

NAMIBIA LAW JOURNAL

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CONTENTS

GUIDE TO CONTRIBUTORS	iii
INTRODUCTION	1
<i>Nico Horn</i>	
ARTICLES.....	3
Litigating with class: Considering a potential framework for class actions in Namibia.....	3
<i>Diane R Hazel</i>	
The need to reform the Namibian public procurement system: A comment on the Neckartal Dam saga	41
<i>Anne Schmidt</i>	
Accountability (or the absence thereof) in the Namibian public sector: A look at legislation and policies in place	51
<i>Dennis U Zaire</i>	
JUDGMENT NOTES	69
Melancholic medical law: Namibian medical practitioners may get away with homicide – The story of Mr H.....	69
<i>Clever Mapaure</i>	
Determining reasonable possibility of compliance with the ‘48 hours rule’: An analysis of <i>Minister of Safety and Security v Kabotana</i>	103
<i>Ndjodi ML Ndeunyema</i>	
BOOK REVIEW.....	111
Beyond the law: Multi-disciplinary perspectives on human rights. Frans Viljoen, assisted by Jehoshaphat Njau (Eds); Pretoria: Pretoria University Law Press, 2012, 295 pages.....	111
<i>Johannes DK Kariseb</i>	





GUIDE TO CONTRIBUTORS

The *Namibia Law Journal (NLJ)* is a joint project of the Supreme Court of Namibia, the Law Society of Namibia and the University of Namibia.

The Editorial Board will accept articles and notes dealing with or relevant to Namibian law. The discussion of Namibian legislation and case law are dealt with as priorities.

Submissions can be made by e-mail to namibialawjournal@gmail.com in the form of a file attachment in MS Word. Although not preferred, the editors will also accept typed copies mailed to PO Box 27146, Windhoek, Namibia.

All submissions will be reviewed by one of the Advisory Board members or an expert in the field of the submission.

Submissions for the second semester edition in 2014 need to reach the editors by 15 September 2014.

All submissions need to comply with the following requirements:

- Submissions are to be in English.
- Only original, unpublished articles and notes are usually accepted by the Editorial Board. If a contributor wishes to submit an article that has been published elsewhere, s/he should acknowledge such prior publication in the submission. The article should be accompanied by a letter stating that the author has copyright of the article.
- By submitting an article for publication, the author transfers copyright of the submission to the Namibia Law Journal Trust.
- Articles should be between 4,000 and 10,000 words, including footnotes.
- “Judgment Notes” contain discussions of recent cases, not merely summaries of them. Submissions in this category should not exceed 10,000 words.
- Shorter notes, i.e. not longer than 4,000 words, can be submitted for publication in the “Other Notes and Comments” section.
- Summaries of recent cases (not longer than 4,000 words) are published in the relevant section.
- Reviews of Namibian or southern African legal books should not exceed 3,000 words.

The *NLJ* style sheet can be obtained from the Editor-in-Chief at namibialawjournal@gmail.com.



INTRODUCTION

Nico Horn*

Although a little late, it is a pleasure to present you with Issue 1 of the *Namibia Law Journal* for 2014, six years after the publication of the first edition.

The *NLJ* has experienced a little dryness in respect of contributions during the past year or so. However, contributions have picked up in the last few months and there is now more than enough material for Issue 2 this year. It is also time for a review of the present Editorial Board and readers can expect some interesting changes in the months ahead.

The contributors to Issue 1 reflect a healthy growth in Namibian academic legal researchers. **Clever Mapaire**, a PhD Candidate at the University of Namibia (he has meanwhile finished his dissertation), writes on the absence of legal instruments to deal with possible homicide cases against medical practitioners.

The first Namibian graduate to receive a Rhodes Scholarship for graduate studies at Oxford, **Ndjodi Ndeunyema**, contributes a judgment note on *The Minister of Safety and Security versus Kabotana*. **Kennedy Kariseb**, an LLB Candidate and Student Assistant at the University of Namibia, adds a review of Frans Viljoen's book, *Beyond the Law: Multi-disciplinary perspectives on human rights*.

Dianne Hazel, an American lawyer and Fulbright scholar in Namibia, considers a legal framework for class action in Namibia, while **Anne Schmidt**, a legal researcher from Germany, looks at the reform necessary in the Namibian procurement framework in a comment on the Neckartal Dam saga. Lastly, **Dennis Zaire**, a regular contributor, looks at the presence (and absence) of legislation to ensure accountability in the Namibian public sector.

With this latest issue, a wide variety of practitioners and scholars are at your doorstep once again to enrich and challenge the Namibian legal fraternity.

* Editor-in-Chief; Associate Professor, Faculty of Law, University of Namibia.



ARTICLES

Litigating with class: Considering a potential framework for class actions in Namibia

Diane R Hazel*

Introduction

Since Namibia gained independence in 1990, the Namibian Parliament has passed various statutes that provide greater rights and protections for Namibians on a range of issues. For example, the Competition Act, 2003,¹ came into force in 2008 and seeks to ensure that markets remain competitive so that consumers may purchase better quality goods and services at lower prices. The Environmental Management Act, 2007, promotes sustainable development of natural resources and the environment to protect not only the present generation of Namibians, but also “to meet the needs and aspirations of future generations”.² In addition, many have passionately advocated for the adoption of an all-encompassing consumer protection statute. Although statutes such as these theoretically offer a number of protections to Namibian citizens, Namibians may not be able to fully enjoy these benefits without a means of enforcing the statutes on a collective basis, particularly through class action lawsuits.

A *class action lawsuit* is an action brought by a representative applicant to protect a right that belongs to a group of people in which the judgment will bind the group as a whole.³ At its core, it is a type of procedural joinder device that allows one or more persons to initiate a lawsuit as a representative of all those similarly situated.⁴ A distinguishing feature of class action lawsuits is that not all the members of the class are identified at the time when the class action is initiated.⁵

* Diane Hazel is an American Lawyer and Fulbright Scholar studying competition law and economic development in Namibia. The author would like to thank Sacky Shanghala, Chairperson of the Law Reform and Development Commission, for his assistance in generating the idea for this article and for his general support of the author's research during her grant term.

1 No. 2 of 2003, GN 54/2008, GG 4004.

2 No. 7 of 2007.

3 Gidi, A. 2003. “Class actions in Brazil – A model for civil law countries”. *American Journal of Comparative Law*, 51:334.

4 Weston, M. 2006. “Universes colliding: The constitutional implications of arbitral class actions”. *