zimbabwe grew exponentially in the first ten years after independence from 1980 to 1990, with visible flourishing in various sectors, including in the areas of education, agriculture, mining and tourism, among others. The economy blossomed with double digit growth rates as a result of a thriving export trade in mineral resources, agricultural produce and foodstuffs to the rest of the African continent and other parts of the world, to the extent that the country became known as the 'breadbasket' and 'envy' of Africa.[4] Zimbabwe offered hope not only as one of the most promising postcolonial success stories in Africa, but also as an enabling political economy where the exercise and enjoyment of the right to development thrived, albeit just for two decades.[5]

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1 Richardson, CJ *The Collapse of Zimbabwe in the Wake of the 2000–2003 Land Reforms* (Edwin Mellen Press, 2004).

2 Murphy, GA 'Robert Mugabe's Africa: Zimbabwe as a Failed State' (2013) 1(3) *Tulane Journal of International Affairs* 1.

3 Mlambo, AS *A History of Zimbabwe* (Cambridge University Press 2014) 194.

4 Noyes, AN *A New Zimbabwe? Assessing Continuity and Change After Mugabe* (Rand Corporation, 2020) 3; Orlet, C 'From Breadbasket to Dustbowl' *The American Spectator* <https://spectator.org/48721_breadbasket-dustbowl/> accessed 10 December 2024.

5 The right to development as it is enshrined in the African Charter essentially guarantees entitlement to economic, social and cultural development. The socio-economic progress recorded during the first two decades of Mugabe's government is read in this light to imply realisation of the right to development during that period.

Zimbabwe should have sustained the path to prosperity, as its early growth indicators suggested. Unfortunately, the situation turned out differently, as a result of a combination of adverse factors that led to the intricate question about land restitution. At independence, a constitutional promise on land restitution was made, but the promise was unjustly delayed and the legitimate expectation of redistributive justice was thus denied to the impoverished black population. When the claim for land took a radical turn in 2000, it provoked widespread hysteria, mixed reactions and a dominant narrative that seemed to suggest it was unpardonable to have taken away farmlands from the white minority. The dynamics dramatically changed, resulting in the collapse of the economy and a downward spiral into a failed state.[6] As the country slumped deeper into worse levels of recession and the most devastating hyperinflation in world history,[7] with multiple interwoven adversities for the population, concerns about Robert Mugabe's power monopoly, autocratic leadership, democratic insufficiencies and governance malpractices grew and crystallised; he was seen as a problem, rather than the once-charismatic leader who offered a solution to the country's problems. Perceptions thus shifted to popular demands for transformation of the country's political landscape.

Of course, despite Mugabe's liberation credentials and legacy as the father of the nation, his 37-year-grip on power and his lack of strategy to rescue the country led to the popular consensus that 'Mugabe must go', which became the rallying cry during his last days in power.[8] The belief was that with Mugabe gone, a new government would be able to fix the socio-economic problems and return the country to normalcy. Although he could not be removed by conventional electoral processes, Mugabe eventually succumbed to an orchestrated palace coup in November 2017, which ushered in Emmerson Mnangagwa as the successor.[9] Despite the controversial political transition, executive corruption, nepotism, abuse of power and misappropriation of state resources for personal and political party interests have persisted, and it is reported that livelihoods in Zimbabwe have degenerated under the Mnangagwa government.[10] This suggests that the actual problem

6 Muvingi, IJ 'The Politics of Entitlement and State Failure in Zimbabwe' (2008) 40(1) *Peace Research* 79.

7 Johnson, M 'Worst Cases of Hyperinflation in History' (2024) Investopedia <https://www.investopedia.com/articles/personal-finance/122915/worst-hyperinflations-history.asp> accessed 14 September 2025.

8 Ogenga, F 'Mugabe Must Go: Textual Meanings of the Representation of the Zimbabwean Situation by the South African Press' (2011) 1(1) *African Conflict and Peacebuilding Review* 39, 39-70; Moyo, J '"Mugabe Must Go": Thousands in Zimbabwe Rally Against Leader' *New York Times* <https://www.nytimes.com/2017/11/18/world/africa/zimbabwe-mugabe-march.html> accessed 14 October 2024; British Broadcasting Corporation '"Mugabe Must Go": Demonstrators and Police Clash in Zimbabwe' <https://www.bbc.com/news/world-africa-36968995> accessed 22 October 2024.

9 Nyathi, M & Ncube, M 'The 2017 Military Coup in Zimbabwe: Implications for Human Rights and the Rule of Law' (2020) 20(2) *African Human Rights Law Journal* 830.

10 Gavin, M 'Trouble Ahead in Zimbabwe' Council on Foreign Relations <https://www.cfr.org/blog/trouble-ahead-zimbabwe> accessed 11 November 2024; Muronzi, C '3 Years after Mugabe Overthrow, Many Zimbabweans Say Life's Worse' *Al Jazeera* <https://www.aljazeera.com/news/2020/11/14/three-years-since-mugabe-overthrow-zimbabweans-say-life-is-worse> accessed 11 November 2024.

may not be political leadership but something much deeper, an enquiry that we engage with in this article, seeking to determine the cause of the economic collapse and whether the land question provides the solution.

For Munangagwa, the crisis is the result of 'a political problem, that is exacerbated by failed policies'.[11] Policy failures not only exacerbate the political problem but also jeopardise prospects for realising the right to development. With respect to Zimbabwe's treaty commitment under the African Charter, the government is obligated to 'formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals'.[12] The argument is that fixing the development policy dilemma entails recourse to a people-centred rights-based approach in conceptualising development. Such an approach should take into account the right to ownership and control over the land as an essential component of achieving the development purpose, which will address the economic distress that the country has experienced over the last two decades.

From a right to development point of view on how to address the multi-layered dilemma in Zimbabwe, in the next section, we provide a retrospective analysis of the reasons for the rupture of the economy. With reference to the right to development argument in section 3, we highlight the Zimbabwean government's duty to ensure the effective and equitable redistribution of the land in response to its treaty and constitutional obligations to equalise opportunities for development. With the economy steadily recovering as a result of the productive use of the land by the black population, we argue that the land repossession in Zimbabwe fulfilled a legitimate right to development expectation. Noting, however, that the land redistribution was skewed in favour of ZANU-PF political elites and their associates who grabbed the most fertile portions of the land,[13] we argue that redistributive justice demands fairness and equitable access to the land so as to equalise opportunities for development for the benefit of the impoverished segments of the population. The last section concludes the article, by focusing on the right to development prospects for Zimbabwe.

2. Economic collapse

This section provides a retrospective critical analysis of the systemic collapse of the Zimbabwe economy, and identifies the underlying factors that caused the collapse. The socio-economic and political situation in Zimbabwe has rightly or wrongly been attributed to several factors, most of them concerning socio-economic and political concerns relating to maladministration and mismanagement, corruption and misappropriation, bad governance and democratic deficits, tribal politics and nepotism, among others. While these factors have indeed exacerbated the dire economic situation, we contend that they

11 Munangagwa, CL 'The Economic Decline of Zimbabwe' (2009) 3(9) *Gettysburg Economic Review* 110, 112.

12 Declaration on the Right to Development Resolution A/RES/41/128 adopted by the UN General Assembly on 4 December 1986, art 2(3).

13 Moyo, S 'Land Concentration and Accumulation after Redistributive Reform in Post-Settler Zimbabwe' (2011) 38(128) *Review of African Political Economy* 257.

are peripheral and do not go to the core of the problem. If not identified and accurately responded to, efforts at stabilising the economy will probably not get to the profundity in redressing the principal issues. In delving into the core of the enquiry, we aim to unearth the multi-layered factors and thus, point out the genesis of the distressed political economy so that equilibrium can be established and appropriate measures taken to stabilise the economy and enable the people of Zimbabwe to exercise their right to development.

2.1 Promising start, and then sudden decline – What went wrong?

The extent to which development may be achieved and sustained in any country depends on the model for development adopted. When the Mugabe government took over political leadership of Zimbabwe from white minority rule in 1980, it adopted a state interventionist model, which was cautiously implemented with a 'mild and pragmatic application of socialism', with heavy investments in health, education and other essential social services, aimed at accelerating socio-economic development.[14] Mkandawire explains that '[t]he government's major policy declaration on the economy called for "growth with equity" presumably on the grounds that only a high rate of growth would permit improvements in the living standards of the majority without adversely affecting the white minority'.[15] Apparently, the model worked to an extent, and with a relatively well-structured and diversified economy, Zimbabwe faired relatively well with recorded gains in poverty reduction and improvement in living standards for the poor in the first decade post-independence.[16] The expression that 'if it isn't broken, don't try to fix it' (if something works well already, there is no need to change it) should probably have guided political thinking in Zimbabwe when it was forced by the World Bank and the International Monetary Fund (IMF), among other powerful stakeholders, to adopt the market-oriented Economic Structural Adjustment Programme (ESAP) in 1991. The dilemma with neoliberalism is that it is principally concerned with the growth of the market economy, it promotes monopoly capital, and it is designed to enrich a privileged few much more than it is concerned about social welfare for the impoverished majority.

Unlike the socialist model, which is essentially redistributive in nature, the neoliberal market economy model does not guarantee redistributive justice and hence does not guarantee to the entire population the opportunity to exercise and enjoy the right to development. The right to development is, in our estimation, socialist in nature; it promises equitable redistributive benefits and equality of opportunities for development, and therefore guarantees prospects for shared prosperity and welfare gains for everyone.

14 Mugabe, R 'Robert Mugabe on Zimbabwe' 1982 Britannica Book of the Year <https://www.britannica.com/topic/Robert-Mugabe-on-Zimbabwe-1985189> accessed 3 October 2024.

15 Mkandawire, TP (1985) '"Home Grown" Austerity Measures: The Case of Zimbabwe' (1985) 10(1) *Africa Development* 236, 247.

16 In 1991, Mugabe's administration abandoned its intervention economic strategy and adopted what was considered to be a market-driven approach – the Economic Structural Adjustment Programme (ESAP) – with a view to reorienting the economy from the production of non-tradeable goods and services to the production of goods that were tradeable. See generally Kanyenze, G 'Economic Structural Adjustment Programme (ESAP): Precursor to the Fast-Track Resettlement?' in Masiiwa, M (ed) *Post-Independence Land Reform in Zimbabwe: Controversies and Impact on the Economy* (Friedrich Stiftung 2004) 90.

The socialist model was relevant to the postcolonial context in Zimbabwe, requiring broad-based redistributive measures to redress the structural and systemic imbalances inherited from colonial rule. We contend that the Mugabe government was under no compulsion to fix what was not broken. The only justification for the IMF/World Bank's globalisation expedition was to push the neoliberal (free market) agenda into the political economy of fragile sovereign states. At the time the structural adjustment policies were introduced in Zimbabwe, there was no solid reasoning to restructure an economy that was functioning at its best. Other peripheral factors might have contributed, but probably not to the extent of rupturing the Zimbabwe economy at that stage.

For over three decades since the socialist model was abandoned, it could not be determined whether, how and to what extent it would have succeeded in sustaining development in Zimbabwe. Besides, there is no evidence that the disruptions Zimbabwe began to experience in the 1990s were caused by the socialist model and redistributive policies that the Mugabe government implemented from the 1980s to the early 2000s. There is, however, substantial evidence that the economic decline stemmed directly from the implementation of the World Bank/IMF-imposed structural adjustment policies that mandated recourse to austerity measures, cuts in social spending, increased costs for education and healthcare, the privatisation of public services and the subjugation of the government to unsustainable loan conditionalities.[17] Assessing the adverse impact of structural adjustment on the impoverished population, particularly women and children, and its broader implications for the social welfare benefits that the population had enjoyed in the preceding decade, several scholars affirm that the implementation of the ESAP was disastrous and inopportune.[18] This finding is supported by the fact that the IMF/World Bank's ill-advised structural adjustment programmes also failed in many other African countries, and the impact on the populations in those countries was as dismal as in Zimbabwe.[19] Was it necessary to compel Zimbabwe to abandon its socialist model, which was functioning optimally, in favour of the neoliberal market model that caused the economy to crash?

17 Kingston, KG 'The Impacts of the World Bank and IMF Structural Adjustment Programmes on Africa: The Case Study of Cote D'Ivoire, Senegal, Uganda, and Zimbabwe' (2011) 1(2) *Sacha Journal of Policy and Strategic Studies* 121.

18 Thomson, M, Kentikelenis, A & Stubbs, T 'Structural Adjustment Programmes Adversely Affect Vulnerable Populations: A Systematic-Narrative Review of their Effect on Child and Maternal Health' (2017) 38(13) *Public Health Reviews* 1; Kawewe, SM & Dibie, R 'The Impact of Economic Structural Adjustment Programs [ESAPs] on Women and Children: Implications for Social Welfare in Zimbabwe' (2000) 27(4) *The Journal of Sociology & Social Welfare* 79, 102-103; Kanji, N & Jazdowska, N 'Structural Adjustment and Women in Zimbabwe' (1993) 56 *Review of African Political Economy* 11.

19 Muiyoro, P 'The Effects of World Bank and IMF Structural Adjustment Programs on Developing Countries in Africa' Master's Dissertation, TR Sakarya University Social Sciences Institute (2020) 9-13; Odutayo, A 'Conditional Development: Ghana Crippled by Structural Adjustment Programmes' (2015) *E-International Relations* 1; Lopez, C 'Are Structural Adjustment Programmes an Adequate Response to Globalisation?' UNESCO (1999) 511-519; Zattler, J 'The Effects of Structural Adjustment Programmes' (1989) 24(6) *Intereconomics* 282; Kingston (note 17) 110.

Despite the challenges, the ESAP went along with the Washington Consensus principles, which emphasised cost recovery for social services, the minimal role of the state in the economy, financial liberalisation, competitive exchange rates, trade liberalisation, openness to foreign direct investment, privatisation and deregulation.[20] However, the question that might not have been considered when the neoliberal economic policies were introduced was whether such policies were suitable for a country that had just emerged from colonialism and white minority rule, with a huge proportion of its population largely still dispossessed and lacking the capacity to compete in a free market economy. While the ESAP might have been intended to stimulate greater economic growth, there was no indication how the intended growth would benefit the poor. As Machemedze rightly notes, the ESAP instead 'reversed the otherwise steady growth of the economy that Zimbabwe was experiencing'.[21] The downside of the imposed ESAP was that it virtually opened up the country to free market competition to the disadvantage of the black majority. Under colonial rule, the Zimbabwean population was massively dispossessed of land and resources and thus disproportionately disadvantaged and rendered incapable of engaging equally in free market competition with the privileged and economically strong white minority and foreign investors.

As highlighted above, the Zimbabwean economy experienced a decline principally because of the introduction of neoliberal policies. Many sectors of the economy were negatively affected by retrenchments and the scaling-down of operations, with the adverse impact causing enormous suffering and hardship for ordinary black people.[22] The deteriorating economic situation triggered resentment and discontent towards the government, both on the home front by the population, labour unions, the private sector and civil society organisations, and on the external front by multilateral and bilateral donors, including the IMF/World Bank that caused the decline.[23] What is compelling about the IMF/World Bank resentment towards Zimbabwe is that, in addition to their faulty prescriptive neoliberal policies harming the country, they further pressured the government to adopt even more stringent austerity measures with negative effects, including salary cuts and reductions in food subsidies.[24]

The conditionalities that forced the Zimbabwe government to liberalise the economy were obviously portrayed as well-intentioned. However, as the realities, including the experiences in other African countries eventually revealed, the hidden motive behind the economic liberalisation was to disrupt and collapse postcolonial nation states in Africa and thus pressurise the resultant dysfunctional governments into opening up to the World Bank/IMF-driven globalisation agenda (an extension of colonial imperial domination)

20 Machemedze, R 'Zimbabwe and the IMF: Time for Shifting from Neo-liberal Paradigm to People Centered Development Alternatives' Southern Africa Regional Poverty Network <https://sarpn.org/documents/d0000758/index.php> accessed 14 September 2023.
21 Ibid.
22 Ibid 1-2.
23 Ibid.
24 Mkandawire (note 15) 237.

that aims at a subtle takeover of major sectors of the economy,[25] not excluding land, which was seized across Africa.[26] The neoliberal approach conflicted with the Zimbabwe government's commitment to redressing colonial injustices through a prudent rather than a doctrinaire approach.[27] The choice reflected an ethical consideration of what would be good for Zimbabwe, especially concerning the unresolved question of land restitution.

2.2 The vexed land question and the orchestrated collapse of the economy

Confronted with growing adversity that was exacerbated by mounting pressures on the home front by opposition political parties and on the external front by international stakeholders, the Mugabe government became apprehensive about an imminent loss in the parliamentary elections of 2000.[28] As a desperate face-saving measure to appease the disenchanted population, the Mugabe government authorised the land invasion that led to the forcible seizure of white-owned commercial farms. Had Mugabe's socialist governance model prevailed, the land restitution would probably have been dealt with in a more prudent manner, in the sense that the redistributive benefits might have prevented the population from resorting to radicalism in repossessing the land. Facing stiff domestic pressure, the Mugabe government was compelled to agree to the popular demand for land, which it exploited politically by running Mugabe's presidential election campaign in 2000 with a focus on land repossession.[29] The irate population took advantage of the campaign promises of land repossession and proceeded to invade and seize farms from the whites.[30] While Mugabe was criticised for the radical approach to land repossession, there was no reason for the white population to resist returning the land to those whose ancestral entitlement to the land was incontestable.

Gundami affirms that the core purpose of the Zimbabwe liberation struggle was to reclaim the land, which was why the land question formed the central subject of the negotiations at the Lancaster House Conference in London from 10 September to 15

25 Meagher, K 'A Back Door to Globalisation? Structural Adjustment, Globalisation and Transborder Trade in West Africa' (2003) 30(95) *Review of African Political Economy* 57; Olutayo, AO & Omobowale, AO 'Capitalism, Globalisation and the Underdevelopment Process in Africa: History in Perpetuity' (2007) 32(2) *Africa Development* 97; Moore, D 'Neoliberal Globalisation and the Triple Crisis of "Modernisation" in Africa: Zimbabwe, the Democratic Republic of the Congo and South Africa' (2001) 22(6) *Third World Quarterly* 909.

26 Tulone, A et al 'Main Intrinsic Factors Driving Land Grabbing in the African Countries' Agro-food Industry' (2022) 120(106225) *Land Use Policy* 1-9; Hall, R 'Land Grabbing in Africa and the New Politics of Food' Future Agriculture – Policy Brief No 041 (2011).

27 Bratton, M 'Development in Zimbabwe: Strategy and Tactics' (1981) 19(3) *The Journal of Modern African Studies* 447, 447; see also Knight, VC 'The Social and Economic Transformation of Zimbabwe' (1983) 82(482) *Current History* 106, 106.

28 Moore, D 'Is the Land the Economy and the Economy the Land? Primitive Accumulation in Zimbabwe' (2001) 19(2) *Journal of Contemporary African Studies* 253; Moore, D 'Democracy is Coming to Zimbabwe' (2001) 36(1) *Australian Journal of Political Science* 163.

29 Africa All Party Parliamentary Group 'Land in Zimbabwe: Past Mistakes, Future Prospects' A Report by the Africa All Party Parliamentary Group (December 2009) 9.

30 Titanski, JL 'Land Reform Sparks Controversy in Zimbabwe' EBSCO (2023) <https://www.ebsco.com/research-starters/law/land-reform-sparks-controversy-zimbabwe> accessed 24 August 2025.

December 1979.[31] The Conference culminated in the granting of political independence to Zimbabwe. Contrary to the general perception that the land question was resolved during the Lancaster House negotiations, no tangible deliberations took place on the question of land restitution. Rather, there was a fluid agreement, which entitled the minority white settlers to retain ownership over the land in their possession and control, and to dispose of it only on 'willing seller' and 'willing buyer' terms.[32]

Justice delayed is justice denied. Twenty years had passed when the radical land repossession happened in 2000. This was beyond a reasonable time for the Lancaster House agreements on land restitution to have been honoured. By every indication, the white settlers were not at any point post-independence willing to freely dispose of the land that they had grabbed and that they controlled.[33] It defeats rational thinking that land in Zimbabwe should be bought from white settlers when the land was forcibly seized from indigenous people during the colonial period and no form of compensation was ever paid to them.

At the end of the colonial era, an estimated 6,700 white settler farmers owned 15.5 million hectares of land, representing 47% of the total farmland under freehold tenure. Only 8,000 small-scale black farmers owned or leased 1.4 million hectares, representing a minimal 4% of the total farmland.[34] Gundami explains that the largest proportion of the black population, amounting to about 700,000 peasant households, occupied 16.4 million hectares of Tribal Trust Lands (communal lands), which amounted to 49% of the semi-arid to arid land they shared under communal tenure.[35] Under such a dispensation of gross injustice in access to and ownership of land, it is inconceivable that the black population would ever have enjoyed equality of opportunity for development. Justice and fairness required that the terms of the Lancaster House Agreement be honoured to enable the legitimate transfer of the land to indigenous Zimbabweans in return for adequate compensation to the white farmers, which compensation had to be borne by the British government, with support from its western allies.[36] The latter reneged on the promise and thus contravened the terms of the Lancaster Agreement.[37] By the 1990s (a decade later), with a minimal £44 million made available by the British government, only between 52,000 and 70,000 families were allocated and resettled on previously white-owned farmlands on a willing seller and willing buyer basis, instead of the 162,000 households envisaged in the early 1980s.[38]

31 Gundami, PH 'The Land Question and its Missiological Implications for the Church in Zimbabwe' (2003) 31(3) *Missionalia* 467.

32 See Onslow, S 'Zimbabwe: Land and the Lancaster House Settlement' (2009) 2(1) *British Scholar* 40, 41-42; Thomas, NN 'Land Reform in Zimbabwe' (2003) 24(4) *Third World Quarterly* 691, 698.

33 Marara, L 'Colonial Land Injustices in Post-Independence Zimbabwe' Origins (April 2025) <https://origins.osu.edu/read/colonial-land-independence-zimbabwe> accessed 14 September 2025.

34 Gundami (note 31) 469; Thomas (note 32) 697.

35 Gundami (note 31) 469.

36 Thomas (note 32) 697.

37 Para 4(c) of the Lancaster House Agreement stipulates: 'In concluding this agreement and signing this report the parties undertake: to comply with the pre-independence arrangements'.

38 Kinsey, BH 'Land Reform, Growth and Equity: Emerging Evidence from Zimbabwe's Resettlement Programme' (1999) 29(2) *Journal of Southern Africa Studies* 173, 173-196; Thomas (note 32) 697.

It would seem that the promises made at Lancaster House barely aimed at averting the imminent expulsion of white people from Zimbabwe. Thomas points out that the terms of the agreement basically protected the rights of white minority farmers to retain the land that they possessed and controlled, and they would only offer to sell under-used portions of the land.[39] As Onslow points out, the reticence in facilitating land restitution bred resentment among the black population, particularly because of the legitimised injustice that allowed white farmers possession, ownership and control of the most fertile and arable large portions of the land,[40] while the majority of the black people remained dispossessed. Thomas' solid argument on the moral obligation (anchored on ethical and economic considerations) for land redistribution in Zimbabwe stands against any counterfactual.[41] Land restitution should not have been the subject of any contestation. Rather, concern ought to have centred on the modality of restitution and redistribution. If the British government had been genuinely committed to land restitution as a central factor in the quest for political and economic independence, recourse to taking the land forcibly would not have been necessary.

Besides the distress that the Zimbabwean political economy had begun to suffer because of the miscalculated adoption of the World Bank/IMF-imposed neoliberal structural adjustment policies, as explained in the previous section, more severe political and socio-economic woes gripped the country, following the radical land redistribution programme that involved the forced eviction of white farmers from the extensive farmlands they owned. Although well-intentioned – aiming to redress the inherited injustices in land ownership – the land redistribution policy was heavily criticised and rightfully so, because of the manner in which it was rashly implemented, resulting in counterproductive consequences for which no damage control measures were put in place. The agricultural sector suffered tremendously, with enormous adverse effects on food production. The agricultural sector was at the time the principal source of revenue and lever of the economy, and sectors like banking, manufacturing and many other related businesses also collapsed.[42] It cannot be stated with certainty whether and to what extent or at what pace Zimbabwe would have recovered from the economic collapse, based exclusively on the political dynamics in the country.

Thomas draws attention to the fact that, as far back as the mid-1980s, there were deliberate efforts to frustrate the land redistribution agreed to at Lancaster for reasons which were characterised by unnecessary complexities, including 'implicit threats of the withdrawal of aid' by foreign donors like the World Bank and the British government.[43] The threat was indeed activated when the Zimbabwean government refused to bow to pressure and proceeded to execute the land restitution in its own way. The European Union responded with coercive and exceedingly harsh economic sanctions on the entire

39 Alexander, J 'State, Peasantry and Resettlement in Zimbabwe' (1994) 21(61) *Review of African Political Economy* 325; Thomas (note 32) 697.

40 Onslow (note 32) 41.

41 Thomas (note 32) 697.

42 Taylor, SD 'Business and Politics in Zimbabwe's Commercial Agriculture Sector' (1999) 27 *African Economic History* 177; US Government Print Office 'Zimbabwe Political and Economic Crisis Senate Hearing 107-102 (2001) <https://www.govinfo.gov/content/pkg/CHRG-107shrg73697/html/CHRG-107shrg73697.htm> accessed 1 September 2024.

43 Thomas (note 32) 698.

Zimbabwean government in 2002, the United States imposed sanctions in 2003 and the United Kingdom in 2004.[44] The sanctions hinged on, among other things, infringements on 'property rights', assuming that it was impermissible to have taken away the land from white farmers, in violation of their property rights. Although the sanctions were said to be targeted at specific individuals in the government for human rights violations, as well as policy and democratic deficits, the adverse effects undeniably had devastating consequences on the entire population.

Contrary to critics who dismiss the negative effects of targeted sanctions, empirical evidence illustrates that economic sanctions are generally not only counterproductive; they also have severely harmful ripple effects of a multidimensional nature.[45] The economic collapse in Zimbabwe is blamed in part on the coercive economic sanctions,[46] which, as Matumbe illustrates, were compounded by corruption, misappropriation of resources and political patronage by the ruling ZANU-PF elite, who further stifled the economy through their unrelenting grip on power.[47] The sanctions, however, worsened a bad situation; we contend that the economy would have recovered in spite of the odds that pivot on the rhetoric of black incapabilities (the narrative that black people are incapable of putting the land to productive use), which we proceed to interrogate.

2.3 Constructed myth of black incapability

The land redistribution programme that took off in the early 1980s was deliberately stalled; one of the principal reasons was, as Thomas explains, that the Zimbabwean government was 'persuaded that the loss of experienced commercial farmers would drain the economy of vital export earnings'.[48] Fletcher puts it this way: 'Zimbabwe's white farmers once helped feed Africa — Now their farms lie in ruins'.[49] The message therefore was that black

44 Council Common Position of 18 February 2002 concerning restrictive measures against Zimbabwe, Acts adopted pursuant to Title V of the Treaty on European Union – Official Journal of the European Communities; Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe, Executive Order 13288 of March 6, 2003 Federal Register – The Daily Journal of the United States Government.

45 Gutmann, J, Neuenkirch, M & Neumeier, F 'The Impact of Economic Sanctions on Target Countries: A Review of the Empirical Evidence' (2023) 24(3) *Economic Policy Forum* 5; Özdamar, Ö & Shahi, E 'Consequences of Economic Sanctions: The State of the Art and Paths Forward' (2021) 23(4) *International Studies Review* 1646; Peksen, D 'Socio-Economic and Political Consequences of Economic Sanctions for Target and Third-party Countries' <https://www.ohchr.org/sites/default/files/Documents/Events/Seminars/CoercitiveMeasures/DursunPeksen.pdf> accessed 12 November 2023.

46 Gumbo, T 'Land Reform as Decoloniality in Zimbabwe' in Bangura, AK (ed) *Socio-Economics, Philosophy and Decoloniality: Exploring the Economic Impact of Colonialism and Neocolonialism Across Africa and its Diaspora* (Palgrave Macmillan 2025) 357.

47 Makumbe, J 'Bureaucratic Corruption in Zimbabwe: Causes and Magnitude of the Problem' (1994) 19(3) *Africa Development/Afrique et Développement* 45; Zinyama, T 'Systematic Corruption in Zimbabwe: Is the Human Factor the Missing Link?' (2021) 12(1) *African Journal of Public Affairs* 132.

48 Thomas (note 32) 698.

49 Fletcher, M 'Zimbabwe's White Farmers Once Helped Feed Africa: Now Their Farms Lie in Ruins' Pulitzer Centre <https://pulitzercenter.org/stories/zimbabwes-white-farmers-once-helped-feed-africa-now-their-farms-lie-ruins> accessed 14 November 2024.

Zimbabweans lack the capabilities to use the land like the 'experienced [white] commercial farmers', to sustain the economy and 'feed Africa'. In the last couple of years, mainstream media has resorted to pushing the false narrative that the Mnangagwa government is repossessing unused land from black farmers and resettling white farmers whose farmlands were seized in the early 2000s.[50] The narrative portrays the black population as incapable of putting the land to use.[51] Interestingly, the mainstream media has not reported on the success stories of the land redistribution programme.

When white farmers owned the land, they made a huge contribution to developing the Zimbabwean economy. Some of the land seized from them has been underused or left to waste. These facts, however, do not outweigh the reality that the black population is equally capable of, and has the potential to achieve, comparable outputs if granted access to the same opportunities, facilities and incentives that enabled the white farmers to thrive. An assessment of the potential of the blacks in relation to the whites must consider peripheral factors that are often deliberately ignored. For instance, when white farmers owned the land, the workers were predominantly blacks, implying that the latter were not by any means lacking technical skills in farming and farm management. It is not possible that because black people now own the land, they suddenly become incapable of putting it to productive use. A 2023 report in *The Telegraph* states that hundreds of white farmers returned to Zimbabwe to boost the agricultural sector, but they can only lease the land or work for the black landlords.[52]

Research findings reveal that many of the beneficiaries of land redistribution have put the land to productive use. For instance, a study conducted by Tekwa and Adesina reveals that the land reform programme has had redistributive outcomes for various categories of women (married, single and widowed), amounting to 12 to 18% of beneficiaries who gained access to land in their own right as opposed to less than 4% of white farms owned by women or women benefiting as proxies of male-headed households prior to the land reform that took place in the 2000s.[53] They contend that the land reform programme has 'hardly ever [been] assessed as a policy instrument for its redistributive, productive, social protection and social reproduction functions',[54] but mostly only from a neoliberal point

50 British Broadcasting Corporation 'Zimbabwe to Return Land Seized from Foreign Farmers' <https://www.bbc.com/news/world-africa-53988788> accessed 31 October 2023; Al Jazeera 'Zimbabwe Repossessing Unused Land from Black Farmers' <https://www.aljazeera.com/news/2022/3/30/zimbabwe-repossessing-unused-land-from-black-farmers> accessed 31 October 2024.

51 Gumede, W 'Lessons from Zimbabwe's Failed Land Reforms' University of the Witwatersrand <https://www.wits.ac.za/news/latest-news/in-their-own-words/2018/2018-10/lessons-from-zimbabwes-failed-land-reforms.html> accessed 24 October 2024; Richardson, CJ *The Collapse of Zimbabwe in the Wake of the 2000–2003 Land Reforms* (Edwin Mellen Press 2004).

52 Farmer, B & Thornycroft, P 'Hundreds of White Farmers Return to Zimbabwe in Boost for Agriculture' <https://www.telegraph.co.uk/global-health/climate-and-people/white-farmers-return-to-zimbabwe-agriculture-boost/> accessed 3 March 2025.

53 Tekwa, N & Adesina, J 'Gender, Poverty and Inequality in the Aftermath of Zimbabwe's Land Reform: A Transformative Social Policy Perspective' (2018) 19(5) *Journal of International Women's Studies* 45, 48-50.

54 Ibid 45.

of view under white ownership. Empirical findings further reveal that following the land repossession, tobacco farming in Zimbabwe has risen steadily, 'with production now often exceeding that generated by white commercial farmers in the 1990s'.[55] It is reported that 'Zimbabwe has recorded the highest tobacco production in its history. The country's tobacco output in the ongoing 2023 marketing season now stands at 261 million kilograms, surpassing the previous record of 259 million kilograms', representing over 85% of the production coming from small-scale black farmers, 60% of whom are beneficiaries of the land reform programme.[56] More empirical evidence by Chimhowu et al illustrates that:

> During our research, we saw that the farmers had a real passion for farming. We found that farmers are making investments: building houses, round brick kitchens, barns, irrigation and water development and buying farm implements. There may still be disputes about some of the big farms, but the 160,000 smaller farmers feel secure and are investing. These are not really 'small' farmers: they have six hectares or more. They are making the land their own, and they are becoming serious commercial farmers.[57]

Land restitution cannot be objectively assessed exclusively from the viewpoint of agricultural productivity and therefore does not guarantee entitlement for it to be used solely for agrarian purposes. Equitable entitlement to land guarantees access to ancillary opportunities in maximising its productivity, including for housing and real estate development, for setting up businesses, and for exploiting minerals and natural resources, among others. In a study of three emerging small towns in rural Zimbabwe over a period of twenty years from 2000 to 2020, Scoones and Murimbarimba illustrate how, as a result of the land redistribution and the consequent transformation of the agrarian structure, the economies of the three towns, namely Mvurwi (a farmworker settlement), Chatsworth (a railway siding) and Maphisa (the shadow of an estate), have grown significantly to the point of generating new economic activities and employment.[58] The findings reveal that the emergence of the three towns is because of the collapse of the white-dominated agrarian economy following the land redistribution, which enabled the dispossessed black population to flourish.

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55 Shonhe, T et al 'Tobacco Farming Following Land Reform in Zimbabwe: A New Dynamic of Social Differentiation and Accumulation' (2022) 48(2) *Journal of Southern Africa Studies* 251; Ruckert, A et al 'The Political Economy of Tobacco Production and Control in Zimbabwe: A Document Analysis' (2022) *Tobaconomics* 1; Kamuti, T 'A Checkered Pathway to Prosperity: The Institutional Challenges of Smallholder Tobacco Production in Zimbabwe' in Barcus, H, Jones, J & Schmitz, S (eds) *Rural Transformations: Globalisation and its Implications for Rural People, Land and Economies* (Routledge 2022) 71.

56 Coleman, A 'Zimbabwe Sells Record of 261 Million Kilograms of Tobacco' *Farmers' Weekly* <https://www.farmersweekly.co.za/agri-news/africa/zimbabwe-sells-record-of-261-million-kilograms-of-tobacco> accessed 19 September 2023; Chingono, N 'Zimbabwe Tobacco Output Expected to Rise 8.5% in 2023' *Reuters* <https://www.reuters.com/world/africa/zimbabwe-tobacco-output-expected-rise-85-2023-2023-03-08/> accessed 19 September 2024.

57 Chimhowu, A et al 'Land Reform in Zimbabwe Revisited: A Qualified Success?' Chatham House - Transcript, 31 January 2013, 1-8 <https://www.chathamhouse.org/sites/default/files/public/Meetings/Meeting%20Transcripts/310113Zimbabwe.pdf> accessed 24 October 2023.

58 Scoones, I & Murimbarimba, F 'Small Towns and Land Reform in Zimbabwe' (2021) 33(6) *The European Journal of Development Research* 2040.

3. Context for the right to development in Zimbabwe

Sen's idea of development as freedom[59] basically means, as stipulated in Article 1 of the Universal Declaration of Human Rights, that '[a]ll human beings are born free and equal in dignity and rights' and thus entitled to convert that freedom into development in ensuring constant improvement in well-being and a life worth living with dignity. Development is accordingly conceived as a vehicle for the attainment of greater freedoms and as a human right – formulated as the right to development, which entitles everyone and all peoples to assert a legitimate claim thereto. The liberation of Zimbabwe from colonial rule provided the opportunity to conceptualise development as a freedom and as a human right, without which the majority of the people would remain unfree and impoverished. Against this backdrop, we base the discussion in this section on the argument that the political and socio-economic situation in Zimbabwe can be redressed; doing so requires, on the one hand, adherence to the normative commitments to the right to development and, on the other hand, policy certainty on the standards imposed by the right to development.

3.1 Normative commitments on the right to development

Zimbabwe has been a state party to the African Charter on Human and Peoples' Rights since May 1986 when it ratified the Charter; it has demonstrated its commitment to adhere to Article 1, which enshrines state parties' obligations to ensure the realisation of all the human and peoples' rights enshrined in the Charter, including the Article 22 provision on the right to development. All human rights and freedoms are qualified as the same in nature and therefore ought to be accorded equal status under international law. However, the African Charter deviates slightly from this principle. It underscores the fact that the right to development deserves closer attention. The preamble to the Charter, which articulates the spirit of human rights law as it applies in Africa, highlights the particular attention that should be accorded to the right to development, which implies an obligation to prioritise development across the continent as a legal entitlement owed to all the peoples of Africa. It takes its cue from people like Doudou Thiam, Cardinal Etienne Duval and Kéba M'baye who, in 1967, 1969 and 1972 respectively, insisted on asserting the right to development for Africa.[60] Sedar Senghor (the Senegalese President at the time), while commissioning the group of experts for the drafting of the African Charter in 1979, emphasised the right to development because of its particular importance to Africa.[61] The position held by these eminent personalities pioneered the idea of a human right to development, which gained recognition not only in Africa but also internationally as an assertion of self-determination against foreign domination.

59 Sen, A *Development as Freedom* (Oxford University Press, 1999).

60 Ngang, CC 'Towards a Right-to-Development Governance in Africa' (2018) 17(1) *Journal of Human Rights* 107, 108-112; Fatsa, O *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Development in Africa* (Martinus Nijhoff Publishers, 2003) 298.

61 See *Kelvin Gumne and Others v Cameroon* (2009) ACHPR 266/03 para 173.

The African Charter guarantees that '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.[62] The concept of the 'common heritage' as it is used in this context implies that natural resources are essential to realise the right to development, and they include the land, which in Zimbabwe has remained the subject of immense controversy triggered, on the one hand, by the reticence demonstrated by the white farmers in returning the land to black people and, on the other hand, by the radical manner in which the Mugabe regime repossessed the land. Read together with Article 21 of the Charter, 'the common heritage entitlement' equips the people of Zimbabwe with the right of ownership of the land, as a prerequisite for making the right to development a reality. Zimbabwe is in this regard enjoined with the duty, as stated in Article 22(2) of the African Charter, to create an enabling rights-based environment to ensure that the land is equitably redistributed and productively used to realise the right to development. The obligation requires, in addition, in terms of the Declaration on the Right to Development, Zimbabwe to 'formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire [Zimbabwean] population and of all individuals' and to also take reasonable 'steps to eliminate obstacles to development',[63] such as those that emanate from the economic collapse that the country is presently confronted with.

For the people of Zimbabwe, the right to development obtains principally from the African Charter but also from domestic legislation as a constitutional entitlement. The Zimbabwean Constitution of 2013 implicitly provides for the right to development in section 13, titled 'National Development', which envisages a framework for development that guarantees, among other things, equitable access to and equal opportunities for development to everyone and all categories of persons, particularly women, as noted in subsection (3). Section 13 is formulated as a national objective intended to guide the Zimbabwean government in its development policy-making obligation, and therefore may be considered from a positive law point of view as essentially non-binding in nature. Normatively, section 13 is interpreted purposively in accordance with the supremacy clause in section 2(2), which binds all natural and juristic persons, 'including the State', to imply a constitutional right to development that is legally binding. Section 47 additionally states that the legally binding rights enshrined in the Constitution do not preclude other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with the Constitution.

62 African Charter on Human and Peoples' Rights, adopted in Nairobi, Kenya on 27 June 1981 OAU Doc cab/leg/67/3 Rev.5 (1981), art 22. The right to development is also enshrined in Art 10 of the African Youth Charter adopted in Banjul, the Gambia on 2 July 2006, which Zimbabwe ratified in 2009, and in Art 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in Maputo, Mozambique on 11 July 2003, which Zimbabwe ratified in 2008 and is bound to adhere to and to ensure their implementation and enforcement at the national level.

63 Declaration on the Right to Development (note 12), arts 2(3) and 8(1).

As already explained earlier, the right to development is recognised and conferred by the African Charter and other treaty instruments that Zimbabwe has ratified. In the absence of any inconsistency with the Zimbabwe Constitution, the right to development, which is legally binding under the African Charter and ancillary instruments, therefore imposes an obligation on Zimbabwe to ensure its realisation. The obligation envisages, as clearly outlined in section 13, a development policy framework that is inclined to legality and provides assurances of expanded choices, and access to equal opportunities for development, as explained in detail below. This notwithstanding, matters of national development lie at the core of every state government's constitutional mandate, requiring democratic responsiveness to the exigencies of the population and accountability for the exercise of governmental authority in allocating available resources for development. Hence, the inherently non-binding nature of the right to development contained in section 13 of the Constitution does not absolve the state of its obligation (whether legal or moral) to create the requisite conditions for development to take place on an equitable basis. It entails policy certainty that, in pursuing competing national development objectives, the people of Zimbabwe should have the opportunity to exercise their right to development.

3.2 Policy certainty on right to development standards

Policy certainty means that relevant policy instruments must contain substantive guarantees on the right to development as envisaged in section 13 of the Constitution, which imposes an obligation for policy formulation, implementation and enforcement. The following three principal right-to-development standards must apply in redressing the situation in Zimbabwe: (1) active meaningful participation in and contribution to development; (2) legally binding entitlement to the land as an asset for development; and (3) redistributive justice in the allocation of resources and opportunities for development and in the sharing of the benefits resulting therefrom. The Zimbabwean economy can only be revived by the people of Zimbabwe. This requires their active involvement and meaningful participation in the processes for development as a human right, guaranteed under the Zimbabwean Constitution and the African Charter.

Section 13(2) of the Constitution states that the people of Zimbabwe must be involved in the 'formulation and implementation of development plans and programmes that affect them'. The economic collapse in Zimbabwe affected the entire population. In seeking to remedy the situation, the policy questions that the government ought to be preoccupied with are whether the country's economy would be better off being driven by a handful of persons or whether it will be more sustainable empowering the entire population economically and, in the latter instance, what policy measures would be relevant in achieving that purpose. A population with the socio-economic and cultural capacity and the productive capabilities to participate in and contribute to development is definitely more of an asset to the economic growth of a country than an impoverished population.

Article 1(1) of the Declaration on the Right to Development affirms that it is the right of every human person and all peoples to participate in, contribute to, and enjoy economic, social, cultural and political development. Participation in, and contribution to, development cannot happen on the basis of the abstract provisions of the law. It requires

equipping the population with the requisite tools, the capabilities, and the material resources to achieve transformative outcomes. It includes, with reference to right to development standards, equitable entitlement to the resources for development, which incorporate the right of access to and control over the land, which lies at the core of the intersectional issues that collapsed the Zimbabwe economy. To attribute the economic collapse to the inability of the black population to run the economy is antithetical to the right to development, which is supposed to guarantee equality of opportunities to all. White farmers have expertise in commercial agriculture and farm management, but these skills are not exclusive to white people and can be acquired by black people.

White farmers are normally seen to be more productive not only because of ownership and control over the land, but because they benefited from huge subsidies, access to credit facilities and open markets for their produce, in addition to political backing.[64] The same has not been true for black farmers, who have been disproportionately affected by the irrational sanctions and thus deprived of equal access to the facilities and opportunities that white farmers enjoyed.[65] If the black population is to attain equitable levels of development, the right to development requires policy certainty on the land question, which is crucial for resuscitating the ailing Zimbabwe economy. The government is under a duty to ensure such policy certainty in accordance with the obligation under Article 22(2) of the African Charter, necessitating a combination of concrete measures to realise the right to development, including equitable redistribution of the land, which is a common heritage to which all the people of Zimbabwe are legitimately entitled.

3.3 Restitution and equitable redistribution of the land

As illustrated, the circumstances in Zimbabwe are largely the outcome of the conflicting entitlement interests of the minority white settlers and the majority indigenous black population with regard to the land. If the land was to be returned to the white farmers, perhaps the sanctions imposed by the United States and the European Union, among others, would be lifted to enable a quick economic recovery. The dilemma in such a scenario is that the *status quo* of development injustice would prevail against the legitimate entitlement and expectations of the black majority and thus contravene the constitutional obligation to ensure equal opportunities and expanded choices to every Zimbabwean citizen on the basis of their right to national development. It is, of course, unfortunate that the land repossession took place in a chaotic manner, characterised by violent evictions, uncertainty and unfairness in terms of who acquired what quantity of land. However, had the land repossession not happened, the law that guarantees the right to development as embodied in Article 22 of the African Charter and section 13 of the Zimbabwean Constitution still obliges the government to formalise equitable redistribution and expanded opportunities for development, which ought to be enjoyed by the entire population. Additionally, Article 21 of the African Charter guarantees exclusive ownership rights over natural resources, including the land, which may not be removed under any circumstances.

64 Chimhowu et al (note 57) 5.

65 Siambombe, A & Hopile, M 'Zimbabwe's Economic Challenges Beyond Sanctions' (2024) 4(1) *African Journal of Inclusive Societies* 109.

Citing the Rhodesian (Zimbabwean) experience, Bashizi, Murhula and Chivasa point out that colonisation, which resulted in the dispossession of indigenous peoples of their ancestral land rights, constituted a crime against humanity.[66] Equity requires that, for every injustice, there must be a just remedy. Article 21(2) of the African Charter states that if ownership rights over African patrimony are contravened, the dispossessed peoples shall have the right to the lawful recovery of the dispossessed property and to adequate compensation for the loss suffered. Therefore, the people of Zimbabwe are legitimately entitled to adequate compensation for the land they lost to the white colonisers, as the demand is being made that white settlers should, despite the injustices inflicted on the indigenous black population, be compensated for the land they took in the 1880s. If compensation is due to the white farmers (probably for their investment in the land),[67] justice requires that the original sin of dispossessing the indigenous population of their ancestral land for about a century and the harm caused to them be equally remedied with proportionate compensation.

The right to development guarantees to all the peoples of Africa redistributive justice in the enjoyment of the common African heritage, at the core of which is the land question. Any unjustifiable compromises to the requirement of equitable redistribution constitute not only a development injustice but, in terms of the applicable provisions of the law, a contravention of the right to development.[68] Moyo notes that the right to development obligates the government of Zimbabwe to ensure that its domestic policies contribute to the realisation of the human rights of its people and also create the conditions favourable for development to happen.[69] This implies an overarching duty in the face of the prevailing compounding challenges to make conditions conducive to the realisation of the right to development.

Politics in Zimbabwe will, accordingly, only make sense when state actions and policies become sufficiently rational and inclined to people-centred development, which entails upholding human rights in the development process. The constitutional obligation requires enabling measures to facilitate development, including equitable redistribution of the land because the land is a common heritage, to which all Zimbabweans are legitimately entitled. Fukuyama notes that if the politics part of the development process is not corrected,

66 Bashizi, P, Murhula, B & Chivasa, N 'Colonialism in Africa: A Forgotten Crime against Humanity' in Biko, A et al (eds) *The Routledge Handbook of Africana Criminologies* (Routledge 2020) 68.

67 Reuters 'Zimbabwe Agrees to Pay $3.5 Billion Compensation to White Farmers' Emerging Markets <https://www.reuters.com/article/us-zimbabwe-farmers-idUSKCN24U1OM> accessed 4 November 2024.

68 Ngang, CC 'Sustainable Right to Development Governance of Natural Resources in Africa' in Ngang, CC & Kamga, SD (eds) *Natural Resource Sovereignty and the Right to Development in Africa* (Routledge 2021) 25.

69 Moyo, K 'Implementing the Right to Development at the Domestic Level: A Critique of the Zimbabwean Constitution of 2013' in Ngang, CC, Kamga, SD & Gumede, V (eds) *Perspectives on the Right to Development* (PULP 2018) 264; Salomon, M 'Legal Cosmopolitanism and the Normative Contribution of the Right to Development' in Marks, SP (ed) *Implementing the Right to Development: The Role of International Law* (Friedrich-Ebert-Stiftung, 2008) 17; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm 276/2003 (2009) AHRLR 75 (ACHPR 2009) para 298.

none of the other aspects of development will work either; this implies that politics and the institutional agency of the state are instrumental for development policy-making and cannot be taken for granted, lest perilous mistakes be made.[70]

4. Conclusion: Right to development prospects for Zimbabwe

Acknowledging that land is of strategic importance in creating development, as much as the white minority in Zimbabwe took possession of and used land to improve their standards of living, we submit that the dispossessed and impoverished majority black population are equally entitled to and evidently more in need of the land for the same purpose. The right to development is guaranteed to all peoples equally. The black people in Zimbabwe would not have had the opportunity to participate in, contribute to or benefit from development had the land and, of course, the agriculture-driven economy remained under the ownership and control of the white farmers. To the extent that realisation of the right to development entails justice and fairness and recourse to the rule of law, the right to ownership and control of the land by the black population in Zimbabwe is indisputable. Gumbo affirms that the radical land repossession campaign was 'a legitimate vehicle to address the legacies of colonialism'.[71] With the economy steadily recovering as a result of the productive use of the land, as illustrated,[72] we argue that the land repossession in Zimbabwe fulfilled a legitimate right to development expectation.

Many Zimbabweans did not benefit from the land redistribution programme and are therefore unfairly excluded and deprived of the opportunity for development. Article 2(3) of the Declaration on the Right to Development and section 13 of the Zimbabwean Constitution enjoin the government to adopt appropriate national policies to ensure that the context for development effectively guarantees constant improvement in the well-being of the entire population and of every individual on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting from the development process. In addition to consolidating land ownership rights for indigenous people, development also requires an enabling political environment that guarantees policy certainty on measures for eradicating obstacles to development, such as executive corruption, nepotism, abuse of power, and misappropriation of state resources for personal and partisan gains.

How to cite:

Carol Chi Ngang and Garufu Paradzai 'The Land Question, Economic Collapse and the Right to Development in Zimbabwe' (2025) 5 *Turf Law Journal* 115-133.

70 Fukuyama, F 'The Role of Politics in Development' Centre for Development and Enterprise Insight (2023) 1.

71 Gumbo (note 46) 357.

72 Hiney, F 'Sowing the Seeds of a Comeback: Zimbabwe's Agricultural Revival' *Forbes Africa*, 9 August 2025 <https://www.forbesafrica.com/current-affairs/2025/08/08/sowing-the-seeds-of-a-comeback-zimbabwes-agricultural-revival/> accessed 4 September 2025; Chilamphuma, E 'Zimbabwe Economic Recovery Driven by Mining, Agriculture and Tourism' *Further Africa*, 2 July 2025 <https://furtherafrica.com/2025/07/02/zimbabwe-economic-recovery-driven-by-mining-agriculture-and-tourism/> accessed 4 September 2025.

Received: 10 November 2024, Accepted: 15 February 2025, Published: 10 April 2025, Doi: https://doi.org/10.62726/tlj.v5.51

Water Resource Protection in Africa's Mining Sector: A Nigerian Perspective

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Abstract

Extractives from mining pollute water sources in mine communities, resulting in severe impacts on the health of people, animals, aquatic life and agricultural land. Mining operations can lead to competition for water resources between host communities and companies, resulting in social conflicts. This is the experience in Nigeria, where the economy depends strongly on the extractive industries. Currently, the mining industry is one of the sectors considered for economic development in Nigeria. Although benefits can be derived from the development of mineral resources in the country, it is necessary to consider the adverse impacts of the activity. This article examines the current state of water resource management in mining and highlights the effects of mining activities on water, as well as the challenges involved in Nigeria. It argues that mining has an adverse impact on water quality and poses a significant risk to the communities surrounding mines. It identifies and examines the relevant laws in the Nigerian mining industry, determining the extent to which they protect water during mining operations. Considering the challenges posed to water protection in Nigeria, the article finds that the government's response to the problems surrounding water use in mining is inadequate. It draws lessons from other countries and suggests that the government should strengthen national laws, monitor the use of water by industries, and ensure that they minimise their impact on water resources in Nigeria through sustainable mining practices.

Keywords

water, mining, mining impacts, mining industry, Nigeria

1. Introduction

Mineral resources are sources of wealth and are beneficial to countries, especially those endowed with them. The solid mineral industry in Nigeria is gradually becoming a significant contributor to the economy, both in terms of its prospects and its impact on economic growth. However, mining can be extremely harmful and destructive if not regulated effectively, as evidenced by abuses and disasters worldwide. Air and water

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pollution; the devastation of fertile lands; the loss of biodiversity, wildlife, farmlands and buildings; and the violation of the human rights of host communities such as their rights to life, food, water, culture, health and a healthy environment are outcomes of the poor regulation of mining operations. African governments, particularly the Nigerian government, must make efforts to mitigate these environmental impacts, especially with regard to water resources.

Mining is closely linked to water-related issues, including access to water and water quality.[1] These problems can occur where mines are located in areas that rely on the same source of water for drinking or agriculture.[2] Water resources can be categorised into two main types: surface water, which includes rivers, streams, and springs, and groundwater, which encompasses boreholes and wells. The use and management of water resources can be severely impacted in mining areas, resulting in reduced water supply and compromised quality. Mining is one of the most water-intensive industries.[3] Mines obtain water from the ground, streams, lakes, rivers or commercial water suppliers.[4] The mining industry utilises water for various purposes, including mining processes, dust suppression, extraction processes, and site maintenance.[5] Certain mining sites can also be located in areas where access to water is limited, which exacerbates the scarcity of water. Water scarcity poses a significant challenge to the mining industry, as the mining process relies on a consistent and long-term supply of water. Hence, water resources must be protected. The legal protection of water resources in the mining industry across Africa is an area of growing concern as the continent grapples with increasing mining activity, water scarcity and the need to protect vital ecosystems. The protection of water resources encompasses various activities that aim to safeguard and enhance the quality and quantity of these resources.[6]

This article examines the risks posed by mining activities to water resources and the degree to which they are protected, particularly in the Nigerian mining industry. It further examines the methods adopted by the mining industry globally to protect water resources and suggests ways to address the challenge of effective water resource management in the mining industry in Nigeria and Africa as a whole. The article examines the key laws in South Africa and Kenya to draw important lessons for Nigeria.

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1 Thomashausen, S, Maennling, N & Mebratu-Tsegaye, T 'A Comparative Overview of Legal Frameworks Governing Water Use and Water Discharge in the Mining Sector' (2018) 55 *Resources Policy* 143.

2 Ibid.

3 McNeill, D, Tang, M & Steel, A 'Water Scarcity is Greatest Risk to Metals and Mining' FitchRatings, 8 July 2020 <https://www.fitchratings.com/research/infrastructure-project-finance/water-scarcity-is-greatest-risk-to-metals-mining-08-07-2020> accessed 19 February 2022.

4 Christiansen, B '6 Ways to Improve Water Conservation in Mining Operations' 13 August 2021 <https://www.watertechonline.com/industry/article/14207319/6-ways-to-improve-water-conservation-in-mining-operations> accessed 19 February 2022.

5 Ibid.

6 United States Environmental Protection Agency 'Basic Information about Source Water Protection' <https://www.epa.gov/sourcewaterprotection/basic-information-about-source-water-protection> accessed 17 April 2022.

2. Mining developments in Nigeria

Nigeria has been a mono-product economy since the discovery of oil, depending solely on the income from crude oil exploration. The decline in the price of crude oil between 2014 and 2016 negatively impacted the country's earnings, leading to a recession.[7] With the recession, there was a push for diversification from the oil sector to the mining sector, an aspect of the country's economy that had been neglected since the discovery of crude oil. Before the recession, the federal government had taken steps to overhaul the solid mineral industry, aiming to make a significant contribution to the economy. In 2008, the Nigerian Minister of Solid Minerals Development (now Mines and Steel Development) initiated the development of seven mineral resources – coal, barytes, bitumen, gold, iron ore, lead/zinc and limestone – that were considered significant because the country has them in substantial quantities that can sustain mining for an extended period.[8] The development and exploration of these resources will provide potential opportunities for economic growth, contribute to the country's gross domestic product (GDP), and enhance infrastructural development.[9]

Currently, despite the country's vast resources, the mining sector makes a relatively insignificant contribution to the Nigerian economy. The Minister of Mines and Steel Development reported that the sector declined from 5.6 per cent in 1980 to about 0.33 per cent.[10] Challenges to the development of the sector, as identified by the Minister of Mines and Steel Development, include insufficient geodata and geological knowledge, weak governance, and poor capacity to implement and enforce mining regulations.[11]

3. The importance of water in mining operations and the impact of mining activities on water resources

Water is a key driver of economic and social development in many areas of Nigeria. Groundwater is a viable and critical source of water used for domestic purposes, livestock, irrigation, farming, and industrial purposes. Artisanal and small-scale mining, as well as

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7 The World Bank 'Nigeria at a Glance – Overview' <https://www.worldbank.org/en/country/nigeria/overview> accessed 16 November 2024.

8 Federal Republic of Nigeria – Nigeria Extractive Industries Transparency Initiative (NEITI) 'Scoping Study on the Nigerian Mining Sector' October 2011 <https://documents1.worldbank.org/curated/en/647231468292929219/pdf/Nigeria0scopin0Draft0Report00510911.pdf> accessed 16 November 2024; Oladunjoye, O & Okonkwo, N 'The Mining Sector in Nigeria' 1 December 2015 <https://ia601009.us.archive.org/8/items/KWMTheMiningSectorInNigeria/KWM%20_%20The%20mining%20sector%20in%20Nigeria.pdf> accessed 3 January 2025.

9 Gbenga Biobaku & Co 'Mining in Nigeria – The Nigerian Minerals and Mining Act, 2007' 2 <https://www.gbc-law.com/assets/publications/Mining_in_Nigeria.pdf> accessed 16 November 2024.

10 Minister Olamilekan Adegbite said this at a workshop on 'Improving Fiscal Transparency in Nigeria's Mining Sector', organised by Global Rights in collaboration with the Nigeria Extractive Industries Transparency Initiative (NEITI) in Abuja. See Onyedinefu, G 'Mining Sector's Contribution to GDP Remains Low Despite Potentials – Minister' *Business Day*, 2 March 2022 <https://businessday.ng/news/article/mining-sectors-contribution-to-gdp-remains-low-despite-potentials-minister/> accessed 17 April 2022.

11 Onyedinefu ibid.

large-scale mining, have contributed to soil and water pollution. Surface water bodies in and around large urban areas in Nigeria are frequently of poor quality due to pollution. The surface waters in and around many cities are nearly toxic and cannot support an aquatic ecosystem.[12]

Water contamination implies that less water is available for consumption and environmental processes, and a huge amount of revenue would be required to clean up the contaminated water.[13] Mining projects significantly impact on water quality and the availability of water resources in the vicinity of the project. Pollution of air, water and land are outcomes of mineral development. The waste generated after the removal of minerals, which contain acid that generates heavy metals, is often left on the surface of the ground in piles and is a source of water pollution.[14] The bedrock walls from which minerals are excavated are also a source of metal pollution and are a consequence of mining.[15]

Acid mine drainage is another adverse effect of mining. It is regarded as a threat to water resources. This occurs when sulphides in rocks are excavated and exposed to water and air during mining, which produces sulphuric acid. The acid mine drainage may wash off the mine into streams and rivers, or leach into groundwater. It affects water quality and is harmful to aquatic life. Acid mine drainage also dissolves toxic metals, such as copper, aluminium, lead, and mercury, from surrounding rock. Such metals can be lethal to humans and animals. Acid mine drainage can be perpetually harmful because the damage it causes can persist long after a mine is closed. According to a study conducted in the Enugu metropolis, acid mine drainage pollution resulting from coal mining activities affects the quality of both surface and groundwater resources.[16] Streams flowing from mine tunnels move through exposed coal seams and bedrock and around waste dumps of mines into water surfaces and groundwater areas. Acid transported by rainwater or drainage is deposited into streams, lakes, rivers and groundwater. Acid mine drainage degrades water quality and impacts aquatic life, resulting in death. Water pollution can be caused by heavy metals such as arsenic, cobalt, copper, lead, silver, and zinc, which can be found in underground mines or rocks that are excavated and come into contact with water. These metals are transported downstream as water washes over the rock surface.[17] Acidic drainage laden with metal emitted from abandoned coal mines can have profound impacts on aquatic life, affecting the growth and reproduction of aquatic plants and animals

12 Federal Ministry of Water Resources 'National Water Resources Policy' July 2016 <https://policyvault.africa/policy/national-water-resources-policy-2/> accessed 15 November 2024.

13 Haggard, EL, Sheridan, CM & Harding, KG 'Quantification of Water Usage at a South African Platinum Processing Plant' (2014) 41(2) *Water SA* 279.

14 CL Mangdong et al 'The Impact of Mineral Development on Water Resources, Effects of Tin Mining on Water Quality: Focus on Some Parts of the Jos Plateau, Nigeria' (2015) 9(4) *Journal of Environmental Science, Toxicology and Food Technology* 61.

15 Ibid.

16 Obiadi, II et al 'Effects of Coal Mining on the Water Resources in the Communities Hosting the Iva Valley and Okpara Coal Mines in Enugu, Southeast Nigeria' (2016) 2 *Sustainable Water Resources Management* 212.

17 Safe Drinking Water Foundation (SDWF) 'Mining and Water Pollution' <https://www.safewater.org/fact-sheets-1/2017/1/23/miningandwaterpollution> accessed 26 February 2022.

and contaminating drinking water.[18] These impacts lead to environmental degradation, including the contamination of water resources, with significant health implications for the affected population.[19] The high level of water pollution is mostly and partly caused by poor control of mining resulting in heavy poisoning.

A study was done in Arufu, in Wukari local government area, Northeastern Nigeria, Taraba State to assess the level of pollution, ecological hazards and health risks related to the presence of metals in the water.[20] It indicated that the water was contaminated by heavy metals. The concentration of the metals in the water exceeded the standard of the World Health Organisation and Nigeria for quality drinking water. The water in the area was heavily polluted with heavy metal and posed great ecological and health risks to children and adults living in the area.

Furthermore, artisanal and small-scale mining, which are prevalent in regions like Niger State, Zamfara and Kebbi, often operate outside the regulatory framework. The activities of the informal sector can lead to unregulated water use and waste disposal, and contamination, which has an adverse impact on local water bodies and ecosystems.

4. Water use and its protection in the mining industries

This section examines the relevant laws regulating the mining industry and discusses the extent to which they address the use of water in the course of companies' operations.

4.1 The protection of water resources under the extant laws in Nigeria

Relevant laws considered include the 1999 Constitution ('CFRN'), the Water Resources Act[21] and the Nigerian Minerals and Mining Act ('NMMA') 20 of 2007.[22] In Nigeria, water resources are managed at both the federal and state levels. State governments have regulations and agencies responsible for managing water resources, though these are sometimes weakly coordinated with federal efforts. The government of the federation is vested with the right to use and control all surface and groundwater, and any watercourse that affects more than one state.[23] The purpose of this is to ensure the coordination of activities that will possibly affect the quality, quantity, distribution, use and management of water.[24] The NMMA is the primary legislation that regulates the mining industry.[25]

18 USGS 'Mining and Water Quality' Water Science School, 8 June 2018 <https://www.usgs.gov/special-topics/water-science-school/science/mining-and-water-quality> accessed 26 February 2022.

19 Obiadi et al (note 16) 212.

20 Adewumi, AJ & Laniyan, TA 'Contamination, Ecological, and Human Health Risks of Heavy Metals in Water from a Pb–Zn–F Mining Area, North Eastern Nigeria' (2023) 21(10) *Journal of Water and Health* 1470.

21 Cap W2, LFN 2004.

22 Cap N162, LFN 2004. Other statutes are the National Inland Waterways Act No. 47, LFN 2004; the River Basins Development Authority Act R9, LFN 2004; the Nigeria Hydrological Services Agency (Establishment) Act, Cap N110A, LFN 2004; the National Water Resources Institute Act, Cap N83, LFN 2004; the Land Use Act, Cap L5, LFN 2004; and the Nigeria Environmental Standards and Regulations Enforcement Agency Act, Cap N164, LFN 2004.

23 Section 1 of the Water Resources Act.

24 Section 1(a).

25 Nigerian Minerals and Mining Act 20 of 2007.

The Act was passed into law in March 2007 and repealed the Minerals and Mining Act of 1999.[26] The 2007 Act comprises six chapters and 165 sections covering matters relating to the ownership and control of minerals; prospecting, mining and quarrying; small-scale mining; possession and purchase of minerals; environmental considerations and the rights of host communities; offences and penalties; and miscellaneous provisions. The Nigerian Minerals and Mining Regulations, 2011 (the 'Regulations') were issued by the Minister of Mines and Steel Development in terms of section 21 of the NMMA. The Regulations define the rules and processes in respect of matters mentioned in the Act and give effect to the implementation of the provisions of the Act.[27] Under the NMMA, mineral resources in Nigeria are vested in the federal government and lands where mineral resources are found in commercial quantities and acquired by the government. According to the 1999 Constitution, mines and minerals are under the control of the federal government.[28] Therefore, the federal government controls all mineral resources in the country.

In Nigeria, the state is under an obligation to protect and improve the environment and safeguard the water, air and land, forest and wild life.[29] The objectives of the Water Resources Act include protecting, conserving and controlling water resources for equitable and sustainable social and economic development and to maintain environmental integrity.[30] The Water Resources Act ensures that water resources are allocated and distributed for all uses.[31] The Minister can grant licences for activities such as the diversion of water and impounding water for mining purposes, including the discharge of waste water into any watercourse.[32] Individuals are not allowed to exploit mineral resources, divert or impound water for mining purposes, except as provided for in the NMMA.[33] During mining operations, individuals cannot pollute or cause to be polluted any water or watercourse within the area leased for mining or beyond the area.[34] Persons who use water in any way connected to mining operations must ensure that such water does not contain injurious substances in quantities that will be adverse to animal or vegetable life where such water leaves the area of mining operations.[35] In addition, managers of mines are required to provide ample measures to safeguard people, especially the host community, from dangers related to the storage of tailings; to reduce the effect of air pollution; and to ensure that mine waste is properly treated prior to final disposal to prevent contamination, including air and water pollution.[36] Compensation must be paid by a licensee or lessee to the owner or occupier who suffers from the pollution of any source of water meant for domestic and other purposes caused by mining operations.[37]

26 Act 34 of 1999, Cap M12, LFN 2004.
27 Regulations 3 of Nigerian Minerals and Mining Regulations 2011.
28 Item 39, Exclusive Legislative List, Part I Second Schedule of the CFRN.
29 Section 20 of the CFRN.
30 Section 1(a) of the Water Resources Act.
31 Section 1(b) of the Water Resources Act.
32 Section 4(1)(f) of the Water Resources Act.
33 Section 2(1) of the NMMA.
34 Section 123 of the NMMA.
35 Section 124 of the NMMA.
36 Section 125(1)(b) and (e) of the NMMA.
37 Section 125(b) of the NMMA.

A mineral title holder must deposit the required quantity of tailings prescribed by regulations. The holder is not allowed, except with the permission of the Mines Inspectorate Department, to deposit a larger amount of tailings in any natural watercourse.[38] The Mines Inspectorate may authorise the deposit of larger quantities of tailings than those allowed by the regulations, subject to an application by the mineral title holder.[39] The mineral title holder is expected to ascertain concerns, such as the likelihood of conflict over resources such as water or sacred areas in neighbouring areas,[40] and to identify options to prevent and reduce conflict, and compensate affected people.[41] Mining companies in Nigeria are required to conduct environmental impact assessments (EIAs) for projects that may have a significant environmental impact. This includes assessing the potential effects of mining on water quality and availability, and ecosystems. The EIA process is critical for ensuring that water resources are considered in the planning and operation of mining projects.

Despite these provisions, water pollution still persists. Mining activities continue to have an adverse impact on the environment. This may be due to the poor enforcement of the laws, leading to their violation by mining companies. Mining operations, especially in water-scarce areas, can lead to conflicts over water resources among mining companies, local communities, and agricultural sectors. The growing demand for water resources exacerbates these conflicts. Additionally, climate variability, such as droughts or floods, can impact water availability and complicate water resource management in mining areas, particularly in regions where water scarcity is already a concern. The reduction of water for human consumption contributes to water scarcity, which affects the human population. More than 40 per cent of people are affected by water scarcity, which is likely to increase as temperatures rise.[42] It has been projected that, by 2050, one in four people will suffer recurrent water shortages.

5. Water use and its protection in the mining industries

At the global level, international organisations and laws promote sustainable mining. The International Council on Mining and Metals (ICMM) is an international organisation that promotes a 'safe, fair and sustainable mining and metals industry'. Members of the ICMM are expected to implement mining principles as a criterion of their membership. The mining principles provide environmental, social and governance requirements for the mining and metals industry. Some of these principles are particularly relevant to water stewardship: respect for human rights; implementing effective risk-management strategies to address potential mining impacts; adopting practices and methods that allow for continuous improvement in environmental performance issues like water stewardship, energy use and climate change; conserving biodiversity; and proactively engaging stakeholders on challenges related to sustainable development.

38 Section 126(2) of the NMMA.
39 Section 126(3) of the NMMA.
40 Regulation 182(2).
41 Regulation 182(3)(b).
42 <https://www.undp.org/sustainable-development-goals/clean-water-and-sanitation> accessed 15 November 2024.

In order to curb the challenges associated with water use by the mining industry, while certain ways are suggested to conserve water in the mining industry, this article focuses on ways of encouraging effective and sustainable water management in the mining industry. Due to the significant impact of mining activities on the quality and quantity of water resources, there is a need for transparency and disclosure on the management of water use.[43] The pressure to act more sustainably in the way mining industries use water is similar to the pressure to protect human rights. ICMM members have agreed to manage water resources in a manner that is fair and equitable through the implementation of certain commitments towards water.[44] In January 2017, the ICMM released its position statement setting out the approach of its members to water stewardship, the Water Stewardship Framework.[45] In the framework, water stewardship refers to using water 'in ways that are socially equitable, environmentally sustainable, and economically beneficial'.[46] Members of the ICMM commit to being transparent and accountable by reporting water risks, management activities and performance; managing water at operations effectively; and collaborating to achieve responsible and sustainable water use.

The African Union (AU) at the regional level has adopted several frameworks aimed at promoting sustainable development, including the Africa Mining Vision (AMV), which emphasises the need for the sustainable and equitable use of natural resources. The AMV encourages responsible water use, particularly in the mining sector, and calls for the enforcement of strict regulations to minimise environmental harm. The African Commission on Human and Peoples' Rights Resolution on Human Rights-Based Approach to Natural Resources Governance[47] states that parties must ensure that human rights are respected in matters such as the exploration of natural resources, the management of toxic waste, and the establishment of a legal framework for the sustainable development of natural resources and water. States must strengthen regional efforts to promote laws on natural resources that respect everyone's human rights and require transparent, maximum and effective community participation in decision-making about the benefits of any development on their land or other resources that affects them in any substantial way. Additionally, international standards such as the United Nations Guiding Principles on Business and Human Rights outline the responsibilities of businesses, including those in

43 International Council on Mining and Metals (ICMM) 'Implement Water Stewardship Practices' <https://www.icmm.com/en-gb/environmental-stewardship/water/implement-water-stewardship-practices> accessed 19 February 2022.

44 Ibid.

45 International Council on Mining and Metals (ICMM) 'Water Stewardship Framework' <https://www.icmm.com/website/publications/pdfs/environmental-stewardship/2014/guidance_water-stewardship-framework.pdf > accessed 19 February 2022.

46 International Council on Mining and Metals (ICMM) 'Water Stewardship: Position Statement' <https://www.icmm.com/en-gb/about-us/member-requirements/position-statements/water-stewardship> accessed 22 February 2022. See also Alliance for Water Stewardship 'The AWS International Water Stewardship Standard' <https://a4ws.org/the-aws-standard-2-0/> accessed 22 February 2022.

47 African Commission on Human and Peoples' Rights (African Commission), at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, The Gambia, ACHPR/Res.224 (LI) 2012 <http://www.achpr.org/sessions/51st/resolutions/224/> accessed 16 November 2024.

the mining sector, to respect human rights, which includes ensuring that local communities have access to clean water and that companies do not contribute to environmental harm.

South Africa and Kenya are considered, in order to draw lessons for Nigeria as regards the protection of water resources in the course of mining development. Mining is the bedrock of the economy of these countries, with South Africa having a long history of mining, and they encounter environmental challenges, including acid mine drainage, water scarcity, and pollution from mining activities. The countries have enacted laws and policies to safeguard water resources in the context of mining.

5.1 Legal protection of water resources in South Africa

The mining industry in South Africa is described as the bedrock of the country's economy.[48] Mining contributed 7.3 per cent to the GDP in 2018 and the industry exported R312 billion worth of commodities.[49] In 2018, mining contributed R93 billion to fixed investment,[50] and the sector employed 456 438 people.[51] In the 2017/2018 fiscal year, R7.6 billion was paid in royalties and the industry paid R22 billion in company taxes.[52] The mineral industry in South Africa, which constantly contributes to the country's economy, is largely supported by gold, diamond, coal and platinum production.[53] In 2023, the industry added around 202.05 billion South African rand (approximately 11.18 billion USD) to the country's GDP.[54] The industry contributed 7.53 per cent of the GDP and employed about half a million people directly.

The abundance of mineral resources has led to significant investment by large-scale mining companies. The Mineral and Petroleum Resources Development Act (MPRDA)[55] and the Constitution of South Africa, 1996 protect the environment against pollution. According to section 24(b) of the Constitution, the environment must be protected for the benefit of present and future generations through legislative measures that prevent pollution and environmental degradation, promote conservation, and ensure the sustainable development of natural resources while promoting economic and social development. One of the objects of the MPRDA is to give effect to section 24 of the Constitution to ensure that mineral resources are developed in an orderly and ecologically

48 South African Government 'Minerals and Mining Policy of South Africa: Green Paper' <https://www.gov.za/documents/minerals-and-mining-policy-south-africa-green-paper> accessed 16 November 2024.

49 Minerals Council South Africa 'Facts and Figures – Pocketbook 2018' 8 <https://www.mineralscouncil.org.za/industry-news/publications/facts-and-figures> accessed 16 November 2024.

50 Ibid.

51 Ibid 4.

52 Ibid 8.

53 Department of Minerals and Energy, Republic of South Africa 'South Africa's Mineral Industry 2001/2002' 19th edition (2002) 1.

54 Natalie Cowling Statista 'Value added by the mining industry to the Gross Domestic Product (GDP) in South Africa from 2016 to 2023' 25 June 2024 <https://www.statista.com/statistics/1121214/mining-sectors-value-added-to-gdp-in-south-africa/#:~:text=The%20mining%20sector%20forms%20an,percent%20from%20the%20previous%20year.> accessed 31 March 2025.

55 Act 28 of 2002.

sustainable manner.[56] The holder of a mining right can, subject to the National Water Act[57] (NWA), use water from natural springs, lakes, rivers or streams located on the land which is related to the mining right.[58]

The preamble of the NWA recognises that water resource management aims to achieve sustainable water use for the benefit of all water users. It further recognises the importance of the protection of water resources to realise the sustainability of the water resources in the interests of all water users. The NWA purports to ensure that the water resources in the country are protected, used and managed in ways that consider meeting the needs of future and present generations, promoting equitable access to water and the sustainable and beneficial use of water in the public interest, and preventing the pollution and degradation of water resources, including meeting international obligations.[59] Protection as regards water resource means

> [m]aintenance of the quality of the water resource to the extent that the water resource may be used in an ecologically sustainable way; prevention of the degradation of the water resource and rehabilitation of the water resource.[60]

The country's water resources must be protected, utilised, developed, conserved, managed, and controlled in accordance with the national water strategy.[61] The national government, through the Minister of Water Affairs and Forestry, is obligated to ensure the protection of water resources so that they are used, managed and controlled in a sustainable and equitable manner for the benefit of all.[62] The national government is charged with the overall responsibility for water resource management, and the NWA provides for a national water resource strategy, which is a framework for the use, development, management and control of water resources in the country.[63] The strategy is binding on all relevant authorities and institutions. It must be reviewed at intervals of not more than five years.[64] The contents of the national water strategy are prescribed in section 6 of the NWA.

Chapter 3 of the Act focuses on the protection of water resources. The chapter states that the protection of water resources is related to their use, development, conservation, management and control. It outlines necessary measures to protect water resources, which can be developed within the context of the national water resource strategy, as well as measures to prevent pollution and address its effects. Pollution is described as the 'direct or indirect alteration of the physical, chemical, or biological properties of a water resource,' which renders it less fit for any use, harmful to people, aquatic and non-aquatic life, and detrimental to water quality and property.[65] The owner, occupier, or user of the land where

56 Section 2(h) of the MPRDA.
57 36 of 1998.
58 Section 5(3)(d) of the MPRDA.
59 Section 2 of the NWA.
60 Section 1(1) (xvii) of the NWA.
61 Section 5(3) of the NWA.
62 Section 3(1) of the NWA.
63 Chapter 2 Part I of the NWA.
64 Section 4(b) of the NWA.
65 Section 1(xv) of the NWA.

any activity causes or is likely to cause pollution of water resources must take reasonable measures to prevent the occurrence or recurrence of such pollution.[66] The measures to be taken are listed in sub-section (2). Persons must also take reasonable measures to prevent, reduce and remedy the effects of any incident or accident where a substance pollutes or is likely to pollute a water resource. [67]

Water use is described in the NWA as taking and storing water, activities that reduce stream flow, the discharge and disposal of waste, activities that adversely impact water, altering a watercourse, extracting water from underground sources for specific purposes, and recreational activities.[68] Some activities carried out by mining companies are described under the general principles of water use in the NWA. These include collecting water from a watercourse; diverting the flow of water in a watercourse; discharging waste or waste water into a water resource through a pipe, canal or sewer; disposing waste in any manner that may impact negatively on water; and disposing water containing waste from any industry or power generation process in any manner[69] Water use must be licensed, except in circumstances mentioned in the NWA.[70] The use of water is subject to any condition provided by the relevant authority, limitation, restriction or prohibition in the NWA or any relevant law, and in matters concerning the disposal or discharge of waste or water containing waste, the person authorised to use water must comply with any applicable waste standards or management practices provided in the NWA, and may not waste that water.[71]

A Water Tribunal is set up to hear appeals against decisions made by the relevant authorities. The tribunal is an independent body with jurisdiction in all the provinces, and it can conduct hearings anywhere in the country.[72] Persons can bring appeals to a High Court over a decision of the tribunal on a question of law.[73] Tribunal members must be knowledgeable in the law, engineering, water resource management or related fields.[74] Disputes may be settled through mediation and negotiation.[75] The NWA makes provision for the court to determine compensation for harm or loss due to an offence under the NWA or for damage caused to water resources.[76] After such determination, the court may award damages for the loss or harm suffered, order the accused to pay the cost of any remedial procedures, and order that the remedial measures to be implemented are carried out by the accused or the relevant management institution.[77]

In relation to the protection, development, use, conservation, management, and control of water resources, the National Water Resource Strategy (NWRS) was developed

66 Section 19(1) of the NWA.
67 Section 20(4) and (1) of the NWA.
68 Chapter 4 of the NWA.
69 Section 21 of the NWA.
70 Section 22(1) of the NWA.
71 Section 22(2)(a)–(d) of the NWA.
72 Section 146(1) and (2) of the NWA.
73 Section 149 of the NWA.
74 Section 146(4) of the NWA.
75 Section 150(1) of the NWA.
76 Section 152 of the NWA.
77 Section 153 of the NWA.

to achieve these goals sustainably. The second edition builds on the first edition published in 2004. South Africa is facing water scarcity and challenges relating to environmental degradation, security of supply, resource pollution, and inefficient water use.[78] The NWRS is a legal instrument for implementing the NWA and it is binding on all relevant authorities and institutions implementing the Act. The NWA requires that the strategy be reviewed every five years. The NWA recognises that the role of water conservation and water demand management (WCWDM) is vital in water resource management so that all user sectors have equitable access to the desired quantity, quality and reliability of water.[79] The strategy states that integrating and implementing WCWDM into operations and creating a water-wise business culture should be prioritised in the mining industrial sectors.[80] This will contribute to the sustainable use of water. Other plans include South Africa's vision for 2030, which demands sufficient water resources.

5.2 Legal protection of water resources in Kenya

The mining sector in Kenya has the potential to make a significant contribution to Kenya's GDP. In the first half of 2021, mining and quarrying added KSh 45.4 billion (approximately USD 402 million) to Kenya's GDP.[81] The annual value added by the sector in 2020 was KSh 77.5 billion (about USD 686 million). However, despite the country's potential natural resource wealth, there are challenges, such as negative mining impacts on local communities. A specific challenge is the degradation of water resources, one of the causes of which is poorly managed waste discharge from industries and sewage channels.[82] To address these challenges, certain steps were taken and laws and policies were implemented. Some relevant laws and policies will be examined to determine the extent to which they protect the country's water resources.

Water resources are described generally as part of natural resources in the Constitution of Kenya. The Constitution describes natural resources as

> the physical non-human factors and components, whether renewable or non-renewable, including–
>
> (a) sunlight;
>
> (b) surface and groundwater;
>
> (c) forests, biodiversity and genetic resources; and
>
> (d) rocks, minerals, fossil fuels and other sources of energy.[83]

78 Department of Water Affairs, Republic of South Africa 'National Water Resource Strategy – Water for an Equitable and Sustainable Future' 2 ed (June 2013).

79 WCWDM is the foremost reconciliation strategy to balance water supply and demand.

80 Department of Water Affairs, Republic of South Africa (note 80) 55.

81 Statista 'Value added by the mining and quarrying sector to the Gross Domestic Product (GDP) in Kenya from 2018 to 2022' <https://www.statista.com/statistics/1167552/value-added-by-mining-and-quarrying-to-the-gdp-at-current-prices-in-kenya> accessed 16 November 2024.

82 Ministry of Water and Irrigation 'The National Water Resources Management Strategy First Edition (NWRMS) 2006–2008' 2.

83 Article 260 of the Constitution of Kenya, 2010.

Water resources also include any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below ground.[84] Natural resources include water resources, both surface and groundwater. In addition, land is defined to include any body of water on or under the surface, as well as natural resources.[85] The Constitution guarantees the effective use and management of these resources. The state is under an obligation to ensure that the environment and natural resources are exploited, used and managed sustainably, and that the accruing benefits are shared equitably.[86] This implies that water resources must be managed and used sustainably. The state is also required to ensure that the natural resources, which include water resources, are used for the benefit of Kenyans.[87] Every person must cooperate with the state's organs and other individuals to ensure that natural resources are developed and utilized sustainably.[88] Furthermore, the Constitution guarantees the protection of the right to clean and safe water in adequate quantities.[89] It is recognised as part of the economic and social rights in the Constitution. Article 42 of the Constitution, which spells out the right to a clean and healthy environment, seems to consider the obligations in article 69.

The Mining Act[90] is applicable to the development of mineral resources in the country.[91] The Cabinet Secretary who is charged with the responsibility of mining, the Principal Secretary, and any other person who administers the Act must be guided by the principles contained in the Constitution, such as the national values and principles of governance;[92] the enactment of legislation by Parliament that ensures the investment values and principles of public service;[93] the principles of public finance;[94] and the values and principles of public service.[95] Under the Mining Act, the holder of a licence or permit is expected to use land according to the terms of the permit or licence and must ensure that 'the seepage of toxic waste into streams, rivers, lakes and wetlands is avoided and that disposal of any toxic waste is done in the approved areas only'.[96] The right or entitlement conferred under a mineral right will not exempt a person from complying with the Water Act[97] provisions that relate to the right to use water from any water resource.[98]

According to the Water Act, every water resource is vested in the state[99] and the minister has the power of control over every water resource in accordance with the Act.[100]

84 Section 2(1) of the Water Act.
85 Article 260. See also article 62(1)(i) of the Constitution of Kenya, 2010.
86 Article 69(1)(a) of the Constitution of Kenya, 2010.
87 Article 69(1)(h) of the Constitution of Kenya, 2010.
88 Article 69(2) of the Constitution of Kenya, 2010.
89 Article 43(1)(d) of the Constitution of Kenya, 2010.
90 12 of 2016.
91 Section 2(1) of the Mining Act.
92 Article 10 of the Constitution of Kenya, 2010.
93 Article 66(2) of the Constitution of Kenya, 2010.
94 Article 201(c) and (d) of the Constitution of Kenya, 2010.
95 Article 232 of the Constitution of Kenya, 2010.
96 Section 179(b) of the Mining Act.
97 Act 8 of 2002.
98 Section 177 of the Mining Act.
99 Section 3 of the Water Act.
100 Section 4 of the Water Act.

The right to use water from any water resource is also vested in the minister.[101] The Act establishes the Water Resources Management Authority,[102] and one of its functions is to regulate and protect the quality of water resources from adverse impacts.[103] A national water resources management strategy (NWRMS) must be formulated to be published in the *Gazette* in line with the manner in which water resources would be used, conserved, managed and protected,[104] and to be periodically reviewed by the Minister.[105] The NWRMS prescribes the principles, objectives, procedures, and institutional arrangements for the management, protection, use, development, conservation, and control of Kenya's water resources.[106] The minister and relevant bodies must consider and implement the strategy as they exercise their powers or perform their functions.[107]

The NWRMS was developed to address the challenges encountered in Kenya.[108] The strategy is enshrined in the Water Act of 2002 and focuses on the management of water resources in the country. Principles adopted in the formulation of the strategy include achieving equitable access to water, promoting the sustainable use of water, and ensuring the efficient and effective use of water for optimal social and economic benefits. The strategy considers the 'user pays' and 'polluter pays' principles. Apart from implementing mechanisms that promote equal access to water for all Kenyans, other objectives include enhancing the availability of good-quality and sufficient water resources, developing policies and mechanisms for disaster management, and promoting the integration of sectoral and regional water policies.

With regard to implementing mechanisms for an integrated approach to land and water resources management, approaches to preventing pollution were considered.[109] This involves minimising pollution, and recycling waste to minimise present and future risks posed by toxic substances to people's health and to the environment. Those responsible for any pollution must take the necessary actions to reduce pollution and start recycling in their production systems.[110] Precautionary measures will also need to be implemented to prevent hazardous substances from contaminating water.

Kenya continues to make changes to its strategy plans to ensure that water resources are protected. This is evident in the enactment of a new Water Act (in 2016) and the development of another Water Resources Authority Strategic Plan[111] by the Water Resources

101 Section 5 of the Water Act.
102 Section 7 of the Water Act.
103 Section 8(1)(e) of the Water Act.
104 Section 11(1) of the Water Act.
105 Section 11(2) of the Water Act.
106 Section 11(3) of the Water Act.
107 Section 11(4) of the Water Act.
108 Ministry of Water and Irrigation (note XX) 11.
109 Ibid.
110 Ibid.
111 The Water Resources Authority (WRA) is a corporation under the Ministry of Water and Sanitation established under the Water Act of 2016; it was previously the Water Resources Management Authority (WRMA) under the former Water Act of 2002. The first Strategic Plan was for 2012-2017.

Authority.[112] The current plan is the Strategic Plan 2018–2022, which introduced legal and institutional changes at the national level and reforms at the county level.

6. Conclusion

Although benefits can be derived from the development of mineral resources in Nigeria, these are not without adverse effects. A significant adverse impact of the extractive industries is the challenge posed by mining operations to local communities' water resources, in addition to the challenges of accessing clean water in Nigeria. Mining industries have a negative impact on the environment by contaminating drinking water and disrupting the growth and life of plants and animals. Although the extractive industry contributes to economic growth, it is crucial to consider the effective management of both surface and groundwater resources. The mining industry in Nigeria needs to consider alternative sources to reduce their water use and waste. One important lesson drawn from examining the relevant laws of South Africa and Kenya is the importance accorded to the sustainable use of water. These countries ensure the protection of water resources and the use and management of these resources must meet the needs of present and future generations. Relevant policies promote equitable access to water and the sustainable and beneficial use of water. In South Africa, protection means preventing the degradation of the resources and ensuring their rehabilitation. Likewise, in Kenya, natural resources must be used and managed sustainably. Additionally, a tribunal has been set up to hear appeals against decisions made by the relevant authorities. Compensation can also be determined in a court of justice.

Therefore, sustainable practices should be encouraged in the mining industry in Nigeria to protect water resources, in line with Sustainable Development Goal 6 on clean water and sanitation. This will contribute to achieving universal and equitable access to safe and affordable drinking water by 2030.[113] Taking steps towards pollution reduction, preventing dumping, and minimising the release of hazardous chemicals improves water quality, a target for 2030. In promoting sustainable mining practices, mining companies should be required to adopt recognised best practices for water management, such as implementing proper waste management systems to prevent the contamination of water resources. Monitoring systems should be established, including community-based forums, to enable stakeholders to voice their concerns and provide feedback on water management practices, thereby ensuring that local needs are effectively addressed. The government should strengthen conflict resolution mechanisms to mediate disputes and ensure that mining activities do not harm local water resources. To address water scarcity, companies should be encouraged to invest in community water projects and infrastructure, ensuring the availability of clean water for local populations, particularly in areas affected by water scarcity.

112 Others include Vision 2030, the National Water Master Plan 2030, the Kenya National Adaptation Plan 2015-2030, and the Sustainable Development Goals (SDGs).

113 United Nations Development Programme (UNDP) 'Goal 6 Clean Water and Sanitation' <https://www.undp.org/sustainable-development-goals/clean-water-and-sanitation> accessed 15 November 2024.

At this point, it is important to push the discussion beyond countries in Africa, particularly at the regional level. The matter then becomes a collective responsibility involving countries, civil societies, mining companies and relevant stakeholders for the effective protection of water resources. The legal framework and institutions of the regional government for addressing the risks posed by mining companies to water resources can be examined and discussed, as well as the way forward.

How to cite:

Oluwatosin B Igbayiloye and Oluwabunmi L Niyi-Gafar 'Water Resource Protection in Africa's Mining Sector: A Nigerian Perspective' (2025) 5 *Turf Law Journal* 134-149.

Received: 25 March 2025, Accepted: 10 April 2025, Published: 19 June 2025, Doi: https://doi.org/10.62726/tlj.v5.64

Navigating the Efficacy of Arbitration as a Tool for Resolving Employment Disputes in Nigeria: Lessons from South Africa

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Abstract

Disputes are inevitable in human interactions and relationships. They occur in every aspect of life, regardless of the situation or relationship. The workplace is no exception. One well-recognised and popular dispute resolution model often adopted in the workplace, apart from litigation, is arbitration. Arbitration is preferred for its less formal nature and the benefit of having a binding and enforceable award. This article examines the nature of arbitration, the employer–employee relationship, arbitration as a dispute resolution process in Nigeria and South Africa, and the lessons learned from South Africa. It also considers the efficacy of arbitration as a mechanism for resolving disputes in Nigeria and South Africa. Additionally, it explores how arbitration can be effectively utilised and institutionalised in Nigeria's employment dispute resolution process by evaluating South Africa's experience, particularly through the activities of the Commission for Conciliation, Mediation and Arbitration (CCMA). The article employs a doctrinal research methodology. It finds that South Africa has robust provisions for arbitration that could be replicated in Nigeria. In conclusion, the article asserts that arbitration is an effective model for resolving employment disputes and serves as a viable alternative to court proceedings or litigation. It recommends the effective use of arbitration to resolve employment disputes in Nigeria.

Keywords

arbitration, dispute resolution, employee, employer, Nigeria, South Africa

1. Introduction

Disputes between employees and employers are a significant global challenge in employment and industrial relations.[1] Disputes make virtually every aspect of the workspace unproductive and hurt the employment relationship. Employment relationships and disputes are inseparable because disputes often arise between the employer and the employee.

1 Obidinma, EOC & Nwachukwu, TN 'Unveiling the Positives of Arbitration Clause in a Contract of Employment' (2023) *African Journal of Criminal Law and Jurisprudence* 135, 135.

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When disputes arise, efforts are made to resolve such disputes. Parties are at liberty to adopt any dispute resolution model. The most common and recognised means of resolving employment disputes is litigation. However, due to its rigidity, delays and strict adherence to procedural rules, litigation has not produced satisfactory results for disputing parties. These shortcomings have led to the need for a more flexible and binding alternative dispute resolution process. An alternative dispute resolution model often adopted by parties is arbitration, which is binding and enforceable against all parties. The origin of arbitration can be traced to the common law and the practice of merchants and traders who submitted their disputes to a specifically selected individual who helped them settle their disputes. Subsequently, laws were enacted to improve the activities of the independent and neutral individual chosen and to make the process binding with an enforceable award.[2]

Arbitration is a broad dispute resolution process that can be adopted to resolve employment disputes.[3] Arbitration is a popular mechanism for resolving disputes. It is flexible and accessible to disputing parties, irrespective of their cultural, political, and social affiliations and location. Rather than resorting to litigation, parties may agree to submit their disputes to arbitration, which has remained an effective means of resolving employment disputes across the globe.

The most important tool of arbitration is the arbitration agreement. An arbitration agreement guides the conduct of the disputing parties who have submitted to arbitration, and the employment-related dispute is no exception. The essence of arbitration is to provide a quick, fair and flexible dispute resolution process. Its affordability, speedy process, selection of experienced arbitrators and its confidentiality have contributed to the success of arbitration in settling employment disputes. Where an employee agrees to submit to arbitration, and the employee has agreed to avoid litigation where disputes arise between the employee and the employer, the employee may resort to litigation only where the parties cannot resolve their disputes and this is provided for in the arbitration agreement.[4] Employers may also choose to maintain the confidentiality of the employment relationship by restricting dispute resolution alternatives to arbitration only.

This study examines the nature of arbitration, the employer–employee relationship, employment disputes, the efficacy of arbitration in settling employment disputes, arbitration in South Africa and Nigeria with lessons from South Africa, and the challenges associated with resorting to arbitration to resolve employment disputes. The study considers South Africa due to its robust provisions on the adoption of arbitration in resolving employment disputes. South Africa has a well-established and effective Commission for Conciliation, Mediation and Arbitration (CCMA) under the Labour Relations Act 1995, compared to the Industrial Arbitration Panel established by Nigeria's Trade Dispute Act.[5] The CCMA

2 Ubanyionwu, CJ 'Origin and Nature of Customary and Common Law Arbitration' (2023) 7(2) *African Journal of Law and Human Rights* 36, 36.

3 Chijoke, C 'The Nature of Arbitration Agreement in Nigeria: An Overview' (2013) <https://www.researchgate.net/publication/325225778> accessed 12 July 2024.

4 Threshold Attorneys 'Arbitration Clauses and the Employment Disputes: The Pros and Cons of Employment Arbitration Agreements in Nigeria' (2020) <https://threshold-attorneys.com/wp-content/uploads/2020/11/DEMAND-NOTICE-3.pdf> accessed 12 July 2024.

5 Cap T18, Laws of the Federation of Nigeria 2004.

provides for a simplified, speedy and flexible dispute resolution process to resolve employment disputes. The CCMA is also regulated by the Commission for Conciliation, Mediation and Arbitration Rules of 2023.

2. The nature of arbitration

Arbitration is the most popular alternative dispute resolution process. It is a voluntary process that can be used to resolve domestic and international disputes. It is often used to resolve disputes arising from commercial or contractual agreements, such as employment. Disputes are submitted by agreement to one or more arbitrators to resolve disputes through a binding and enforceable award.[6] Parties are at liberty to submit their dispute to arbitration and to determine the procedure to be adopted when the need arises. The submission of a dispute to arbitration by parties means that an implied authority is given to an arbitrator to assist them in resolving their dispute. It is a flexible process that allows parties to appoint the arbitrator who will preside over their dispute, to choose the procedure to be adopted, to decide on the venue of arbitration, to determine the applicable law and to apply to set aside an arbitration award if necessary.[7]

Arbitration is a non-legal process that involves an impartial and independent arbitrator who makes a decision based on the evidence presented before him.[8] The arbitrator is often a person who is an expert with special skills in the area of dispute resolution. To make it an effective process, arbitration must involve the voluntary participation and agreement of the parties.[9] Arbitration proceedings are conducted in an informal setting without the application of strict rules of evidence like the adversarial process. Arbitration provides for more private and confidential proceedings in a more relaxed atmosphere. Unlike an open court that is accessible to members of the public, only parties and their representatives are allowed to be part of the proceedings and there is no specific form of proceedings or applicable law because parties determine the form that proceedings will take and the applicable law.[10]

Arbitration can be applied to resolve sensitive and confidential issues that cannot be discussed in an open court.[11] Parties may agree to resort to arbitration before or after the dispute has arisen. This demonstrates the flexibility and autonomy of the parties in arbitration. The major instrument of arbitration as an alternative dispute resolution procedure is the arbitration agreement. This instrument binds parties, authenticates arbitral proceedings, and reflects the relationship between the employer and the employee.

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6 Ibe, CE 'The Machinery for Enforcement of Domestic Arbitral Award in Nigeria – Prospects for Stay of Execution of Non-Monetary Awards: Another View' (2011) 2 *Nnamdi Azikwe University Journal of International Law and Jurisprudence* 304.

7 Ibid.

8 Labour Relations Agency (LRA) 'Arbitration Explained' <https://www.lra.org.uk/sites/default/files/2019-03/Arbitration%20Explained.pdf> accessed 12 July 2024.

9 Ibid.

10 Plavec, K 'The Applicable Law to the Interpretation of Arbitration Agreements Revisited' (2020) *University of Vienna Law Review* 82, 85.

11 Alternative Dispute Resolution Law <https://nou.edu.ng/coursewarecontent/LAW%20517.pdf> accessed 12 July 2024.

An arbitration agreement is a contractual agreement between parties to have their disputes resolved through arbitration. It is a contract separate and distinct from the initial contract. It can take the form of an arbitration clause or a submission agreement. An arbitration clause is an agreement to have disputes resolved by arbitration before such disputes arise, while a submission agreement is an agreement to have disputes resolved by arbitration when such disputes arise. Arbitration is common in commercial transactions and employment contracts because it gives the parties involved the opportunity to resolve their disputes without resorting to court and also maintains the relationship between them.[12] Sometimes, employers may include a mandatory arbitration clause in the contract of employment.

Proceedings in arbitration can take the form of in-person proceedings, or a virtual process, or a hybrid process. Arbitral proceedings are in-person or physical where the arbitrators, the disputing parties, experts and witnesses must be physically present to participate in proceedings, while virtual arbitration proceedings dispense with the physical presence of parties. Virtual proceedings are also known as electronic or online arbitration.[13] It allows parties to take part in proceedings from the comfort of their homes, offices or wherever they choose to be. Virtual arbitration involves the use of technological innovations for service delivery. It makes use of the internet to ensure the transmission of data and electronic communications. Though under-used, it was recognised during the Covid-19 pandemic that led to global restrictions and social distancing.[14]

Arbitration is a private and confidential alternative dispute resolution model that helps parties to resolve their disputes and provides for a binding and enforceable arbitral award. The confidentiality of the arbitral process helps an employee or an employer who wants the dispute resolution to remain confidential, especially where it relates to a messy dispute which they do not want to make public.[15] Arbitration helps parties to resolve their disputes promptly and ensures that employment claims are resolved fairly without violating employment law. Arbitration gives parties considerable control over the process. Resolving employment dispute through arbitration give parties the opportunity to decide on who to appoint as an arbitrator and to express their concern about any irregularities, the procedures to be adopted during the hearing etc.[16] The simplified rules of evidence in arbitration as against the strict rule of evidence often adopted in litigation have contributed to its effectiveness in resolving employment-related disputes. The rules of evidence are often relaxed for easy production of evidence and prompt resolution. Case management is

12 Shonk, K 'What is an Arbitration Agreement?' <https://www.pon.harvard.edu/tag/arbitration-agreement/> accessed 24 March 2025.

13 Schmitz, AJ 'Arbitration in the Age of Covid: Examining Arbitration's Move Online' (2020-2021) 22 *Cardozo Journal of Conflict Resolution* 245.

14 Labanieh, MF, Hussain, MA & Mahdzir, N 'Does E-Arbitration Provide a Suitable Response for the "New Normal" Phenomenon during the Era of Covid-19 Pandemic?' (2021) 6(22) *International Journal of Law, Government and Communication* 215, 215.

15 Frost, P & Freehills, HS 'Arbitration of Employment Disputes' <https://www.blackstonechambers.com/documents/Arbitration_of_employment_disputes.pdf> accessed 1 October 2024.

16 Scheinkman, AD 'Workplace Conflict Resolution through Mediation and Arbitration' (2023) <https://www.namadr.com/publications-conflict-resolution-through-mediation-and-arbitration> accessed 30 September 2024.

flexible and effective in the resolution of disputes, thus creating a line of communication between the employer and the employee as to the applicable law, the venue to be chosen for the hearing, and the appointment of the arbitrator (if necessary).[17] Parties may bring several issues before the tribunal without first determining the jurisdiction of the tribunal to hear or commence proceedings; Parties have access to documents and exercise their autonomous power. The likelihood of parties maintaining their relationship after disputes are resolved is greater in arbitration, compared to litigation, because, apart from the role played by arbitrators, parties can also exercise their autonomous powers.

3. The employer–employee relationship

An employee is someone who is engaged to work for the employer, while an employer is the person or organisation that employs the employee. An employee works for wages or a salary in return for his labour and commitment. An employee is a party who performs services in a legal relationship, or exchanges his professional activities in return for remuneration.[18] An employer, on the other hand, conducts business or commercial transactions with the aim of making a profit.[19] The employer controls the employee under an implied or express contract legally recognised by law.[20] This translates into a work relationship, otherwise known as an employer–employee relationship or an employment relationship.

The employer–employee relationship is a contractual relationship between the employer and the employee in relation to employment terms and is important for the success of any business or organisation. The employer–employee relationship exists when the employer and the employee conclude an agreement that the employee works for the employer in return for the payment of a salary or wages. This relationship is governed by contract and extant laws such as the Nigerian Labour Act and the South African Labour Relations Act.[21] It may be an oral, implied or express agreement where one party agrees to employ someone willing to work as a worker.[22] This agreement is expected to be reduced to writing not later than three months after employment.[23] The contract specifies the rights and duties of the parties, which are contained in the extant laws.[24] These laws comprise the principal legislation that governs the relationship between employers and their employees in the labour market. However, the provisions of the Nigerian Labour Act are limited to employees who engage in manual work or clerical work in private or public establishments.[25] Other laws that regulate the relationship between an employer

17 Frost & Freehills (note 15).
18 Aliyu, MS, Abbas, SMS & Kachalla, D 'The Effect of Remuneration on Employee Job Satisfaction: Descriptive Research of a Public Sector Organisation' (2023) 2(3) *International Journal of Social Science Humanity and Management Research* 177, 178.
19 Muideen, S & Raji, A 'Balanced Employee-Employer Relationship: A Mechanism for Industrial Development in Nigeria' (2016) 13(2) *Bangladesh E-Journal of Sociology* 89, 92.
20 Ibid.
21 Cap T18, Laws of the Federation of Nigeria 2004; Labour Relations Act 66 of 1995.
22 Nigerian Labour Act, s 91.
23 Nigerian Labour Act, s 7.
24 Nigerian Labour Act, ss 7,11, 13-20; South African Labour Relations Act, ss 187, 188 and 197.
25 'Legal Perspectives of Employer-Employee Relationship in the Nigerian Labour Market' (2023) <https://wwwharlemsolicitors.com> accessed 19 March 2025.

and an employee in Nigeria are the Trade Union Act, the Workmen's Compensation Act 1987 (now Employees' Compensation Act 2010), the National Industrial Court Act 2006, the National Industrial Court Rules 2017 and the International Labour Organisation Conventions.

Employment relationships may be managerial relationships or market relationships. It is a managerial relationship when the employer controls the organisation's management, while it is a market relationship when the relationship focuses on labour, working hours, wages or salaries, pensions and other benefits or entitlements.[26] This relationship creates a link between an employee and an employer, thus creating a conducive working relationship between the parties. The relationship between an employer and employee may be for a fixed term, temporary or permanent. At the start of the relationship, there is an imbalance between the employer and the employee because the former has power while the latter has no power.[27] Employment relationship provides a platform for employees to recognise the rights and benefits that come with employment and labour law.[28] The employment relationship gives the employer the legal authority to instruct while the employee is under an obligation to obey lawful instructions relating to their employment.[29]

The relationship involves the voluntary exchange of promises between parties and the demonstration of willingness to work for the mutual gain of the parties.[30] The relationship is regulated by contract with specific reference to the rights and responsibilities that guarantee fairness, productivity, a conducive environment and a harmonious working relationship.[31] The contract may be oral or written, and express or implied, but it should be in writing and must be signed within three months of the start of the contractual relationship.[32] Employers have the right to hire and fire and to set the conditions of employment, and are responsible for paying wages, salaries and benefits; guaranteeing workplace safety and health; conforming with labour laws and resolving employment disputes.[33] Where the employee is a foreigner, the employer must provide language support, relocation assistance and support for dependants; promote an inclusive workplace culture and comply with immigration rules. Employees' responsibilities are to perform their duties as stated in the job description, cooperation, effective communication with colleagues, honesty, ensuring confidentiality of sensitive and private information, and professionalism, among others.[34]

26 Fajana, S *Industrial Relations in Nigeria: Theories and Features* (Lafobet Publishers, 1995).
27 Emudainohwo, E 'Analyzing the Duties of Employer and Employee in the Nigerian Law' (2021) 12 *Beijing Law Review* 305, 307.
28 Ibid.
29 Ibid; See also Collins, H, Ewing, KD & Maccolgan, *A Labour Law* (Cambridge University Press, 2012) 7.
30 Science Direct 'Employment Relationship – An Overview' <https://www.sciencedirect.com> accessed 18 August 2024.
31 'The Rights and Responsibilities of Employers in Nigeria' <https://www.firmusnigeria.com/the-rights-and-responsibilities-of-employers-in-nigeria> accessed 18 August 2024.
32 Nigerian Labour Act, s 7.
33 Ibid.
34 Ibid.

4. Arbitration agreements

In the absence of any collective or sole agreement on how disputes should be resolved, parties may rely on the employer's policies, such as the disciplinary codes of the human resources department of the employer. Where parties agree to arbitration for dispute resolution, the arbitration agreement discloses this consensus. An arbitration agreement exists where two or more people agree that a dispute between them is to be resolved in a legally binding way by an arbitral tribunal based on the evidence before the tribunal.[35] It is often in writing, and serves as the cornerstone for arbitration proceedings and dispute resolution. An arbitration agreement is an agreement by parties to submit all or certain disputes which have arisen or which may arise between parties in respect of their legally defined relationship, whether contractual or otherwise, to arbitration.[36] An arbitration agreement may be incorporated as a clause in the contract or in a separate agreement. There must be a subsisting contractual relationship between the parties before they can agree to submit their disputes to arbitration in terms of the arbitration agreement, and both parties must possess the legal capacity to enter into a contract and must be able comply with the decision or award of the tribunal.[37] The reference to arbitration must be clear, all-encompassing and cover all the issues for resolution between the parties, and it is binding on the parties to the dispute. The Nigerian Arbitration and Mediation Act provides that an arbitration agreement, which has been consented to by parties to settle their disputes, is binding and enforceable against these parties, unless they agree otherwise or where the agreement is inoperative.[38]

An arbitration agreement is a comprehensive document that must contain the number of arbitrators to be appointed (if more than one), the mode of appointment of arbitrator(s) by the parties, a clear definition of the power and authority of arbitrators, a decision on the venue of arbitration, the applicable law, the procedure for the conduct of arbitral proceedings and the language of arbitration. These are all essential for effective arbitration.[39] It is a written agreement that provides reference to the arbitration of any existing or future disputes.[40] Apart from the written requirement of the arbitration agreement, it may be by electronic communication that is accessible for subsequent references or contained in an exchange of points of claim and defence, in which the parties have agreed to.[41] An arbitration agreement may contain the *Scott v Avery*[42] clause or the *Atlantic Shipping*[43] clause. While the *Scott v Avery* clause makes arbitration a condition precedent to litigation, the *Atlantic Shipping* clause sets a time limit for parties to appoint arbitrators and to submit

35 *CN Onuselogu Ent Ltd v Afribank (Nig) Ltd* 2005 (1) NWLR (Pt 940) 577.
36 UNCITRAL Model Law 2006, art 7.
37 Alternative Dispute Resolution Law <https://nou.edu.ng/coursewarecontent/LAW%20517.pdf> accessed 12 July 2024.
38 Arbitration and Mediation Act 2023, s 1(3).
39 Ibid.
40 South Africa Arbitration Act of 1965.
41 Arbitration and Mediation Act, s 2(4).
42 (1855) 8 CAS 811.
43 *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus and Co* (1920) 3 Lloyd's Law Reports 108.

their dispute to arbitration; it stops parties from resorting to arbitration where the time period has elapsed.[44] These clauses can be inserted into an arbitration agreement for speedy dispute resolution.

Arbitration agreements can exist through an arbitration clause or a submission agreement. An arbitration clause is a clause in the contract where parties undertake to submit disputes that may arise in relation to their contractual relationship to arbitration.[45] An arbitration clause that forms part of a contract is often treated as an agreement that is independent of the terms of the contract, in other words, the invalidity of the contract does not affect the arbitration clause.[46] An arbitration clause states the rights and options of parties in situations where there are disputes in relation to the contract of employment. In most arbitration clauses, the parties agree not to resort to litigation immediately. Instead, they resolve their disputes through the arbitration process to avoid litigation. Rather than sue each other, the parties attempt to settle their differences during arbitration. To avoid any ambiguity, the arbitration clause must be specific.

In the case of a submission agreement, parties submit to arbitration when a dispute arises.[47] A submission agreement includes a concise description of the subject matter to be submitted to arbitration and it deals with future disputes. Sometimes some actual issues arise and the parties enter into a submission agreement notwithstanding the fact that there is an arbitration clause already in place.[48] In this case, the arbitration clause compels parties to sign the submission agreement and, if any of the parties refuse to sign the submission agreement, the court may intervene to supplement the content of the submission agreement with its judgment to become a submission agreement.[49] However, this judicial intervention affects the speed of arbitration and increases the costs of arbitration.

The enforceability of an arbitration agreement is vital to the resolution of employment disputes. Parties are said to be enforcing an arbitration agreement when they decide to settle their dispute through arbitration and as contained in the arbitration agreement. The UNCITRAL Model Law and the New York Convention give effect to the enforcement of the arbitration agreement.[50] Article 8 of the UNCITRAL Model Law provides:

> A court which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

44 Idornigie, PO 'The Legal Regime of International Commercial Arbitration' (PhD thesis, University of Jos, 2002) 60.

45 United Nations Conference on Trade and Development (UNCTAD) 'Arbitration Agreement' <https://www.unctad.org/system/files/official-document/edmmisc232add39_en.pdf> accessed 13 July 2024.

46 UNCITRAL Model Law, art 16(1).

47 UNCTAD 'Arbitration Agreement' (note XX).

48 Ibid.

49 Ibid.

50 Both Nigerian and South African arbitration laws are based on the UNCITRAL Model Law 2006. The countries are also signatories to the New York Convention 1958.

> Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article II.1 of the New York Convention also provides:

> that each contracting states shall recognise an agreement in writing under which parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

In this case, this agreement prevents the court from interfering or resolving disputes between parties, apart from disputing parties who unanimously agree to waive the arbitral process. Section 1(3) of Nigeria's Arbitration and Mediation Act also recognises the fact that it is enforceable against parties.

5. The meaning of an employment dispute

An employment dispute is a dispute that often arises from the employer–employee relationship. It is an official disagreement relating to the employee's rights, and it usually arises between an employer and an employee.[51] It arises from conflicts relating to an existing or terminated employment relationship. If left unresolved, it can destroy the harmonious working relationship and the employee's productivity. It may arise from alleged or actual discrimination, unfair dismissal, wrongful termination, workplace harassment, unfair demotion, misleading representation, breach of the employment contract, or any other matter relating to employment or the workplace.[52] The four major sources of employment disputes are wrongful termination, wage disputes, discrimination and harassment claims, and severance agreements.

In the case of wrongful termination of employment, an employee's employment status is affected and may lead to some form of difficulty and/or emotional damage. An employer may terminate an employee's employment at any time, but this becomes an issue where such termination is wrongful or unfair. Employees whose employers dismiss them may claim that their termination was wrongful and that their employer did not act reasonably in terminating their employment. Generally, it is wrongful when the employee is dismissed without cause, such as depriving an employee of his benefits or entitlements, or terminating his employment as a punishment for exercising his rights.[53]

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51 Cambridge Dictionary 'Employment Dispute' <https://www.dictionary.cambridge.org/dictionary/english/employment-dispute> accessed 2 August 2024.

52 Law Insider 'Employment Dispute Definition' <https://www.lawinsider.com/dictionary/employment-dispute> accessed 2 August 2024.

53 'Employment Disputes – A Guide for Employers' (2023) <https://www.lawbites.co.uk/resources/blog/employment-dispute> accessed 2 August 2024. This guide gives a general overview of employment disputes.

There might be a wage dispute, with an allegation of improper compensation for work done, or the employer might deny overtime pay or regular breaks.[54] Other issues that may lead to wage disputes are wrongfully classifying a worker as an independent contractor, tax issues, workers' benefits, and other entitlements. Employers' unlawful wage or salary deductions without the consent of employees can lead to conflict between them. Where deductions do not comply with the employment contract and labour laws, this will lead to a dispute between the employer and the employees.[55] An employer's refusal to pay minimum wages, failure to pay bonuses, or miscalculation of bonuses may lead to conflict in the employment sector.[56]

Discrimination and harassment claims, such as unfair treatment on the grounds of age, disability, gender identity, sex, religious beliefs, and the denial of certain benefits are common workplace issues that often lead to disputes between employers and employees. Discrimination may also arise from an employee's treatment. There might be issues relating to discrimination against an employee where such an employee is not treated fairly or where there is a hostile or offensive behaviour in the workplace.[57] In addition, an unsafe work environment may lead to unfair treatment and expose employees to hazards, injuries and accidents.

The severance agreement between the employer and its employee may also lead to conflict. A severance agreement is a legal document that stipulates the conditions for termination of employment. It states the conditions that both the employer and the employee must meet during the subsistence of the employment relationship.[58] It can also be regarded as a waiver of liability signed by an employee to protect the employer from legal claims.[59] It details the rights and responsibilities of the employer and the employee during or upon employment termination. It is a contract that relieves the employer of all claims by the employee in exchange for the payment of money (severance pay) or other benefits.[60] Therefore, a breach of any of the conditions in the severance agreement may lead to a dispute between the parties. The parties may resort to litigation, arbitration, or any other alternative dispute resolution process to resolve these disputes.

6. The resolution of employment disputes through arbitration in Nigeria

The history of trade dispute legislation in Nigeria can be traced to the Trade Disputes (Arbitration and Inquiry) (Lagos) Ordinance of 1941, the main legislation that encourages

54 Gimbel, Reilly, Guerin and Brown (LLP) '4 Common Types of Employment Disputes' <https://www.grgblaw.com/wisconsin-trial-lawyers/4-common-types-of-employment-dispute> accessed 2 August 2024.

55 'Employment Disputes – A Guide for Employers' (note XX).

56 Ibid.

57 Ibid.

58 'A Guide to Severance Agreements' <https://www.indeed.com/career-advice-development/severance-agreement> accessed 2 October 2024.

59 Ahn, R 'How to Craft a Severance Agreement' <https://www.careerminds.com/blog/severance-agreement-template> accessed 2 October 2024.

60 'Severance Agreement and Release of Claims' <https://www.legalaidatwork.org/factsheet/severance-agreement-and-release-of-claims-fact-sheet/> accessed 2 August 2024. The employer is often under no obligation to make a severance payment unless it is in exchange for the release of claims.

alternative dispute resolution, such as arbitration in employment disputes. Under this Ordinance, the government could intervene in trade or employment disputes only when it was invited to do so, or when the parties consented to such intervention. Stakeholders in the employment relationship were responsible for resolving disputes using alternative means.[61] Subsequently, the Trade Dispute Decree 7 of 1976 that established the National Industrial Court Act was passed. This decree later became the Trade Dispute Act of 1976.[62]

The Trade Dispute Act provides for alternative dispute resolution in situations where there is a prior agreement on the model of dispute and where there is no such agreement.[63] Where there is a prior agreement on the mode to be adopted in resolving disputes, each party must honour such an agreement. Where no such agreement exists, the parties must appoint a neutral party within seven days to assist them in resolving their dispute. However, where disputes are not settled, they must be reported in writing to the Minister of Labour.[64] The Minister of Labour may also determine steps that can help the parties to resolve their disputes.[65] The Minister may refer the dispute to a conciliator;[66] where this fails, an arbitration tribunal will be recommended,[67] and where arbitration fails, the parties will be referred to the National Industrial Court[68] and a board of inquiry, respectively,[69] if necessary. The parties may be referred to an Industrial Arbitration Panel where the conciliator is unable to resolve the dispute between the parties. The Trade Dispute Act establishes the Industrial Arbitration Panel. The Industrial Arbitration Panel (also known as the Panel) consists of a chairman, a vice-chairman and other members who must not be less than ten in number, including two representatives of the employer and two representatives of the workers or employees.[70] The Panel plays an important role in industrial arbitration and dispute resolution. It offers an informal setting for resolving employment disputes, ensuring that technicalities are minimised and focusing on an equitable outcome.[71]

In settling disputes between parties, the Industrial Arbitration Panel establishes an arbitration tribunal consisting of one or more arbitrators nominated by workers and the employer and presided over by the chairman or vice-chairman of the Panel.[72] The Panel

61 Agomo, CK *Nigeria Employment and Labour Relations Law and Practice* (Concept Publication Ltd, 2011) 310).
62 Trade Dispute Act Cap. T8 Laws of the Federation 2004 (the 2004 update).
63 Trade Dispute Act, s 7; Akintola, *J Nigerian Investment Laws and Business Regulations* (Learned Publications Ltd, 2002) 339.
64 Trade Dispute Act, s 6. This report is also known as declaration of disputes.
65 Trade Dispute Act, s 7.
66 Trade Dispute Act, s 8.
67 Trade Dispute Act, s 9.
68 Trade Dispute Act, s 14.
69 Trade Dispute Act, s 33.
70 Trade Dispute Act, s 9(2).
71 Ogbu, FC 'The Role of Industrial Arbitration in Resolving Labour Disputes in Nigeria: An Analysis of the National Industrial Courts' Jurisdiction and Effectiveness' (2024) <https://wwwssrn.com/abstract=4976395> accessed 24 March 2025.
72 Trade Dispute Act, s 9(4). Where a sole arbitrator is to be appointed, the chairman of the Industrial Arbitration Panel makes the appointment.

must render an award within 21 days, and the Minister of Labour may extend it as needed.[73] The award is sent to the Minister of Labour, who may confirm it and communicate this to the parties or return it to the tribunal for reconsideration.[74] However, the Minister of Labour cannot nullify or set aside an award made by the Panel,[75] but parties can raise objections to the award. Where there is no objection, the Minister of Labour has the power to publish a notice confirming the binding nature of the award in the Federal Gazette.[76] Where an objection is made, the Minister of Labour refers the dispute to the National Industrial Court.

The National Industrial Court was established by the National Industrial Court (NICN) Act.[77] This Act emphasises the power, rights and control of the employer in the employment relationship. The Act establishes the National Industrial Court for the resolution of employment disputes and other labour or industrial matters. The court has original jurisdiction to deal with labour matters and disputes such as the wrongful termination of employment, pensions, salaries, gratuities and discrimination in the workplace, among others.[78] The National Industrial Court Act establishes an Alternative Dispute Resolution (ADR) Centre to encourage reconciliation and to promote prompt dispute resolution between parties.[79] The ADR Centre offers only mediation and conciliation services to disputing parties. However, this does not preclude parties from using arbitration where they believe it is the best option or where they have agreed to resolve their disputes through arbitration. Notwithstanding the provisions of the National Industrial Court Act, the arbitral award remains binding on the parties. The provisions of the National Industrial Court Act on alternative dispute resolution create a relaxed atmosphere for dispute resolution, promote industrial relationships and consistency, rather than confusion resulting from conflicting decisions of the court.[80]

7. The resolution of employment disputes through arbitration in South Africa

Arbitration is a recognised dispute resolution mechanism in South Africa that offers a flexible and cost-effective dispute resolution process. It became more popular with the enactment of the International Arbitration Act of 2017. This Act integrated the UNCITRAL Model Law into South African law and it led to a huge increase in international arbitration in South Africa.[81] The history of arbitration in South Africa can be traced back to the South African traditional system of dispute resolution which was interrupted by British colonialism. Colonialism introduced Roman-Dutch law.[82] This law was based on a peaceful

73 Trade Dispute Act, s 13(1) and (2).
74 Trade Dispute Act, s 13(3).
75 *Abdul-Raheem & Ors v Oloruntoba-Ojo* 2006 (15) NWLR (Pt. 1003) 581.
76 Trade Dispute Act, s 13(4).
77 National Industrial Court Act of 2006.
78 Iyam, UI & Ugwu, D 'Overhauling the National Industrial Court Act: A Pathway to Effective Labour Dispute Settlement in Nigeria' (2010) 9(1) *Global Journal of Social Science* 63, 63.
79 National Industrial Court Act, s 20.
80 Iyam & Ugwu (note XX) 64.
81 'Perspectives on Dispute Resolution in South Africa' <https://www.ciarb.org/news-listing/perspectives-on-dispute-resolution-from-south-africa/> accessed 21 February 2025.
82 Rantsane, DP 'The Origin of Arbitration Law in South Africa' (2020) 23(1) *Potchefstroom Electronic Law Journal* 1, 5-7.

and non-violent method of dispute resolution known as arbitration. Arbitration offered a more flexible, speedy and cost-effective dispute resolution process than litigation. Under Roman law, arbitration award was final and there was no right of appeal, arbitration was practically made an alternative to litigation and not a forerunner to litigation. Arbitration was otherwise known as *compromissium*. It operated independently and as an alternative to litigation.[83] When parties opted for arbitration, they were allowed to appoint their arbitrator(s), who could not be slaves, deaf, dumb, women and children under the age of 18. Under Roman law, these people could not perform public functions.[84] Roman law later developed into Roman-Dutch law. Roman-Dutch law involved arbiters and arbitrators who were regarded as elected judges; they dealt with matters referred to them with the consent of the disputing parties.[85] Arbiters resolved disputes within the powers given to them and in accordance with the law and custom, while arbitrators had more expertise and were more friendly than arbiters. Roman-Dutch law was introduced into South Africa in 1652 by the European settlers. Despite introducing the Roman-Dutch law, there was no developed arbitration system. This challenge led to the enactment of the arbitration law.[86] Prior to the introduction of arbitration, disputes were resolved through adversarial means which was expensive and delayed, with a very low settlement rate.[87] The effects of the adversarial process led to the need to explore arbitration as an alternative dispute resolution mechanism.

In South Africa, the Labour Relations Act of 1995 regulates dispute resolution. Prior to the enactment of the Labour Relations Act, the Wiehahn Commission of Inquiry was established in 1979 to investigate labour situations and make recommendations. This led to the recommendation on the extension of freedom of association to all persons irrespective of their sex or race, and allowed black workers to rely on the provisions of the Labour Relations Act of 1956.[88] The Labour Relations Act has made the settlement of employment disputes between employers and employees easier and gives parties the opportunity to have their disputes resolved promptly without the need for a trial. Like the Industrial Arbitration Panel in the case of Nigeria, the Labour Relations Act makes provision for the Commission for Conciliation, Mediation and Arbitration (CCMA) to assist parties in resolving their disputes.[89]

In 1994, the interim Constitution was passed, and new labour relations legislation was enacted.[90] The Labour Relations Act of 1995 came into effect in 1996. The CCMA

83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid.
87 'Alternative Dispute Resolution in the Work Place: South Africa Experience' <https://www.accord.org.za/ajcr-issues/alternative-dispute-resolution-adr-in-the-workplace/> accessed 21 February 2025.
88 Bhoola, U 'National Labour Law Profile: South Africa' <https://www.ilo.org> accessed 14 December 2024.
89 Labour Relations Act, s 112. The Act established the CCMA as an independent body whose members are approved by the National Economic Development and Labour Council.
90 Ibid.

is responsible for mediating and arbitrating industrial disputes in South Africa; its major functions are conciliating, mediating, and arbitrating employment disputes.[91] The Commission regulates it for the Conciliation, Mediation and Arbitration Rules of 2023. The CCMA does not have jurisdiction over disputes relating to independent contractors or disputes not within the scope of the Labour Relations Act and the Employment Equity Act. Where disputes relating to the dismissal of employees over alleged misconduct,[92] intolerable employment[93] and unfair labour practices[94] are not resolved through conciliation, they are referred to arbitration, where the CCMA acts as the arbitrator.[95] In other words, where disputes are not resolved through conciliation, either of the parties may request the CCMA to resolve such dispute through arbitration.[96] Disputes are referred to the Labour Court for adjudication where they cannot be resolved by conciliation, mediation and arbitration.[97]

A party may request the CCMA to arbitrate employment disputes by tendering documents as an annexure. Form 7.13 must be duly completed by the party making the request and may be submitted through the CCMA electronic referral portal or by any other means.[98] The parties or a third party may make the request and must serve it on the other party. Where the request to refer dispute to arbitration is served out of time, an application for condonation must be attached to the request. Upon service of the request for arbitration, the CCMA has the discretionary power to either accept or refuse the request for arbitration. Where there is an arbitral hearing, the CCMA is expected to notify the disputing parties in writing of such a hearing. This notice must be given at least 21 days before the scheduled date of the hearing.[99] The number of days may be shortened based on the agreement of the parties or the circumstances of the case. An additional seven days will be required when the notice is sent by registered mail.[100] The party making the request is expected to submit a statement of his case (containing material facts and legal issues arising from the material facts) while the other party submits an answer or affidavit to the statement served on him.[101] Suppose one party decides not to comply with the directives of the CCMA. In that case, the CCMA has the discretion to continue with proceedings, but may note such non-compliance when considering costs after the arbitral proceedings.[102] However, scheduled arbitration proceedings may be postponed by the agreement of both parties or on the application of any of the parties or where the parties do not appear on the

91 'What is the Role of CCMA in Helping to Settle Labour Disputes?' <https://www.hrfuture.net/workplace-culture/strategy/legal/what-is-the-role-of-the-ccma-in-helping-to-settle-labour-disputes/> accessed 14 December 2024.
92 Labour Relations Act, s 191(5)(a)(i).
93 Labour Relations Act, s 191(5)(a)(ii).
94 Labour Relations Act, s 191(5)(a)(iv).
95 *Numsa v Bader Bop (Pty) Ltd and Minister of Labour* Case No. CCT/12/02 (Constitutional Court).
96 Labour Relations Act, s 74(4).
97 Labour Relations Act, s 191(6).
98 CCMA Rules of 2023, Rule 18.
99 Ibid, Rule 21.
100 Ibid.
101 Ibid, Rule 19(1).
102 Ibid, Rule 19(3).

scheduled date.[103] The notice or application for postponement must be sent to the CCMA not later than seven days before the scheduled date of the hearing.[104] Non-compliance with the rules for the postponement of the scheduled date is not a ground to reject an application for postponement. The reason for non-compliance must be stated and must be compelling. The CCMA must also consider whether the other party will suffer any irreparable loss or harm if the scheduled date is postponed.[105]

Before the commencement of proceedings, the parties are expected to undergo a mandatory pre-arbitration conference to reach consensus and deal with matters such as the means of settling the dispute, the facts agreed by the parties, the issues to be decided by the CCMA, relief sought, the calculation of compensation, the exchange of relevant documents, the preparation of documents, the arrangement and numbering of documents, how documentary evidence will be dealt with, how affidavits will be admitted in evidence, on-site inspections (if needed), provision for the attendance of witness, the resolution of preliminary issues, the exchange of witness statements, determining the necessity or otherwise of expert evidence, discussing how arbitration can be expedited, the estimated period required for the hearing, representation, if an interpreter will be needed and the language of the interpreter.[106] At the end of the pre-arbitration conference, parties are expected to draw up and sign a pre-hearing agreement setting out the facts to which they have agreed or not. The pre-hearing minute must be sent to the CCMA seven days before the scheduled date of the hearing. The content of the minute will determine whether a directive will be issued to the parties to hold a further pre-hearing conference or on the conduct of the arbitration proceeding or on the postponement of the scheduled arbitration.[107] The place of hearing is the region where the course of action arose, or the employer's principal place of business, or a place determined by a Senior Commissioner in the CCMA's head office.[108]

CCMA awards are final and cannot be appealed against, except in the case of an arbitration award on the interpretation of agency shop agreements,[109] and an award in respect of unfair discrimination on the ground of sexual harassment or any discrimination dispute where the employee earns below the threshold amount stipulated in section 3 of the Basic Conditions of Employment Act.[110] However, the Labour Court may set aside an allegedly defective award. An award is defective if the CCMA committed misconduct in relation to its duties as an arbitrator, if it commits gross irregularity in the conduct of arbitration proceedings, if it exceeds its powers or if the award was improperly obtained.[111] Where any of these grounds has been established, a party may apply to the Labour Court to review an arbitration award or ruling of the CCMA.

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103 Ibid, Rule 23.
104 Ibid.
105 *Erasmus NO v Commission for Conciliation, Mediation and Arbitration* (2012) 3 *ILJ* 1670 (LC).
106 CCMA Rules of 2023, Rule 20.
107 Ibid.
108 Ibid, Rule 24.
109 Labour Relations Act, s 24(7).
110 Labour Relations Act, s 10(8).
111 Labour Relations Act, s 145.

Apart from the Labour Relations Act, which recognises arbitration as an effective dispute resolution mechanism and the importance of the CCMA, the Employment Equity Act also allows parties to resolve their disputes by exploring arbitration through the CCMA. The Employment Equity Act recognises the CCMA in arbitration proceedings and its powers to make a binding award that gives effect to the provisions of the Act. Where disputes are not resolved by conciliation, the CCMA may resolve such disputes by arbitration based on the parties' consent or if one of the parties refers the dispute to the Labour Court for adjudication.[112]

8. Lessons from South Africa

South Africa has a robust arbitration framework and institutions, and procedural efficiency that Nigeria can learn from. South Africa has adopted arbitration as an effective mechanism for resolving employment disputes and has made it part of its transformation agenda in labour relations.[113] This led to the establishment of the CCMA to assist with dispute resolution. The CCMA is an independent and statutory dispute resolution body that deals with disputes without necessarily involving legal experts or litigation. However, parties may elect to involve legal practitioners or experts in the dispute resolution process. The CCMA is independent of the state, trade unions, employers, employees, political parties or any association.[114] The CCMA operates effectively; it leaves no room for doubt and ensures impartiality in justice delivery. In Nigeria, the perception of bias and partiality often stops parties from resorting to arbitration. The CCMA promotes an accessible and user-friendly platform for dispute resolution for all categories of employers and employees (including low-income earners). Nigeria should adopt an effective process that is beneficial to all employment disputants. The CCMA has the power to make regulations relating to practice and procedure on resolving disputes through conciliation and arbitration, arbitration proceedings, the joinder of parties, the substitution of parties and other matters incidental to performing its duties.[115] Parties must try conciliation and arbitration before exploring other options such as strikes, lockouts and litigation.

In South Africa, the Labour Relations Act regulates dispute resolution. Like the Industrial Arbitration Panel in Nigeria, the Labour Relations Act makes provision for the CCMA to assist parties in resolving their disputes.[116] Before establishing the CCMA, the Independent Mediation Service of South Africa (IMSSA) assisted parties with dispute resolution.[117] Where disputes are not resolved through conciliation, either party may request the CCMA to resolve such disputes through arbitration.[118] Where conciliation fails,

112 Employment Equity Act of 1998, s 52.

113 Accord 'Alternative Dispute Resolution (ADR) in the Work Place' <https://www.accord.org.za/ajcr-issues/alternative-dispute-resolution-adr-in-the-workplace> accessed 27 November 2024.

114 Labour Relations Act, s 113.

115 Labour Relations Act, s 115(2A). Any regulation made by the CCMA must be published in the *Government Gazette*.

116 Labour Relations Act, s 112.

117 Pretorius, P 'ADR: Successes and Challenges' in Centre for Applied Legal Studies 'Trends in South Africa Labour' (Selected paper from the Fourth Annual Labour Law Conference, University of Witwatersrand, 1991) 103.

118 Labour Relations Act, s 74(4).

disputes are resolved through arbitration by the CCMA. Where it is a requirement of the Act, either party or both parties may make the request.[119] Nigeria has no pre-arbitration dispute resolution process because dispute resolution is fragmented. Disputes are referred to the Labour Court for adjudication where they cannot be resolved through conciliation, mediation and arbitration.[120] Due to inadequate institutional support and uncertainties, Nigeria's Trade Disputes Act and Arbitration and Mediation Act have limited application. The operation of the CCMA reflects cost-effectiveness and speedy dispute resolution, which are lacking in Nigeria's arbitration process. The CCMA promotes efficiency by setting time limits for parties to explore conciliation and arbitration before resorting to litigation.[121] However, the CCMA does not settle disputes relating to independent contractors, bargaining, statutory councils, or private agreements.[122] As in South Africa, in Nigeria arbitration should be made the first port of call before litigation. Parties should be encouraged to have their disputes resolved via arbitration and, where it fails, they can approach the court as their last resort.

9. Conclusion and recommendations

This article exposes the gaps in arbitration as a dispute resolution process in Nigeria while acknowledging the effectiveness of arbitration in South Africa. Arbitration is an effective alternative to litigation, offering a more relaxed atmosphere for disputing parties. Before parties can resolve their disputes through arbitration, they must reach an agreement, either through an arbitration clause or a submission agreement, stipulating that their dispute will be settled through arbitration. Arbitration should be explored prior to litigation, which is often the last resort. The Trade Dispute Act, the Labour Relations Act, the courts, and other special courts dedicated to employment and labour disputes recommend amicable dispute resolution via any of the alternative dispute resolution methods before disputes are taken to court. This guidance has enabled parties to resolve their disputes without the technicalities associated with litigation. The CCMA in South Africa also promotes dispute resolution between employers and employees; in addition to its general functions, it has the authority to establish rules and regulations to facilitate amicable dispute resolution between disputing parties. Compared to Nigeria, South Africa has a more robust institution for resolving employment disputes. Through the CCMA, South Africa offers more efficient, cost-effective, and user-friendly dispute resolution processes, which should be implemented in Nigeria. This article advocates for adopting and effectively utilising arbitration before resorting to the courts. Legislative reform is essential to promote arbitration in Nigeria. South Africa's Labour Relations Act should serve as a model for comprehensive legislative reform in Nigeria. The article also suggests amending the Trade Disputes Act. It further recommends that provisions be made for the accreditation of private professional arbitration bodies to facilitate easy and prompt dispute resolution.

119 Labour Relations Act, s 115(b).
120 Labour Relations Act, s 191(5).
121 Labour Relations Act, s 191(4) and (5).
122 'What is the Role of the CCMA in Helping to Settle Labour Disputes?' (note XX).

The Industrial Arbitration Panel in Nigeria should possess a robust structure and functions akin to those of South Africa's CCMA. Regulations should be enacted to govern the activities of the Industrial Arbitration Panel. Alternatively, the Industrial Arbitration Panel could be elevated to a commission.

How to cite:

Oluwayemi O Ogunkorode, Kemisola B Akanle and Tayewo Adewumi 'Navigating the Efficacy of Arbitration as a Tool for Resolving Employment Disputes in Nigeria: Lessons from South Africa' (2025) 5 *Turf Law Journal* 150-167.

Received: 14 October 2024, Accepted: 2 April 2025, Published: 9 April 2025, Doi: https://doi.org/10.62726/tlj.v5.45

The Legal Framework of the Commission of Mediation and Arbitration in the Settlement of Labour Disputes in Tanzania

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Abstract

This article examines the legal position of the Commission of Mediation and Arbitration (CMA) in resolving labour disputes in Tanzania. It examines labour disputes and the settlement of labour disputes under the CMA through mediation and arbitration, in accordance with the Employment and Labour Relations Act, Cap 366 RE 2019 (ELRA), and the Labour Institutions Act, Cap 300 RE 2019 (LIA). The analysis focuses on the legal and institutional framework of the CMA, the powers of meditators and arbitrators, and court decisions on the mandates of the CMA. The article examines procedures for referring disputes to the CMA for mediation and arbitration, including time limits for referring the dispute, condonation, conducting mediation and arbitration, determining jurisdictional issues in arbitration, maintaining records of arbitration proceedings, joinder and substitution of parties in arbitration, and arbitration awards, as well as how to challenge faulty awards. Combined mediation and arbitration (med–arb) and its legal framework also form part of the discussion. In settling labour disputes, the CMA faces challenges such as jurisdiction, the time it takes to resolve disputes, the appearance and non-appearance of parties at the CMA, the legal effects, and conflicting decisions and procedural inefficiencies that impede its performance. The article calls for amendments to the ELRA, the LIA, and the rules made thereunder and for the CMA to address challenges that inhibit the smooth settlement of labour disputes.

Keywords

labour disputes, settlement of labour disputes, Commission for Mediation and Arbitration, mediation, arbitration

1. Introduction

The rise of labour disputes between employers and employees is the result of inequalities that exist in the bargaining positions of the parties to the employment contract. Labour conflicts are inherent in the labour relationship or the workplace.[1] If labour conflicts remain

1 Clarence, T & Tsweledi, B 'A Critique of the Protection Afforded to Non-Standard Workers in a Temporary Employment Services Context in South Africa' (2014) 18(1) *Law, Democracy & Development* 340.

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unresolved, they escalate into disputes that can cause social, legal, and economic problems. Labour disputes require the development of a system of settlement through concerted processes, other than routine litigation, to achieve flexible, simple, relatively inexpensive, less hostile, and expeditious methods of settlement. The Employment and Labour Relations Act, Cap 366 RE 2019 (ELRA) and the Labour Institutions Act, Cap 300 RE 2019 (LIA) have introduced a system of settlement of labour disputes that is less technical, can be accessed by more people, costs less, and operates with greater speed than the ordinary courts. Mediation and arbitration are the preferred methods of settling labour disputes in modern times and are used by the Commission of Mediation and Arbitration (CMA).

This article analyses the legal framework of the CMA in settling labour disputes in Tanzania. It employs a doctrinal legal research methodology involving a descriptive and detailed analysis of legal rules found in statutes, regulations, and cases relevant to the subject. The discussion focuses on the legal provisions applied by the CMA to settle labour disputes and how the courts have interpreted them in relation to the mandates envisaged in the law. Therefore, the article explores, albeit in summary, labour disputes and the settlement of labour disputes under the CMA. At the CMA, labour disputes are settled by mediation and arbitration. The article describes mediation and arbitration, aligning them with labour dispute settlement under the ELRA and the LIA, as well as the rules made thereunder.[2] It assesses the CMA by focusing on its establishment, composition, functions and jurisdiction. In addressing the institutional framework of the CMA, the article examines mediators and arbitrators, concentrating on their appointments and the powers they have to resolve labour disputes.

The article also describes procedures for referring disputes to the CMA. It begins with a discussion of the mediation of labour disputes, including time limits for referring disputes to mediation, condonation, and the conduct of mediation. There is a special focus on mediating disputes of interest and complaints before the CMA. The article later addresses the conduct of arbitration under the CMA, including determining jurisdictional issues, postponing arbitration, the records of arbitration proceedings and their legal framework, and the joinder and substitution of parties in arbitration. The article also examines combined mediation and arbitration (med–arb), arbitration awards and how to challenge faulty awards. The article concludes with a discussion of the challenges facing the CMA in settling labour disputes and the solutions to these challenges.

2. Labour dispute settlement under the CMA

Labour disputes are disagreements between workers and employers in relation to the arrangement of working conditions. Labour disputes arise between individual workers and employers, as well as between workers' unions and employers' unions, depending on whether such disputes relate to individual workers and employers or their organisations.[3] Disputes may concern the workers' association or employers' association in their exercise

2 Labour Institutions (Mediation and Arbitration) Rules 2007, GN No. 64 of 23 March 2007, and Labour Institutions (Mediation Arbitration Guidelines) Rules 2007, GN No. 67 of 23 March 2007.

3 Centel, T *Labour Dispute Resolution in Turkey* (Springer, 2019) 24.

of their collective labour rights such as representing their members in negotiating, fixing, maintaining, changing or seeking to arrange terms and conditions of employment.

Additionally, dispute settlement in the CMA developed as a result of the heavy workloads of the ordinary courts in resolving labour disputes under the old labour laws. Long trials caused by technicalities and formalities in ordinary courts led to the establishment of the CMA to resolve labour disputes. The current regime of labour dispute settlement in Tanzania provides parties with the opportunity to apply to the CMA, an independent and impartial institution for resolving labour disputes through mediation and arbitration.

Mediation is one of the methods used by both courts and quasi-judicial bodies to resolve disputes. It can take different forms, such as court-annexed mediation, private mediation, and institutionalised mediation conducted by an independent institution, such as the CMA. Despite the fact that mediation has been practised from time immemorial, it has not been easy to define.[4] Mediation has been defined as the decision-making process in which parties to the employment dispute are assisted by a third party, the mediator, who tries to improve the process of decision-making and to assist the parties in reaching an outcome that is acceptable to them.[5] Mediation is also defined as a decision-making process in which the parties are assisted by a third party, the mediator, who attempts to facilitate the decision-making process and assist the parties in reaching an outcome to which each can agree.[6] It is a decision-making process in which the approved mediator assists the parties by facilitating discussions between them, allowing them to communicate effectively regarding the matters in dispute.[7]

Tanzanian labour laws define mediation as a process in which a person independent of the parties is appointed as a mediator to assist them in resolving a dispute. The mediator may meet with the parties either jointly or separately and, through discussion and facilitation, help them settle their dispute.[8] Mediation is also described as a formal stage, following negotiations or consultations, where the parties settle disputes amicably, thereby preserving their working relationship.[9] As a method of dispute settlement, mediation is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties but rather solutions which are mutually commercially acceptable at the time of the mediation.[10] The voluntary and amicable aspect of dispute settlement in the mediation process is maintained but is achieved with the aid of a neutral third party.[11] The neutral

4 Kurien, G 'Critique of Myth of Mediation' (1995) 43(6) *ADRJ* 3.
5 Ibid.
6 Boulle, L & Rycroft, A *Mediation Principles, Processes, Practice* (Butterworths, 1997) 3.
7 Lukumay, Z 'A Reflection of Court-Annexed Mediation in Tanzania' (2016) 1(1) *LST Law Review* 54.
8 Labour Institutions (Mediation and Arbitration Guidelines) Rules 2007, GN No. 67 of 2007, rule 3(1).
9 *Tanzania Breweries Ltd v Charles Malabona* Labour Revision No. 24 of 2007, High Court of Tanzania Labour Division at Mwanza, consolidated with *Tanzania Breweries Ltd v Henry Kilagula* Labour Revision No. 219 of 2008, High Court of Tanzania Labour Division at Mwanza (unreported) 9; *Buzwagi Project v Antony Lameck* Revision No. 297 of 2008, High Court of Tanzania Labour Division at Mwanza (unreported) 8.
10 *Cable & Wireless v IBM United Kingdom Ltd* [2003] EWHC 316.
11 *Tanzania Breweries Ltd* (note 9) 9.

party must be someone experienced in the relevant field and should offer alternative suggestions to stimulate discussion and facilitate movement towards a resolution.[12]

The mediation process is preferred for resolving labour disputes because it promotes access to justice and restorative justice, and is effective in preserving relationships between the parties, unlike an adversarial dispute settlement process.[13] Additionally, mediation facilitates the expeditious and cost-effective settlement of disputes, dispenses with technicalities in the rules and procedures of evidence, and provides parties with solutions to disputes that are beyond the scope and powers of judicial officers.[14] Mediation is made compulsory under the LIA to achieve the policy objective of promoting the spirit of amicable settlement of industrial conflicts, which is vital for economic efficiency and productivity.[15] Thus, for a successful mediation process, certain key features must be present, including the mediator's qualifications, skills, and expertise, the mediator's neutrality, the degree of confidentiality maintained throughout the process, and the legal status of any settlement outcome.[16]

Arbitration can be defined as a system of settling disputes whereby the parties present their cases to a mutually agreed-upon neutral party and commit to abiding by that person's decision, recognising it as final and binding.[17] Arbitration is also described as an adjudicative process which takes place pursuant to an agreement between the parties to a dispute, whereby that dispute is referred for final determination to an independent and impartial arbitral tribunal appointed by or on behalf of the parties.[18] Arbitration is also defined as a process in which a person appointed as an arbitrator determines the dispute between the parties after hearing their evidence and arguments, and delivers a written decision with reasons in the form of an arbitration award, which is binding on the parties and enforceable in court.[19] Arbitration under the CMA does not provide for the right to appeal against the arbitral award, but an aggrieved party has the right to apply to the Labour Court to set aside the award based on irregularities in the arbitration proceedings.[20]

2.1 Establishment of the CMA

The CMA is established by the LIA as an independent department of the government, which is not subject to the direction or control of any person or authority, to resolve labour disputes through mediation and arbitration methods.[21] It is also independent of

12 Zack, AM 'Can Alternative Dispute Resolution Help to Resolve Employment Disputes?' (1997) 136(1) *International Labour Review* 96.
13 Boulle & Rycroft (note 6) 6; Lukumay (note 7).
14 Ibid.
15 *Tanzania Breweries Ltd* (note 9) 9.
16 Mtavangu, V *Commission for Mediation and Arbitration as a Quasi-Judicial Body for the Resolution of Labour Disputes in Tanzania: An Examination of its Efficiency and Effectiveness* (unpublished LLM dissertation, Mzumbe University, 2011) 34.
17 Zack (note 12) 95.
18 Joubert, WA (ed) *the Law of Arbitration in South Africa* 2 ed (Butterworths, 2003) 399.
19 GN No. 67 of 2007, rule 18(1)–(4).
20 Ibid, rule 18(5) and (6).
21 LIA, s 13(1)(a) and (b).

any political party, trade union, employers' association and federation of trade unions or employers' associations.[22] The government, public authorities, and other registered organisations and federations are nonetheless required by law to provide such assistance and cooperation as may be necessary to ensure that the CMA remains independent of them.[23]

The CMA is a specialised institution presided over by judicial officers who are experts in labour disputes; as a tribunal, its processes are different from those of a court.[24] It is also referred to as a quasi-judicial statutory body.[25] From its inception, the CMA was established to settle labour disputes in an expeditious way and with minimum costs. As an alternative to a court of law, the CMA was also expected to avoid complexities, formalities, technicalities and legalism, which contributed to the delay in settling labour disputes.[26]

2.2 Composition of the CMA

The CMA is composed of six members who represent the 'tripartite character' of the Tanzanian employment relationship, that is, representatives of the government, trade unions, and employers' associations.[27] Some commentators hold in regard to the independence of quasi-judicial bodies that, by having commissioners representing the interests of employers, employees and the government, 'a tripartite quasi-judicial organ' implies that the much-cherished functional independence of the CMA may be more of an ideal than a reality.[28] If the stakeholders in the employment relationship do not interfere with the CMA's independence, the ultimate independence contemplated by the law will be achieved, regardless of the members who constitute the CMA. The government is over-represented in the CMA. Since the government is one of the employers, there is no need for separate representation by the government, as the members of the CMA are appointed by the President (the government) after consultation with the Minister responsible for labour matters, who is, in fact, the President's appointee. Furthermore, the members of the CMA are appointed by the President.[29] Such appointments by the President are subject to the prior recommendation of the Minister responsible for labour matters after consultation with the Labour Economic and Social Council (LESCO).[30]

22 Ibid, s 13(1)(c).
23 Ibid, s 13(2).
24 *Morogoro Canvas Mills (1998) Limited v Jacob Mwansumbi* Labour Revision No. 42 of 2009, High Court Labour Division at Dar es Salaam (unreported).
25 See also *China Railway Jiang Engineering Company Limited v Abdallah Ibadi and Salum Mtengevu* Labour Revision No. 61 of 2008, High Court Labour Division at Dar es Salaam; *Antony Mulungu v Bora Industries Limited* Labour Dispute No. 51 of 2008, High Court Labour Division at Dar es Salaam; and *Edna Pendael Tenga v Parokia of Bugando* Labour Revision No. 19 of 2007, High Court Labour Division.
26 Mtavangu (note 16) 31.
27 LIA, s 16(3).
28 Mhina, MV 'The Labour Institutions Act: Identification of Labour Institutions, their Functions, Composition and Jurisdiction' Paper presented at the workshop on the new Income Tax Act, 2004, the new LIA 2004 and the new ELRA 2004, 6; Mtavangu (note 16) 44.
29 LIA, s 16(1)(a) and (b).
30 Ibid, s 16(4).

The law stipulates that the chairperson of the CMA must not be a member, official, or office-bearer of a trade union, employers' association, or federation, or an employee in the public service.[31] The chairperson must possess knowledge, experience and a considerable degree of involvement in labour matters.[32] This includes a minimum academic qualification of at least a Master's degree in the relevant field, a minimum of five years of working experience in labour or a related field, and general abilities and capacities in the relevant field, as well as in managing national consultative bodies.[33] The law requires commissioners to possess defined qualifications, including a minimum of three years of working experience in labour or a related field, integrity, and expertise in labour, economics, and social fields.[34]

Furthermore, the CMA is coordinated by the Director and the Deputy Director, who the CMA appoints after consultation with the Minister.[35] A person is eligible to be appointed as a Director or Deputy Director if they possess knowledge, skills, and experience in labour relations, dispute prevention, and resolution.[36] Apart from being the chief executive of the CMA, subject to the general directions and control of the CMA, the CMA Director is responsible for implementing the CMA's policy decisions and overseeing the day-to-day administration and management of the CMA's affairs.[37] The Director may also perform the functions conferred on him by labour law or delegated to him by the CMA and may conduct mediations and arbitrations referred to the CMA under the ELRA.[38]

2.3 Functions of the CMA

The CMA has several functions, as provided for in the LIA, which include mediating labour disputes in terms of labour law.[39] The CMA also decides labour disputes referred to it by arbitration if a labour law requires the dispute to be resolved by arbitration; the parties to the dispute agree that their dispute be resolved by arbitration; or the Labour Court (LC) referred the dispute to the CMA to be resolved by arbitration in terms of section 94(3)(a)(ii) of the ELRA.[40] In the exercise of its powers, section 94(3)(a)(ii) allows the LC, instead of deciding a dispute which is under its jurisdiction, to refer it to the CMA to be decided by arbitration.

In addition to the above functions, the CMA may also offer to mediate a dispute that has not been referred to it.[41] Generally, the major functions of the CMA are to mediate and arbitrate labour disputes. Mediation and arbitration are judicial functions in nature; therefore, when performing these functions, the CMA must act judiciously.[42]

31 Ibid, s 16(1)(a)(i) and (ii).
32 Ibid, s 16(2).
33 Labour Institutions (General) Regulations 2017 GN No. 65 of 24 February 2017, reg 4(1)(a)-(c).
34 Ibid, reg 4(2)(a)-(c).
35 LIA, s 18(1) and (2).
36 Ibid, s 18(2).
37 Ibid, s 18(3)(a).
38 Ibid, s 18(3)(b) and (c).
39 Ibid, s 14(1)(a).
40 Ibid, s 14(1)(b)(i)-(iii).
41 Ibid, s 14(2).
42 Maige, I 'A Critical Appraisal on the Efficacy of Dispute Resolution under the Commission for Mediation and Arbitration' (2013) 4(2) *Open University Law Journal* 76.

2.4 Jurisdiction of the CMA

Jurisdiction refers to the authority of a judicial or quasi-judicial body to hear and decide cases. It is the power or competence of a court to hear and determine an issue between parties.[43] Jurisdiction can further be described as

> a lawful power to decide something in a case, or to adjudicate upon a case, and to give effect to the judgment, that is, to have the power to compel the person condemned to make satisfaction.[44]

The CMA is established to mediate and arbitrate employment disputes. The LIA, therefore, designates its powers or competence, i.e., jurisdiction, to determine disputes that arise in certain places with respect to specific individuals, relationships, and issues.

In the case of the CMA, its jurisdiction arises in disputes between parties to the employment relationship, where the law categorically provides that such disputes must be mediated or arbitrated at the CMA. Jurisdiction is the bedrock on which the courts' authority and competence to entertain and decide matters rests.[45] It can be raised at any stage of a case, even at the appellate level.[46] Sometimes, however, jurisdiction may be affected by the parties' prior conduct. This may occur, for instance, when the contract of employment contains a clause requiring disputes arising from that employment relationship to be arbitrated by a private arbitrator, or when a collective agreement supersedes the contract. The jurisdiction of the court or a quasi-judicial body, such as the CMA, must be determined objectively.[47] The law states that the CMA has jurisdiction to mediate disputes referred to it and arbitrate disputes of interest if the parties are engaged in essential services; complaints over the fairness or lawfulness of the employee's termination of employment; any other contravention of this Act or any other law or breach of contract or any employment or labour matter falling under common law; tortious liability and vicarious liability; as well as any dispute referred to arbitration by the LC under section 94(3)(a)(ii) of the ELRA.[48]

On the other hand, the LC is empowered to adjudicate complaints that are not subject to arbitration.[49] The ELRA, the LIA and the regulations made thereunder have indicated a line of demarcation between complaints to be determined through arbitration and those that the LC must decide.[50] The law categorically provides that a statement of complaint

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43 *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) at 424.

44 *Wright v Stuttaford & Co* 1929 EDL 10 at 42; Vromans *De Foro Competenti*; *Spendiff NO v Kolektor (Pty) Ltd* 1992 (2) SA 537 (A) at 551C-D.

45 *Mwananchi Communications Limited and others v Joshua K Kajula and 2 others* Civ. Appl. No. 126/01 of 2016, CA, Dar es Salaam.

46 *Tanzania International Container Terminal Services Limited v Ernest Kalage* Revision No. 634 of 2019, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

47 *Pinetown Town Council v President, Industrial Court* 1984 (3) SA 173 (N) at 179B-D (Leon J).

48 LIA, s 14(1) read together with s 88(1) of the ELRA.

49 ELRA, s 94(1)(d).

50 Ibid, s 94(3)(a)(i) and (1)(d); GN No. 67 of 2007, rule 20(3)(b)(ii); Mwalongo, F 'Labour Disputes Handling Procedure in Tanzania', <file:///C:/Users/HP/Downloads/1668611016813_Labour%20Dispute%20Handling%20Procedures%20By.%20Frank%20Mwalongo%20(1).pdf> accessed 14 October 2024.

shall be presented directly to the LC for matters within the pecuniary jurisdiction of the High Court.[51] Therefore, the CMA's pecuniary jurisdiction is different from that of the LC.

Another issue regarding the CMA's jurisdiction is its geographical scope. The legal position is that the dispute shall be mediated or arbitrated by the CMA at its office, having responsibility for the area in which the cause of action arose,[52] unless the CMA directs otherwise.[53] In a case where the cause of action arose in Shinyanga, where the respondent was working and where he was terminated, and the matter was taken to the Dar es Salaam CMA office, it was held that the Dar es Salaam office could only have jurisdiction over the matter if the applicant had sought the CMA's permission to allow the referral to be made to Dar es Salaam, the preferred place, instead of Shinyanga, which was the CMA office having responsibility for the area where the cause of action arose.[54] Since the cause of action arose in Shinyanga, the Dar es Salaam CMA office had no jurisdiction to arbitrate the dispute.[55] Therefore, the place of hearing is where the cause of action arose unless the CMA directs otherwise, or a party applies to the CMA for the matter to be transferred.[56]

The jurisdiction of the CMA is not excluded where a matter is within its jurisdiction, but a tribunal established by another law is conferred jurisdiction to determine such a matter. The jurisdiction of the CMA will only be excluded where there is an express provision to that effect.[57] Before the amendment of the labour and employment laws in 2015, the LC held the position that the CMA has jurisdiction to determine labour disputes unless they are specifically reserved for the LC.[58] The creation of the labour dispute machinery under the Public Service Act was not intended to exclude the jurisdiction of the CMA; if that had been the intention of Parliament, it would have been specifically stated.[59] Despite the LC's position, a conflict existed between the ELRA and the Public Service Act and it was recommended that Parliament and other responsible organs should re-examine the existing laws to reform and harmonise them.[60]

As a result, the labour and employment laws were amended by enacting the following provision:

> Where there are inconsistences between Labour Laws and Public Service Act, the Public Service Act shall prevail.[61]

Before seeking remedies provided for in the labour laws, a public servant must exhaust all remedies provided for in the Public Service Act.[62] Additionally, the prevailing legal position

51 Labour Court Rules 2007, rule 23(1).
52 GN No. 64 of 2007, rule 22(1).
53 *Francis Kuringe v Singita Grumeti Reserve* Revision No. 37 of 2013, LCCD 1.
54 *Bulyanhulu Gold Mine Ltd v Gasto Myovela* Revision No. 217 of 2011, High Court of Tanzania Labour Division at Dar es Salaam (unreported) 8 February 2013.
55 Ibid.
56 *Kwila Peter Nkwama v General Manager Marine Services Co. Ltd* Labour Revision No. 229 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).
57 Maige (note 42) 78.
58 *Attorney General v Allan Mulla* Labour Revision No. 271 of 2008, High Court of Tanzania at Dar es Salaam (unreported).
59 Ibid.
60 Ibid at 14.
61 Employment and Labour Laws Miscellaneous Amendment Act 24 of 2015, s 22.
62 Public Service Act [Cap. 298], s 32A.

is that, where there is an inconsistency between the provisions of the Public Service Act and any other law governing executive agencies, public institutions, or public service offices, the provisions of the Public Service Act take precedence.[63] Moreover, in the case of a conflict between the ELRA and any other written law relating to employment standards, the standards stipulated under the ELRA prevail.[64] This amendment led to conflicting decisions from the High Court of Tanzania's Labour Division regarding whether a public employee may directly refer a matter to the CMA.[65] However, the Court of Appeal of Tanzania in *Tanzania Posts Corporation v Dominic A. Kalangi*[66] held that public servants must exhaust the remedies available in the Public Service Act. The court held:

> It is unambiguously clear that all disciplinary matters or disputes involving public servants are exclusively within the domain of the Public Service Commission whose decision is appealable to the President. The CMA has no jurisdiction to adjudicate upon such matters.[67]

Moreover, where the aggrieved employee uses the existing statutory dispute settlement machinery at the level of his employer or refers the matter to arbitration before referring it to the CMA, the cause of action, for time limits, is deemed to arise from the date of termination of the last proceedings at the level of the employer or arbitration.[68]

2.5 Appointment of mediators and arbitrators

The CMA appoints mediators and arbitrators in terms of section 19(1) of the LIA. The appointment of mediators and arbitrators of the CMA is a two-stage process.[69] After being appointed in terms of section 19(1) of LIA as mediators and arbitrators, they are further appointed to deal with specific disputes referred to CMA, in terms of section 86(3)(a) of the ELRA (for mediators), and section 88(2)(a) of the ELRA (for arbitrators).[70] The law does not preclude a person from being appointed as both a mediator and an arbitrator or from being assigned to perform in both capacities in respect of a dispute.[71]

This provision is a source of the problem of partiality and is also said to contribute to the erosion of confidentiality.[72] Nonetheless, if mediators and arbitrators adhere to the provisions of the law that provide for confidentiality, there will be no problem. The law prohibits any person from making reference to anything said at mediation proceedings during any subsequent proceedings; and a mediator or any person present during

63 Ibid.
64 See Public Service Act [Cap. 298], s 34A; ELRA, s 102A.
65 These cases include *Deogratus John Lyakwipa and Henry Maghubo v Tanzania Zambia Railway Authority* Revision Application No. 68 of 2019; *Mbozi District Council v Michael Simbeye* Revision No. 47 of 2015; *Salehe Komba & Revocatus Rukonge v Tanzania Posts Corporation* Revision No. 12 of 2018 and *The Board of Trustees of Public Services Pension Fund (PSPF) v Jalia Mayanja and Geofrey Ngonyani* Revision No. 248 of 2017.
66 Civil Appeal No. 12 of 2022 (unreported).
67 Ibid at 10.
68 Maige (note 42) 79.
69 Ibid at 76.
70 Ibid.
71 LIA, s 19(7)(a) and (b).
72 Mtavangu (note 16) 45.

mediation may not be called to give evidence to the CMA or the LC on what transpired during mediation.[73] Mediation is a confidential process designed to settle disputes through mutual agreement.[74] Since all appointed mediators are also arbitrators, it becomes difficult for them to differentiate between the roles of mediators and arbitrators, especially when they perform both roles in the same dispute.[75] The fact that one person conducts both processes is said to have an adverse effect on the mediation proceedings, simply because the parties may be aware that any concessions made during mediation might prejudice their position in the subsequent arbitration hearing.[76] Due to potential problems that may arise from the mediator acting as the arbitrator in the same case, the practice in stations with limited personnel has been for the parties to the dispute to consent to the dispute being mediated and arbitrated by the same person.[77] Additionally, when the CMA station has two or more staff members, the practice has been that if one staff member has been involved in mediation, the same person may not arbitrate the same case.[78]

2.6 Powers of mediators and arbitrators in resolving labour disputes

Mediators and arbitrators are vested with powers exercised by other judicial officers such as magistrates and judges.[79] Mediators and arbitrators may summon any person for questioning or to attend mediation or arbitration hearings if his presence will assist in resolving the dispute.[80] Additionally, they have powers to summon any person believed to be in possession or control of any book, document, or object either to appear himself to be questioned or to produce the said materials.[81] Also, they can administer oaths or accept affirmations from any person before permitting him to adduce the evidence.[82] Lastly, they have powers to question any person about any matter relevant to the dispute at hand.[83]

Mediators have powers to require further mediation meetings between the parties, after the initial hearing scheduled by the CMA, provided that the mediator may do this after the period set aside for mediation has expired and in deciding whether to require further meeting mediator may consider the following: the prospects of progress towards settlement; the consequence of settlement or non-settlement being reached; the interests of the parties; and the general public interest.[84] In exercising their powers under section 20 of the LIA and rules 5 and 19 of GN No. 67 of 2007, mediators and arbitrators should not prosecute cases on behalf of the parties.[85] Furthermore, any person who does not abide by the legal orders

73 GN. No 64 of 2007, rule 17; GN No. 67 of 2007, rule 8(1), (2) and (3).
74 Ibid.
75 Mtavangu (note 16) 45.
76 Ibid.
77 Commentary by the Mbeya Mediator-Arbitrator at the Legal Aid Seminar, 23rd March 2024.
78 Ibid.
79 LIA, s 20; GN No. 67 of 2007, rules 5 and 19.
80 LIA, s 20(1)(a).
81 Ibid, s 20(1)(b).
82 Ibid, s 20(1)(c).
83 Ibid, s 20(1)(d).
84 GN No. 67 of 2007, rule 5(2)(a)(i)-(iv).
85 *BIDCO Oil and Soap Ltd v Robert Matonya and Two Others* Revision No. 70 of 2009 High Court of Tanzania Labour Division at Dar es Salaam (unreported).

of the mediators and arbitrators commits an offence.[86] In exercising their dispute resolution authority, mediators and arbitrators must comply with the code of conduct established by the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules.[87] For instance, mediators and arbitrators are required to act with honesty, impartiality, integrity, and due diligence, and to remain independent of any outside pressure.[88]

3. Referring disputes to the CMA for mediation

Disputes are referred to the CMA by way of a referral by completing and delivering the prescribed form ie the referral document.[89] The law requires that the party who refers a dispute to the CMA must ensure that a copy of the referral has been served on the other parties to the dispute.[90] Additionally, the referring party is required to sign the referral form, and attach the referral document, which is written proof that the referral document was duly served to the other parties to the dispute.[91] Where the referral document is filed out of time, the applicant is required to attach a condonation.[92] If these requirements are not complied with, the referral document will be rejected by the CMA.[93] Also, the complainant is required by the law to include in his referral all the relief sought, and failure by the party to plead all the relief in the first referral is a bar to claiming it during arbitration.[94] After the dispute is duly brought before the CMA, the process of mediation starts.

3.1 Time limit for referring disputes to the CMA and notice for mediation hearing

Disputes about the fairness of an employee's termination of employment must be referred within 30 days from the date of termination or the date on which the employer made a final decision to terminate or uphold the decision to terminate.[95] All other disputes must be referred to the CMA within 60 days from the date on which the dispute arose.[96] After the dispute has been referred to the CMA, the law provides that the CMA must give parties at least 14 days' notice in writing of the mediation hearing unless the parties agree to a shorter period of notice.[97] For subsequent meetings, parties must be given seven days' notice, although they may agree to a shorter period notice.[98] The notice must state the date, time and place of attendance, and the law allows the CMA to contact parties by telephone or other means prior to the commencement of mediation in order to seek to resolve the dispute.[99]

86 LIA, s 20(3).
87 GN No. 66 of 2007.
88 Ibid, rule 4.
89 ELRA, s 86(1); GN No. 64 of 2007, rule 12(1).
90 ELRA, s 86(2).
91 GN No. 64 of 2007, rules 5 and 6.
92 Ibid, rules 11 and 12(2)(a)-(c).
93 Ibid, rule 12(3).
94 *Dr Abel Nkini v Rajabu Ally Kikwete* Revision No. 33 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).
95 GN No. 64 of 2007, rule 10(1).
96 Ibid, rule 10(2).
97 Ibid, rule 13(1).
98 Ibid, rule 13(2).
99 Ibid, rules 13(3) and 14.

3.2 Condonation

The time limit for referring a dispute to the CMA is 30 days from the date the cause of action accrues for disputes regarding the fairness of contract termination, while for other disputes, it is 60 days from the date of accrual.[100] The CMA may, however, condone time upon application for good cause.[101] The phase 'good cause' has been discussed in everal cases. In *Valerie McGivern v Salim Fakhrudin Dalal*,[102] the CA held:

> No particular reason or reasons have been set out as standard sufficient reasons. What constituted good cause cannot, therefore, be laid down by any hard and fast rule. The term good cause is a relative one and is dependent upon the circumstances of each individual case.

Additionally, the delay should not be inordinate, and the applicant must demonstrate diligence, rather than apathy, negligence, or sloppiness in pursuing the action they intend to take.[103] Those who refer their applications to courts of law 'must not show unnecessary delay in doing so; rather, they must show great diligence'.[104] Thus, referring a dispute to the CMA for mediation must be done within a reasonable time, depending on the nature of the case and the circumstances surrounding it.

However, there is no common understanding of what amounts to 'reasonable time'. Where the applicant delayed referring the labour case to the CMA for six years, the delay was held to be inordinate, and the applicant was found to have acted negligently.[105] Referring a dispute to the CMA for mediation must be done within the time specified. This is a fundamental issue involving jurisdiction; it goes to the very root of dealing with civil claims since it is a material point in the speedy administration of justice. Time limitations are essential to ensure that a party does not come to court as and when he chooses.[106]

A party who refers a dispute to the CMA out of time must apply for condonation by setting out grounds for condonation. An application for condonation is made by way of a notice supported by an affidavit.[107] The affidavit should contain, among other particulars, factual statements in support of the application and a statement of legal issues.[108] The requirement that an affidavit in support of an application for condonation should include a statement as to legal issues that arise from the material facts departs substantially from

100 Ibid, rule 10(1) and (2).
101 Ibid, rule 11(2).
102 Civil Application No. 11 of 2015 Court of Appeal of Tanzania at Tanga (Unreported) at p.6.
103 *Lyamuya Construction Company Ltd v Board of Registered Trustee of Young Women's Christian Association of Tanzania* Civil Application No. 02 of 2010, Court of Appeal of Tanzania at Arusha (unreported).
104 See *Edwards v Edwards* [1968] 1 WLR 149 at 151; *Dr. Ally Shabbay v Tanga Bohora Jamaat* [1997] TLR 305; *Vodacom Foundation v Commissioner General (TRA)* Civil Application No. 107/20 of 2017, Court of Appeal of Tanzania at Dar es Salaam (unreported).
105 See *Abdon Pantaleo Msafiri v Tanzania Postal Bank* Misc. Labour Application No. 48 of 2020, High Court of Tanzania at Shinyanga (unreported).
106 *Tanzania Fish Processors Ltd. v Christopher Luhangule* Civil Appeal No. 161 of 1994, Court of Appeal of Tanzania at Mwanza (unreported).
107 GN No. 64 of 2007, rules 11 and 29(1) and (4).
108 Ibid, rule 29(4).

the generally accepted principles of an affidavit, which regard it as an evidential statement containing concrete facts and not law and arguments.[109]

The condonation form must be served on all parties to the dispute.[110] An application for condonation is required by the law to set out grounds for seeking condonation and must include the referring party's submission on the following factors: the degree of lateness; the reasons for the lateness; prospects of succeeding with the dispute and obtaining the relief sought against the other party; any prejudice to the other party; and any other factors of relevance.[111] The rules governing condonation nevertheless have some inadequacies; they do not provide clear procedures on what the mediator must do after receiving the condonation form, and they do not prescribe when the mediator must deal with the issue of time limits.[112] Also the rules are not clear as to who must decide the application for condonation.[113] The practice, nonetheless, reveals that the mediator appointed to mediate the dispute under section 86(3) of the ELRA must decide the issue of condonation. This practice has raised legal concerns for a number of reasons. First, while the application for and determination of condonation is supposed to be done before referral, mediators are appointed after referral and their jurisdiction to deal with specific referrals arises after such appointment.[114] If the jurisdiction of mediators to determine condonation arises before referral, the question that remains unanswered is whether an application for condonation can be decided by way of mediation, taking into account that a mediator is a mere facilitator of dispute resolution.[115]

Disputes that are referred late cannot be processed unless the CMA has condoned the delay.[116] After receiving the application for condonation, the CMA must serve the application on the other party to the dispute according to rule 29(5) of GN No. 64 of 2007, and proceed to hear and determine the application in terms of rule 29(10) or (11) of GN No. 64 of 2007.[117] If the CMA does not do so, it will not be properly be seized with jurisdiction to process the application filed out of time without condonation.[118]

3.3 Conducting mediation under the CMA

The ELRA provides for compulsory mediation to resolve labour disputes.[119] Parties to the employment dispute are required to first try to resolve their dispute under the guidance of the mediator before going to arbitration or adjudication.[120] All labour disputes must

109 Maige (note 42) 82.
110 GN No. 64 of 2007, rule 11(2).
111 Ibid, rule 11(3)(a)-(e).
112 Mtavangu (note 16) 55.
113 Maige (note 42) 82.
114 Ibid.
115 Ibid.
116 *Ally Mzee Moto v TANESCO* Revision No. 255 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported) at 3; *J.W Ladwa v Peter Kimote* Revision No. 52 of 2009, High Court of Tanzania Labour Division at Dar es Salaam (unreported); *Peter Mrema v Michael Kusaga* Revision No. 138 of 2008, High Court of Tanzania Labour Division (unreported).
117 Ibid.
118 Ibid.
119 ELRA, s 86(1) requires the dispute referred to the CMA to be in the prescribed form.
120 Ibid, s 86(3).

first be referred for mediation regardless of the pecuniary jurisdiction of the CMA.[121] If efforts to settle an employment dispute through mediation fail, parties can refer the matter to the CMA for arbitration or to the LC for adjudication, depending on the value of the dispute.[122]

The LIA and the rules made thereunder provides the legal framework for conducting mediation.[123] There are four stages to the process of mediation: introduction, gathering information from the parties, exploring options and developing consensus, and conclusion.[124] Also, mediation under the CMA is a confidential process and, in that regard, no evidence obtained during the mediation process can be used in arbitration or the LC against either party if mediation fails, unless the parties state otherwise.[125] The mediator may not be called as a witness in a dispute in which he was a third party during the mediation proceedings.[126]

The law requires a mediator to resolve the dispute within 30 days of the referral or within any longer period to which the parties agree in writing.[127] Notwithstanding the failure to resolve a dispute within the 30-day period, the mediator shall remain seized of the dispute until the dispute is settled, and may convene meetings between the parties to the dispute in order to settle the dispute at any time before or during any strike, lockout, arbitration or adjudication.[128] The mediator shall decide the manner in which the mediation shall be conducted and, if necessary, may require further meetings within the 30 days.[129] Where the mediator fails to resolve a dispute within 30 days, a party to the dispute may, if the dispute is a dispute of interest, give notice of its intention to commence a strike or lockout.[130] If the dispute is a complaint, a party may refer the complaint to arbitration or to the LC for adjudication.[131]

The law is silent about the time within which a party may refer a complaint to arbitration before the CMA or the LC after the certificate of non-settlement is issued by the mediator. Where the dispute was referred to the LC eight months after the mediation failed, it was found that the law does not allow a party to refer a dispute at any time they choose.[132] Prescribing no time for referring a dispute to arbitration by the CMA or adjudication by

121 *Rita Akena v Tanzania Postal Bank* Labour Dispute No. 32 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported); *Dr. Noordin Jella v Mzumbe University* Revision No. 47 of 2008, High Court of Tanzania Labour Court at Das es Salaam (unreported); and *Bakari S. Tifili v Security Group* Revision No. 282 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

122 *Rita Akena* (note 121); *Cable Television Network v Athuman Kuwinga and Three Others* Labour Revision No. 94 of 2009, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

123 GN No. 64 of 2007 and GN No. 67 of 2007.

124 GN No. 67 of 2007, rule 9(1).

125 Ibid, rule 8(1) and (2).

126 Ibid, rule 8(3).

127 ELRA, s 86(4).

128 Ibid, s 86(8).

129 Ibid, s 86(5).

130 Ibid, s 86(7)(a).

131 Ibid, s 86(7)(b)(i) and (ii).

132 *Dr. Noordin Jella* (note 121).

the LC does not accord with the spirit of the ELRA, which is to provide a means of settling labour disputes expeditiously. Limitation is a material point in the speedy administration of justice to ensure that a party does not come to court as and when he chooses.[133]

Although in Tanzania the law provides for the right to legal representation in mediation proceedings,[134] it gives the mediator powers to extend the period of mediating interest disputes,[135] and to dismiss the complaint if the party who referred the complaint fails to attend a mediation hearing. [136] The law provides further that the mediator may decide the complaint if the other party to the complaint fails to attend a mediation hearing.[137]

3.4 Mediation of a dispute of interest and a complaint

A dispute of interest is referred to the CMA by an employee or trade union. If the referring employee or trade union fails to appear for mediation, the mediator may extend the period for settlement in terms of section 86(4) of the ELRA for a further period of 30 days.[138] The rationale for extending the time is the fact that the person who brings an action to a tribunal is interested in its speedy settlement.[139] If the respondent fails to enter an appearance (in this case, the employer or employers' association), the mediator is not authorised to extend time; instead, he must shorten the period stipulated in the law.[140] Meanwhile, where an employer or an employers' association refers a dispute of interest to the CMA, the mediator may extend the period stipulated under section 86(4) by a further thirty days if the employer or employers' association fails to attend the hearing arranged by the CMA.[141] Also the mediator may shorten the period stipulated in section 86(4) if the employee or trade union party to the dispute fails to attend the hearing.[142]

While in disputes of interest the mediator is not entitled to dispose of the dispute *ex parte* for non-appearance, in disputes of right the mediator is empowered to dismiss the referral if the referring party does not appear without good cause and may enter an *ex parte* award if the person against whom the referral is made does not appear.[143] However, commentators on the labour law and those who support the introduction of the CMA for cost-effective, quick, and relatively formal dispute resolution process view the *ex parte* disposal of a dispute during mediation as defeating the whole object of mediation envisaged in the ELRA. Since the role of the mediator is to assist the parties to mutually resolve disputes and not to impose an award in the absence of the parties, allowing a mediator to assume the position of a judge or arbitrator creates confusion in dispute

133 *Tanzania Fish Processors Ltd. v Christopher Luhangule* Civil Appeal No. 161 of 1994, Court of Appeal of Tanzania at Mwanza (unreported).
134 ELRA, s 86(6)(a) and (b) and rule 7(1) of GN No. 67 of 2007.
135 ELRA, s 87(1).
136 Ibid, s 87(3)(a).
137 Ibid, s 87(3)(b).
138 Ibid, s 87(1)(a).
139 Maige (note 42) 83.
140 ELRA, s 87(1)(b).
141 Ibid, s 87(2)(a).
142 Ibid, s 87(2)(b).
143 Ibid, s 87(3)(a) and (b).

resolution and entails unnecessary delay of litigation.[144] It is improper and contradictory, considering the purpose of mediation. The mediator does not decide the complaint; it is the parties themselves who agree to resolve their dispute under the guidance of the mediator. Therefore, even when all parties attend mediation, the mediator is not vested with powers to decide the complaint but to mediate until the parties voluntarily agree or otherwise.[145]

3.5 Conducting arbitration under the CMA

The CMA uses arbitration to resolve labour disputes. Unlike in mediation, where there is some autonomy, a person appointed as an arbitrator decides a dispute for the parties.[146] The arbitration process involves a hearing, where the parties present evidence and arguments, and the arbitrator provides a decision with reasons in a written award.[147] An arbitration award is binding on the parties and is enforceable before the court.[148] The Act stipulates that arbitration in the CMA occurs after the mediation process has been unsuccessful.[149] The Commissioner can appoint an arbitrator before the dispute has been mediated.[150]

Arbitration, as provided for under the rules, involves five stages. The arbitration process begins with an introduction, followed by an opening statement, a narrowing of the issues, a presentation of evidence, an argument, and a final award.[151] Therefore, the parties to the dispute may present evidence, call witnesses, and present arguments, but are subject to the arbitrator's discretion regarding the appropriate form of the proceedings.[152] The rationale behind the five-stage process in arbitration is to ensure that the issues to be arbitrated are clear to the parties; parties have an opportunity to present evidence, call witnesses and cross-examine them if they so choose; and parties are given an opportunity to present arguments for their case.[153] A five-stage process also intends to ensure that the arbitrator's award contains reasons for the decision.[154] Importantly, arbitration must be conducted swiftly, and must adhere to the principles of natural justice.

The process of arbitration under the CMA is simple and the substantial merits of the dispute are addressed with the minimum of legal formalities.[155] Section 88(4) of ELRA does not empower an arbitrator to disregard legal formalities, which are essential to confer the basic attributes of legal proceedings on these quasi-judicial proceedings.[156] The arbitrator must adhere to legal formalities by affording parties the right to a fair hearing, calling

144 Maige (note 42) 85.
145 Mwalongo (note 50).
146 GN No. 67 of 2007, rule 18(1).
147 Ibid, rule 18(2) and (3).
148 Ibid, rule 18(4).
149 ELRA, s 88(2)(a) and (b).
150 Ibid, s 88(3)(a).
151 GN No. 67 of 2007, rule 22(2).
152 ELRA, s 88(5).
153 *Salim Kitojo v Vodacom Tanzania* Complaint No. 4 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).
154 Ibid.
155 ELRA, s 88(4)(a) and (b).
156 *China Railway Jiang Engineering Co. Ltd.* (note 25).

witnesses, and receiving evidence.[157] Thus, the objective here is that arbitration proceedings must be structured to deal with a dispute fairly, quickly, and without excessive adherence to formalities. Flexibility in legal formalities is crucial in facilitating swift dispute resolution, as it sometimes enables an arbitrator to employ both inquisitorial and adversarial procedures to narrow down the issues in dispute.[158] The arbitrator is also duty-bound to comply with the code of conduct stipulated in the Labour Institutions (Ethics and Code of Conduct for Mediators and Arbitrators) Rules 2007 while arbitrating a labour dispute.

3.6 Determination of jurisdictional issues and postponement of arbitration

During the arbitration proceedings, a jurisdictional issue may arise, and it may appear that jurisdiction has not been determined. In such a situation, the arbitrator shall require the referring party to prove that the CMA has jurisdiction to arbitrate the dispute.[159] Arbitration proceedings may be postponed by an agreement between the parties, on application by parties, or by an arbitrator himself for good reasons.[160] While arbitration may be postponed for good reasons, the arbitration rules do not clarify the phrase 'good reasons', and the arbitrator must decide what constitutes 'good reasons'. This discretionary power vested in the arbitrator may lead to a delay in the arbitration proceedings. The arbitrator may postpone arbitration proceedings for 'good reasons' and because there is no time limit in the labour laws for concluding the arbitration, the rationale for the introduction of cheap, speedy and informal methods of labour dispute settlement is defeated by postponements based on good reason. The law further provides that arbitration proceedings shall be postponed by the CMA, without the parties appearing, if all the parties to the dispute agree in writing to the postponement, and the written agreement for the postponement is received by the CMA more than seven days prior to the scheduled date of the arbitration.[161]

3.7 Record of arbitration proceedings

During arbitration proceedings, an arbitrator is required to keep records with legible handwritten notes or by means of electronic recording.[162] A court record is a serious document which should not be lightly impeached.[163] There is a presumption that a court record accurately represents what happened during the proceedings.[164] Where the arbitrator records the proceedings using handwritten notes, he may not be required to record word for word.[165] In the record of arbitration proceedings, an arbitrator is required to summarise the evidence and arguments submitted by the parties and record all the key issues relating to the dispute.[166] An arbitrator's failure to keep a record of proceedings is

157 Ibid.
158 Maige (note 42) 88-89.
159 GN No. 64 of 2007, rule 20.
160 Ibid, rule 21(1)(a)-(c).
161 Ibid, rule 21(2)(a) and (b).
162 GN No. 64 of 2007, rule 32(1).
163 Court of Appeal in *Halfani Sudi v Abieza Chichili* [1998] TLR 527 at 529; *Shabir F.A. Jessa v Rajkumar Deogra* Civil Reference No. 12 of 1994, Court of Appeal of Tanzania (unreported).
164 *Paulo Osinya v R* [1959] EA 353.
165 GN No. 64 of 2007, rule 32(2).
166 Ibid, rule 32(3).

fundamental and vitiates the entire proceedings.[167] Where the arbitration award does not identify the person who presided over the proceedings as a mediator and arbitrator, such an award shall be quashed by the LC.[168]

Generally, the law has set out guidelines seeking to ensure that arbitration proceedings are orderly, that they have a starting point, reflect the issues between the parties, and indicate facts, evidence and the arguments of the parties.[169] The content of the record of arbitration proceedings complying with the guidelines must clearly indicate the issues to be arbitrated; evidence led by each side to prove or disprove the said issues; arguments by way of written submissions (if the arbitrator has allowed them), which should be indicated in the proceedings, or made part of the record where they are received orally; and closing arguments, where the arbitrator allowed them.[170] Where there were preliminary issues, the evidence and arguments by each side should be indicated in the record. Finally, the record of the proceedings should contain the award indicating the decision and the reasons for the decision.[171] Where there is an application before the LC and there is no proper and accurate record from the CMA, it is impossible to decide the issues that the applicant is complaining about.[172] Therefore, it is mandatory for the arbitrator to keep a record of the arbitration proceedings, whether handwritten or recorded by electronic means.

3.8 Joinder or substitution of parties to arbitration proceedings

The joinder of parties in arbitration proceedings is the process of including additional parties in an ongoing arbitration. It is combination of two or more persons or entities as plaintiffs, applicants, claimants, petitioners, defendants or respondents in arbitration proceedings. The commissioner of the CMA may join any number of persons as parties in proceedings if the right to relief depends substantially on the same question of law or fact, or if the person to be joined in the proceedings has a substantial interest in the subject matter of the proceedings.[173] Joining a third party to arbitration proceedings must be done judicially because arbitration is founded on party autonomy. The arbitration of labour cases by the CMA recognises the need to facilitate a fair and efficient resolution of disputes by accommodating additional parties who may play a role in the broader context of the dispute settlement.[174] Joining a third party in arbitration proceedings must be done in accordance with the applicable laws and rules. It may be done by an arbitrator of his own accord (*suo motu*), on application by a party, or if a person entitled to be joined in

167 *Destofanos Hotel v Domina Marusu* Complaint No. 21 of 2007, High Court of Tanzania Labour Division at Dar es Salaam (unreported).

168 Ibid at 1.

169 GN No. 64 of 2007, rule 32.

170 *Jonathan Tengule v Geita Gold Mining Ltd* Revision No. 29 of 2007, High Court of Tanzania Labour Division at Dar es Salaam (unreported) ruled on 28 November 2008 at 4.

171 Ibid.

172 *Jannere Beemster v Tarasila Petro Shamba* Revision Application No. 12 of 2020, High Court of Tanzania at Arusha (unreported).

173 GN No. 64 of 2007, rule 24(1) and (2).

174 Nwokeke, C 'Joinder of Parties in Arbitration Proceedings Under the Arbitration and Mediation Act 2023' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4592325> accessed 7 October 2024.

the proceedings applies at any time during the proceedings to be joined as a party.[175] These persons may be represented by one or more persons after obtaining leave from the CMA. The joinder of third parties may enhance procedural efficiency and encourage consistency in decision-making. The issue of permission to appear in a representative suit is not a mere formality, since a party who is represented without leave may rightly refuse to be bound by a decree that he was not properly part of.[176] Similarly, the CMA, on application by any party, may substitute a person with an existing party if this becomes necessary.[177]

3.9 Combined mediation and arbitration (med–arb)

The CMA may set down a combined mediation and arbitration (med–arb) process on the same date to be conducted by the same person after giving parties notice on such a combined process.[178] Where the matter is set to be dealt with under this mechanism, the parties are entitled to at least 14 days' notice in writing from the CMA.[179] When the same person has to conduct both mediation and arbitration, that person shall conduct the mediation process in a manner that does not compromise that person's ability to arbitrate the dispute.[180] Unless the parties agree, nothing that transpired during the mediation proceedings can be used during arbitration.[181] To ensure that the arbitrator does not act prejudicially, the law requires the mediator with arbitration power to conduct himself in a manner that does not compromise his ability to arbitrate the dispute.[182] The LC has held on several occasions that med-arb should not be confused with situations where a mediator becomes an arbitrator upon the failure of mediation.[183]

Although the law allows for combined mediation and arbitration proceedings, rule 18 does not override rule 16, which requires the issuing a certificate where mediation has failed.[184] The CMA's power to order combined mediation–arbitration is exercised after giving due notice.[185] The difficulty is that the ELRA prescribes the appointment of a mediator of a dispute first under section 86(3)(a) and, after the failure of mediation, the appointment of an arbitrator under section 88(2)(a).[186] The practice of appointing one person as both mediator and arbitrator at the same time depends on how efficient the mediator is in finalising the mediation, writing the certificate and receiving the

175 GN No. 64 of 2007, rule 24(3)(a)-(c).
176 *Evans Buninange and Another v ACE Tanzania Ltd* Revision No. 61 of 2009, High Court of Tanzania Labour Division at Dar es Salaam (unreported), ruled on 18 June 2010.
177 GN No. 64 of 2007, rule 24(4).
178 Ibid, rule 18(1).
179 Ibid, rule 18(2).
180 Ibid, rule 18(1), (2) and (6).
181 Ibid, rule 18(5).
182 Ibid, rule 18(6).
183 *Kigoma v Phares Ngeleja & TUICO* Labour Revision No. 180 of 2009, High Court of Tanzania Labour Division at Dar Es Salaam (unreported); *Aziz Ally Aidha Adam v Chai Bora Ltd* [2011-12] LCCD 65.
184 *BIDCO Oil and Soap Limited v Abdu Said and Three Others* Revision No. 11 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (unreported).
185 GN No. 64 of 2007, rule 18(1) and (2).
186 *BIDCO Oil and Soap Limited* (note 184).

appointment as arbitrator.[187] Since the mediation of disputes is mandatory, and arbitration follows after its failure, depending on the pecuniary jurisdiction of the case, it remains to be seen how two appointments can be made at the same time without flouting the law.[188]

It is also uncertain on what grounds a party to the proceedings can challenge the arbitral award if he believes that the mediator-arbitrator was influenced by what transpired in mediation when arbitrating.[189] The situation can be addressed by enacting enabling provisions and equipping the CMA with powers to effectively and efficiently carry out its important functions by being able to assign two different persons to perform the two functions in each case. If the reality is as explained, then the CMA must adopt a compromise practice that is not directly contrary to the law and does not cause injustice to either party.[190] Arbitrators have adopted the practice of informing the parties and recording their responses that they have been appointed as arbitrators in order to avoid nullification. If parties feel that the person's previous role as mediator will adversely affect their interests, they have the right to say so, and then the dispute must be arbitrated by another arbitrator who was not part of the mediation proceedings, even if that person has to come from a different area office, involving additional costs and delays.[191]

The CMA is enjoined to adopt a practice of requiring the parties' consent for the mediator proceeding to arbitration, by signing a consent agreement in the manner already prescribed for procedures where med–arb is adopted.[192] The signed consent agreement must be clearly noted in the record before arbitration begins. In the current situation, where a mediator proceeds with the arbitration of a dispute without appointment or without complying with the above procedure of giving parties a choice in the matter, the subsequent proceedings will be found to have been conducted with fundamental irregularity and will be the subject of a review.[193]

3.10 Arbitration awards

An arbitrator may make any appropriate award, but may not make an order for costs unless a party or a person representing a party acted in a frivolous or vexatious manner.[194] Within 30 days of the conclusion of the arbitration proceedings, the arbitrator must issue an award with reasons and must sign the award.[195] An arbitration award is binding on the parties to the dispute and an arbitration award may be served and executed in the LC as if it were a decree of a court of law.[196] An arbitrator who has made an award under section 88(8) may, on application or on his own motion, correct in the award any clerical mistake or error arising from any accidental slip or omission.[197]

187 Ibid.
188 Ibid.
189 Maige (note 42) 89.
190 *Tanzania Breweries Ltd* (note 9) 11.
191 Ibid.
192 GN No. 67 of 2007, rule 30.
193 *Tanzania Breweries Ltd* (note 9) 11.
194 ELRA, s 88(8) and (9).
195 Ibid, s 88(8) and (9).
196 Ibid, s 89(1) and (2).
197 Ibid, s 90.

3.11 Remedies available to a party aggrieved by the arbitration award

A party aggrieved by the arbitration award, especially where the arbitrator awarded costs, and who alleges a defect in any arbitration proceedings under the auspices of the CMA may apply to the LC for a decision to set aside the arbitration award. This must be done within six weeks of the date that the award was served on the applicant, unless the alleged defect involves the improper procurement of the award.[198] If the award was improperly procured, the applicant must apply to the LC within six weeks of discovering the said fact.[199] Other grounds that may require the LC to set aside the CMA's award include misconduct on the part of the arbitrator and if the award is unlawful, illogical or irrational.[200] The application made in terms of section 91 of the ELRA is called a 'revision'. Such an application is also covered by section 94(1)(b) of the ELRA and rule 28(1) of the Labour Court Rules, 2007. These provisions provide for the revision of the decisions by a responsible person or body implementing the provisions of the Act.

The grounds for revision are more explicit, including that the responsible person failed to exercise jurisdiction, or illegally exercised jurisdiction, or has exercised it with material irregularities, or there is an error manifestly apparent on the face of the records.[201] For instance, an application under section 91(1)(a) of the ELRA and rule 28(1) of the Labour Court Rules, 2007 was successful, and the LC set aside the proceedings of the CMA and ordered the return of the matter to the CMA to be heard by a different arbitrator, because the award was not dated.[202]

In *Grumett Fund Limited v Martin Isaya Kajahe*,[203] the record of the proceedings revealed that no issues were framed after opening statements were received as prescribed by the law or before arbitration commenced. The arbitrator missed one of the vital stages in the arbitration process prescribed under rule 22(2) and (4) of GN No. 67 of 2007. As a result, the award was not issued in conformity with the requirements of rule 27(3) of GN No. 67 of 2007, which prescribes that a proper award must indicate the issues in dispute, the arbitrator's decision on them, and the reasons therefore. The LC held that the arbitrator's failure to follow the process for arbitration proceedings amounted to a material irregularity leading to injustice as the parties could not properly present their case. The LC quashed the impugned CMA proceedings, the subsequent award and the order, and referred the dispute back to the CMA to be arbitrated afresh before a different arbitrator.

Moreover, where there is an application before the LC regarding the award issued by the arbitrator in the CMA, the LC may stay the enforcement of the award pending its decision on that award.[204] Where the award is set aside, the LC may decide the dispute in a manner it considers appropriate, or make any order it considers appropriate about the process to be followed to decide the dispute.[205]

198 Ibid, s 91(1)(a).
199 Ibid, s 91(1)(b).
200 Ibid, s 91(2).
201 Rule 28 of the Labour Court Rules, 2007.
202 *Gold Star Paints (Ltd) v Victor C. Kapya* Revision No. 148 of 2012, High Court of Tanzania Labour Division at Dar es Salaam (unreported).
203 Revision No. 29 of 2012, High Court of Tanzania Labour Division at Musoma (unreported).
204 ELRA, s 91(3).
205 Ibid, s 91(4)(a) and (b).

4. Legal challenges faced by the CMA in settling labour disputes

The settlement of labour disputes by the CMA is not without legal challenges. Issues of jurisdiction, the time taken to settle disputes, the appearance and non-appearance of parties before the CMA and their legal effects, and conflicting decisions by a single judge of the High Court Labour Division caused by the application of the doctrine of precedent affect the settlement of labour disputes by the CMA. The CMA's jurisdiction is restricted to specific types of labour disputes, such as unfair termination or non-payment of benefits, leaving certain matters such as statutory offences outside its scope. While the jurisdiction of the CMA seems to have been settled by the amendment of the labour and employment laws in 2015 and 2016, and by *Tanzania Posts Corporation v. Dominic A. Kalangi*,[206] the CMA still faces jurisdictional limitations caused by the scope of cases which can be decided by the CMA. There is overlapping jurisdiction with other institutions such as the Public Service Commission and the LC. Although *Tanzania Posts Corporation v. Dominic A. Kalangi*, decided by the final appellate court, addressed the challenge, the court strictly followed the dictates of the law without considering the need to settle the matter once and for all.[207] The subsidiary legislation under the Public Service Act still maintains that ELRA shall be binding on public servants in operational service in every disciplinary authority having powers of dismissal, termination of appointment, or discipline.[208]

Another challenge is the absence of clear specific procedural rules for med–arb for resolving labour disputes; clearer guidelines and legal recognition are needed to enhance efficiency.[209] The rules[210] governing the non-attendance of parties at the CMA are also unclear, which allows the CMA to decide the matter *ex parte*, contrary to the established rules by the Court of Appeal which hold that, where a party does not attend mediation, the court should not dismiss it or proceed *ex parte* but rather treat it as a failed mediation.[211] Also, where the ELRA prescribes timelines for resolving disputes, the CMA sometimes struggles to meet these, which leads to delays.

5. Conclusion

This article examined the legal framework of the CMA in settling labour disputes. It analysed the approaches employed in labour dispute settlement at the CMA, namely, mediation and arbitration. The legal framework is based on the provisions of the ELRA, the LIA, and the rules made thereunder. These laws provide for a mandatory mediation process

206 Civil Appeal No. 12 of 2022, Court of Appeal of Tanzania at Mtwara (unreported).

207 Sabby, F 'An Assessment of the Commission for Mediation and Arbitration's Jurisdiction over Public Servants' (2022) 49(2) *EALR* 185.

208 Order F. 29(4) of the Public Service Standing Orders of 2009.

209 Rushagama, FM 'Exploring Med–Arb in Tanzanian Industrial Disputes Resolution: A Legal Perspective' (2023) 12 (12) *International Journal of Science and Research* 1878-1883.

210 ELRA, s 87(3)(a) and (b); Labour Institutions (Mediation and Arbitration Guidelines) Rules, rule 14(2)(a)(i) and (ii).

211 See Nkobogo, J 'Legal and Institutional Challenges on Mediation of Labour Disputes in Tanzania' (2021) 48(2) *EALR* 47; *Tanzania Harbours Authority v Mathew Mtalakule & 8 Others* [2002] TLR 385; and *Napkin Manufacturer's Limited v Charles Gadi & Another* Civil Revision No. 2 of 2008, Court of Appeal of Tanzania at Dar es Salaam (unreported).

under the CMA regardless of the disputes' pecuniary jurisdiction and/or value. The article discussed the appointment and powers of mediators and arbitrators and the functions and jurisdiction of the CMA in settling labour disputes. It submits that mediators' and arbitrators' powers are exercised to ensure the settlement of employment disputes cheaply, quickly, and with minimal technicalities. Also, the time limit for referring the matter to the CMA for mediation is prescribed by the law. However, CMA may condone late reference of the dispute for mediation where there is good cause as stated under rule 11 of the GN No 64 of 2007. The court's decisions on what amounts to good cause and reasonable time for condonation were also discussed.

Mediation is a four-stage process; it is confidential, and it aims to settle disputes amicably. If mediation fails, the parties can refer the matter for arbitration before the CMA. An arbitrator will hear and determine the dispute by giving a decision in an arbitration award, which is subject to revision before the LC. Records of arbitration proceedings must be kept; a failure to keep records will lead to the proceedings being vitiated, and the matter will have to be heard *de novo*. The med–arb process is also discussed in the article, with a special focus on its legal implications and how it is not the same as arbitration after the failure of mediation.

The article recommends that the law be amended to address issues of jurisdiction, dismissal or *ex parte* hearings resulting from the non-appearance of parties at CMA mediation proceedings, and adherence to time limits in resolving labour disputes. The CMA must also adopt detailed rules for conducting med–arb so that the parties understand this procedure for settling disputes.

How to cite:

Ferdinand M Temba 'The Legal Framework of the Commission of Mediation and Arbitration in the Settlement of Labour Disputes in Tanzania' (2025) 5 *Turf Law Journal* 168-190.

Received: 23 March 2025, Accepted: 14 April 2025, Published: 6 June 2025, Doi: https://doi.org/10.62726/tlj.v5.62

Legal Challenges Faced by Accused Persons with Speech and/or Hearing Impairment in South African Courts: An Analysis of *Kruse v S* 2018 (2) SACR 644 (WCC)

Isiphile Petse*

Abstract

This case note identifies and analyses the legal impediments faced by speech and/or hearing-impaired (SHI) accused persons in South African courts. In examining the challenges faced by SHI accused persons in court, the note examines Kruse v S *2018 (2) SACR 644 (WCC). The note examines the barriers the SHI accused faces in understanding court proceedings and how South African law should address some of these obstacles. The note makes recommendations that may improve the position of SHI accused persons in the South African criminal justice system, particularly the courts.*

Keywords

South African Constitution, court proceedings, criminal justice system, disability, equality, human rights, speech and hearing impairment

1. Introduction

In South Africa, few sign language interpreting services are available in public areas, such as hospitals, courts and police stations.[1] The absence of communication services disproportionately impacts speech and/or hearing-impaired (SHI) individuals in the criminal justice system, where effective communication is essential.[2] In the *Kruse* case,[3] Raymond Kruse was a 61-year-old SHI accused person who stood trial in the Wynberg Regional Court in 2017. Mr Kruse was convicted of murder and sentenced to 15 years' imprisonment, of which five were suspended.[4] The magistrate's court's decision to convict and sentence Kruse was appealed in the Western Cape High Court because it transpired that, before Kruse's conviction, he had informed the magistrate that he had an SHI and would require communication assistance from a sign language interpreter (SLI).[5]

1 Heap, M & Morgans, H 'Language Policy and SASL: Interpreters in the Public Service' in Watermeyer, B & Swartz, L *et al Disability and Social Change: A South African Agenda* (Human Sciences Research Council 2006) 134.

2 Petse, I 'An Analysis of the Legal Challenges Experienced by Offenders with Hearing and/or Speech Impairment in the South African Criminal Justice System' (LLM thesis, University of the Western Cape 2019) 5.

3 *Kruse v S* 2018 (2) SACR 644 (WCC).

4 Ibid para 10.

5 Ibid para 11.

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Even though the appellant alerted the magistrate to his difficulty and requested an SLI, the magistrate was convinced that the appellant could write and read.[6] This suggested that the magistrate was ignorant and could not place herself in the shoes of the affected individual; therefore, because of the ignorance, the appellant stood trial without being able to hear or even understand the questions asked during the court proceedings.[7] Even though the appellant was provided with written notes from witness testimonies during the court proceedings, he could not respond effectively as he was not given enough time to comprehend and verify the information provided.[8] The appellant was not only affected by the magistrate's insensitive approach but also denied assistance from his family.[9]

For the above reasons, the appeal court confirmed that the magistrate was insensitive about the appellant's disability.[10] The magistrate's refusal to give the appellant full access to an SLI hindered the appellant's adequate understanding of the court proceedings, which silenced the appellant's voice.[11] The appeal court held that the appellant's conviction for murder should be set aside.[12] An accused SHI can be reduced to a 'passive and powerless spectator' at his or her trial.[13] The accused must understand the proceedings, and it is also essential that the court understands the accused.[14] However, understanding is infinitely more difficult for the SHI accused because their only communication method may be sign language.[15] The victimisation of individuals with severe communication disabilities is often overlooked. This lack of attention exacerbates their suffering and perpetuates their invisibility in society.[16] SHI accused persons face significant challenges when they testify in court.[17] This includes miscommunication and communication failures between interpreters and the accused.[18] The accused often cannot understand court proceedings or follow the court officials' instructions.[19] Their right to comprehend is thus often denied.[20]

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6 Ibid para 12.
7 Ibid para 21.
8 Ibid para 14.
9 Ibid para 18.
10 Ibid para 26.
11 Ibid para 20.
12 Ibid para 28.
13 Ibid para 20.
14 Ibid para 4.
15 Bourque, PC 'Admissibility of Statements Made by Deaf Accused' (1978) 20 *Criminal Law Quarterly* 238. See also Kelly, LM 'Sounding out d/Deafness: The Experience of d/Deaf Prisoners' (2018) 8 *Journal of Criminal Psychology* 1, 20–21.
16 Combrinck, H & Meer, T *Gender-based Violence Against Women with Psychosocial and Intellectual Disabilities in South Africa: Promoting Access to Justice* (Committee on the Rights of Persons with Disabilities, Half-day of General Discussion on Women and Girls with Disabilities, 2013) 13.
17 Pillay, AL 'The Rape Survivor with an Intellectual Disability vs the Court' (2012) *South African Journal of Psychology* 313.
18 Dagut, H & Morgan, R 'Barriers to Justice: Violations of the Rights of Deaf and Hard-of-Hearing People in the South African Justice System' (2003) 19 *South African Journal on Human Rights* 30. See also Holness, W & Rule, S 'Legal Capacity of Parties with Intellectual, Psycho-social and Communication Disabilities in Traditional Courts in Kwazulu-Natal' (2018) 6 *African Disability Rights Yearbook* 39.
19 Dagut & Morgan ibid 30. See also *Kruse v S* para 11.
20 Petse (note 2) 6.

Observing the controversy around the legal test for competency to testify,[21] this note argues that, in the *Kruse* case, the appeal court correctly identified the inadequate attention paid to the difficulties encountered by SHI individuals in the South African criminal justice system. This note contends that obstacles faced by SHI accused are prevalent and are exacerbated in the context of the criminal justice system. These obstacles may violate the rights of persons with SHIs. Therefore, there is a need to create awareness of the legal challenges these accused may face in the criminal justice system. This note analyses South African domestic law to determine whether the law is crafted in a manner that supports the rights of SHI accused in the courts.

2. What does understanding and effective communication mean in a fair trial?

South African law has long entrenched the principle that the accused should be able to understand court proceedings.[22] Courts and laws emphasise the crucial nature of the accused comprehending court proceedings.[23] A lack of understanding can significantly prevent the accused from participating meaningfully in the trial.[24] This means the court must ascertain whether the accused can comprehend and effectively communicate to offer a proper defence.[25] The court has also stated that 'effective communication imposes a duty on the state to provide competent interpreters'.[26] Effective communication is essential at every stage of the criminal proceedings, from apprehension to sentencing.[27]

A fair trial requires not only the physical presence of an accused in court, but also the ability of that person to understand the proceedings.[28] It is widely accepted that an accused's ability to understand and be understood is a fundamental requirement for a fair trial.[29] In *S v Dlali*[30] the court re-stated that the criterion for fitness to stand trial is whether the accused, because of mental illness or mental defect, is capable of understanding the proceedings to make a proper defence.[31]

The court in *Kesavarajah v R*[32] also discussed a further consideration to determine whether the accused is fit to stand trial. The majority held that

21 Bornman, J 'Identifying Barriers in the South African Criminal Justice System: Implications for Individuals with Severe Communication Disability' (2016) *Southern African Journal of Criminology* 4. See also Suder, I 'Police tells court of arrest of deaf mute' (6 June 2001) <https://www.iol.co.za/news/south-africa/policeman-tells-court-of-arrest-of-deaf-mute-67711> accessed 7 July 2018. Four policemen were charged with murdering a hearing-impaired offender, Clive Michael, and then dumping him in a cell at the Chatsworth Police Station.

22 Cassim, F *The Right to Meaningful and Informed Participation in the Criminal Process* (LLM thesis, University of South Africa, 2009) chapter 6.

23 Petse (note 2) 58.

24 Ibid.

25 *Kesavarajah v R* (1994) 123 ALR para 463.

26 *S v Ndala* 1996 (2) SACR 218 (C).

27 Denmark, JC *Deafness and Mental Health* (Jessica Kingsley Publishers, 1994) 114.

28 *Rex v Lee Kun* 1916 (1) KB 337 paras 340–43.

29 *Kruse v S* para 5. See also Cassim (note 22).

30 *S v Dlali* [2015] ZAECBHC para 18.

31 Criminal Procedure Act 51 of 1977, s 77(1).

32 *Kesavarajah v R* (1994) 123 ALR.

> [t]he defendant (accused) needs to understand what it is that he is charged with ... He needs to understand generally the nature of the proceedings ... He needs to be able to follow the course of proceedings to understand what is going on in court in a general sense, though he need not, of course, understand the meaning of various court formalities.[33]

The principle of understanding court proceedings is linked to the accused's presence.[34] The court has an obligation to assist an accused in understanding or to assess whether the accused is capable of understanding court proceedings.[35] To guarantee a fair trial, it is imperative to ensure that the accused can present and challenge evidence and that the accused is tried in a language that he or she understands.[36]

3. Rights applicable to effective communication and the SHI accused's understanding during court proceedings

Effective communication is imperative for a fair trial.[37] Many rights guaranteed in s 35(3) of the Constitution depend on effective communication by and with the accused.[38] The Constitution states 'that every accused has a right to a fair trial, which includes: the right to be present when being tried',[39] the right to adduce and challenge evidence,[40] the right to be tried in a language which the accused understands or, if that is not practical, to have the proceedings interpreted in that language,[41] and the right to have the required information provided in a language the accused understands.[42]

3.1 The right to be present when being tried (section 35(3)(e)) and the right to adduce and challenge evidence (section 35(3)(i))

An accused's presence at trial is a prerequisite for exercising active defence rights effectively.[43] The physical presence of an accused is of value only if he or she is also able to communicate.[44] The right to an interpreter guarantees the communication aspect.[45] The presence of the accused is a fundamental component of a fair trial, and failing to comply with this right may result in the proceedings being set aside.[46]

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33 Ibid para 463.
34 Cassim (note 22) chapter 6.
35 *Kruse v S* para 7.
36 Petse (note 2) 59.
37 *Kruse v S* para 4.
38 Ibid.
39 Constitution of South Africa 1996, s 35(3)*(e)*.
40 Constitution of South Africa 1996, s 35(3)*(i)*.
41 Constitution of South Africa 1996, s 35(3)*(k)*.
42 Constitution of South Africa 1996, s 35(4).
43 Steytler, N *Constitutional criminal procedure: a commentary on the Constitution of the Republic of South Africa, 1996* (Butterworth; Lexis Law Pub,1998) 294. See also Joubert, JJ & Bekker, PM *et al Criminal Procedure Handbook* (5 ed, Juta and Company, 2001) 202.
44 Steytler ibid.
45 Constitution of South Africa 1996, s 35(3)*(k)*.
46 *S v Eyden* 1982 (4) SA 141 (T).

In *Pachcourie v Additional Magistrate*,[47] which dealt with the position of a hearing-impaired person, the court held that for the accused to be considered present, the accused should be present in body and also in mind.[48] 'The accused must be able to hear and understand the importance of the evidence being led at his or her trial.'[49] The court concluded that the trial was not handled properly due to improper interpretation. As a result, the hearing-impaired person could not appreciate or understand the importance of the trial.[50]

From the *Pachcourie*[51] case, it can be inferred that presence as a principle does not only entail being of sound mind or being present physically, but includes the fact that the accused should appreciate and understand the importance of the evidence being led in the trial. The purpose of the principle is for the accused to hear the case being made against him or her and to be granted an opportunity to answer what he or she hears.[52] Furthermore, in other jurisdictions where the 'right to be present is not explicitly mentioned in the Constitution, courts have deduced it from the right to adduce and challenge evidence'.[53] Hence, this seems to be a common right. The right to adduce and challenge evidence lies at the heart of the criminal trial, namely, establishing the truth about an accused's guilt or innocence.[54] The right also includes the right to testify and enable defence witnesses to go to court and get support or assistance.[55] Presumably, the right also allows the defence witness to request assistance on behalf of the accused during court proceedings, including support for SLI.

The courts have repeatedly held that a duty rests on a presiding officer to assist the unrepresented accused in exercising his or her right to adduce evidence.[56] The right to adduce evidence also requires a qualified and adequately sworn-in interpreter where appropriate.[57] This is closely linked to the accused's right to be tried in a language that he or she understands.[58] The SHI accused can comprehend and participate in legal proceedings by effectively communicating through a certified and properly sworn-in interpreter. This enhances the standing of the accused.[59]

3.2 The right to be tried in a language that the accused understands (section 35(3)(k)) and the right to be informed in a language which the accused understands (section 35(4))

Section 35(3)*(k)* has two distinct rights: the right to be tried in a language that the accused understands; if this is not practical, then the accused has a right to have proceedings

47 *Pachcourie v Additional Magistrate, Ladysmith* 1978 (3) SA 986 (N).
48 Holness & Rule (note 18) 41.
49 Ibid.
50 *Pachcourie* (note 47).
51 Ibid.
52 *Kruse v S* (note 3) para 4.1.
53 *Colozza v Italy* 12 Feb 1985 Series A no 89 para 27. See also Schwikkard, PJ & Van der Merwe, S *Principles of Evidence* (3 ed, Juta and Company, 2013) 790.
54 *Chamber v Mississippi* 410 US 284 294 (1973).
55 *Pennington v Minister of Justice* 1995 (3) BCLR 270 (C).
56 *S v Sinxadi* 1997 (1) SACR 169 (C); *S v Dyani* 2004 (2) SACR 365 (E).
57 Schwikkard & Van der Merwe (note 53) 794.
58 *S v Saidi* 2007 (2) SACR 637 (C); *S v Manzini* 2007 (2) SACR 107 (W).
59 Petse (note 2) 61.

interpreted in a language that he or she understands. The right to be tried and given information in a language that the accused understands is essential for the accused to exercise the s 35 constitutional right[60] to participate in the trial.[61] The right only comes into play when an accused cannot understand the language in which the court usually conducts its proceedings.[62] This means a language that the accused understands, not the accused's preferred language.[63] Hence, this establishes a communication right for the accused, rather than a language right. Consequently, SHI individuals may rely on this right.[64] The court must comply with the duty to conduct the proceeding in a language that the accused understands only if the duty can be executed in practice.[65]

If the court is unable to conduct the proceedings in a language that the accused understands, the accused has the right to an interpreter.[66] However, due to the high level of linguistic understanding required in court proceedings, those with difficulty in communicating or understanding should not be given an unfair advantage; there should be fairness.[67] The test is whether the accused has the same opportunity to understand and be understood as if he or she is conversant in the language employed in the proceedings.[68] Interpretation should 'be continuous, precise, impartial, competent, and contemporaneous'.[69] Interpretation should also not be in a language that the accused partially understands.[70] The principles mentioned earlier, such as the right to be tried and given information in a language that is comprehensible,[71] must be applied equally to the SHI accused.

The right to effective communication imposes a duty on the state to provide interpreters of competence and integrity.[72] Interpreters should swear under oath to interpret faithfully and to the best of their ability.[73] Legal representation should also be appointed for the accused so that he or she can communicate and be informed of his or her rights.[74] This does not entail that, without legal representation, the SHI accused will not be informed of his or her right, but legal representation will ensure that the SHI accused does not self-incriminate. This means that the right to be tried in a language that the accused understands is applicable not only in court proceedings, but also in pre-trial proceedings under section 35(1).

60 *S v Manzini* 2007 (2) SACR 107 (W).
61 Schwikkard & Van der Merwe (note 53) 800.
62 Steytler (note 43) 363.
63 *Mthethwa v De Bruin NO* 1998 (3) SA BCLR 336 (N) para 338; *S v Damoyi* 2004 (1) SACR 126 (C) para 17.
64 Petse (note 2) 61.
65 Steytler (note 43) 363.
66 Ibid. See also Schwikkard & Van der Merwe (note 53) 800.
67 *R v Tran* (1994) 117 DLR (4th) 7 (SCC) para 30.
68 Ibid para 36.
69 *S v Ngubane* 1995 (1) SACR 384 (T) 385*f*; *S v Ndala* 1996 (2) SACR 218 (C) para 221*b*.
70 *S v Ngubane* ibid; *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891 (T) para 898.
71 Schwikkard & Van der Merwe (note 53) 800.
72 *Matemane v Magistrate, Alberton* 1991 (4) SA 613 (W) para 6191; *S v Ndala* 1996 (2) SACR 218 (C) para 222*h*.
73 *S v Ndala* paras 221-222; *S v Saidi* 2007 (2) SACR 637 (C).
74 *S v Pienaar* 2000 (2) SACR 143 (NC).

4. The SHI accused during court proceedings

In the criminal justice system, there are two types of accused individuals with SHI: the first type can communicate through an SLI, while the second type cannot. Both types face the risk of their constitutionally guaranteed rights being infringed upon during court proceedings.[75] These risks are discussed in the following section.

4.1 Risk of infringing the rights of the SHI accused during court proceedings

An SHI accused faces significant difficulties when he or she needs to testify in court.[76] In legal proceedings, misunderstandings and breakdowns in communication can occur between interpreters and the individuals on trial.[77] This may result in the accused's inability to understand court proceedings and follow court officials' instructions.[78] There are controversies 'around the legal test for competency to testify, as well as whether individuals with a severe communication disability can testify in court'.[79] The following risks of infringement were identified and discussed in the *Kruse* case.

4.2 Risk of infringing the right to be present during court proceedings

During courtroom proceedings, SHI individuals may not consistently have the chance to adequately and promptly process the information due to the quick and interactive nature of communication.[80] In the *Kruse* case, it was found that when a witness testified, her cross-examination followed immediately, without an adjournment to afford the accused an opportunity to consider her evidence and instruct counsel accordingly.[81] This meant that the offender was practically excluded from essential parts of the trial.[82] The case clearly demonstrates the significant risk of violating the rights of an SHI accused to be present, as previously described.[83]

4.3 Risk of infringing the right to adduce evidence during court proceedings

Court interpreters are required to simultaneously translate and record what is being said.[84] In the *Kruse* case, it was noted that the simultaneous written record and translation were complex because there was a high risk that parts of the evidence would be missed or the 'subtleties of communication would be lost'.[85] The interpreter frequently complained that she could not keep up with the proceedings, and her notes were also not an accurate verbatim transcript of the testimony.[86] Consequently, the rights of the SHI accused are at risk of being violated, as they are unable to present and contest evidence.[87]

75 Petse (note 2) 62.
76 Pillay (note 17) 313.
77 Petse (note 2) 62.
78 Dagut & Morgan (note 18) 30.
79 Bornman (note 21) 4.
80 Petse (note 2) 63.
81 *S v Kruse* para 15.3.
82 Ibid.
83 Petse (note 2) 63.
84 *S v Kruse* para 15.1.
85 Ibid.
86 Ibid.
87 Petse (note 2) 64.

4.4 Risk of infringing the right to have the trial interpreted in a language that an SHI accused understands

Interpretation during court proceedings can also be sub-standard, because it may be inconsistent, inaccurate, incompetent and not contemporaneous.[88] In the *Kruse* case, the accused was deprived of the benefit of contemporaneous interpretation, which requires that the interpretation of dialogue be conveyed to the accused as soon as the person has spoken. Due to the lapse of time between giving the testimony and the accused's access to the testimony, there was a limited opportunity for him to detect errors and instruct his counsel to raise issues in cross-examination.[89] In this context, SHI individuals are denied proper interpretation services, which threatens their right to understand the trial proceedings.[90]

5. Conclusion and recommendations

Persons with SHIs face numerous challenges, such as educational disadvantage,[91] social exclusion and potential constitutional violations. Despite this being a longstanding issue, little significant progress has been made in addressing it.[92] To tackle these, specific measures must be implemented. This includes carrying out a fitness-to-stand trial assessment, following the *Kruse* guidelines. Moreover, offering interpreters' services when they are needed to aid communication and guaranteeing access to assistive tools, especially when instructing law enforcement personnel, can significantly address the challenges.[93]

As mentioned before, it may be necessary to pass targeted legislation to address the challenges faced by SHI individuals in the criminal justice system.[94] Educational programmes should be created to educate SHI people about their rights in court procedures, such as how to use interpreters and legal terminology.[95] This should include interdisciplinary training and general role-plays that involve all stakeholders to ensure full access to justice for vulnerable and neglected accused with SHIs in our society.[96] Expert assessments should also be done to ascertain the nature and extent of the accused's impairment and communication skills.[97] Courts must also be made aware that special measures may be necessary to respect, protect, promote and fulfil the SHI accused's right to a fair trial.[98] This will prevent courts from avoiding their duties to deal with matters affecting SHI accused.[99]

88 *S v Ngubane* 1995 (1) SACR 384 (T).
89 *S v Kruse* para 15.3.
90 Petse (note 2) 64.
91 The educational disadvantage was evident in para 12 of *Kruse v S*; the appellant confirmed that he had not had any formal sign language training, even after he left school in grade 5.
92 Petse (note 2) 70.
93 Ibid 72.
94 Ibid.
95 Dagut & Morgan (note 18) 52.
96 Bornman (note 21) 14.
97 *Kruse v S* para 22.
98 Ibid para 23.
99 Petse (note 2) 73.

How to cite:

Isiphile Petse 'Legal Challenges Faced by Accused Persons with Speech and/or Hearing Impairment in South African Courts: An Analysis of *Kruse v S* 2018 (2) SACR 644 (WCC)' (2025) 5 *Turf Law Journal* 191-199.

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The *Turf Law Journal* is a peer-reviewed journal published by the School of Law of the University of Limpopo, South Africa. The purpose of the journal is to give a platform for high quality research on transformative and developmental perspectives about law in South Africa. While the journal is mainly seeking to respond to legal questions in South Africa, contributions on perspectives from Africa and beyond are most welcome. The journal further welcomes contributions that take multi- and inter-disciplinary approaches to law. In particular, the journal is targeting high quality research from emerging scholars and non-conventional perspectives from established researchers.

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(a) For an article to be accepted for publication in the journal, it must meet high-level quality standards and it must be an original piece that has never been published or is not under consideration by another publication.

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The journal publishes articles, book reviews, case notes and comments. The journal welcomes articles of between 8 000 to 12 000 words, inclusive of references. Book reviews, case notes, and comments must be between 3 000 to 5 500 words, inclusive of references. All contributions to the *Turf Law Journal* will be subjected to a compulsory double-blind peer review.

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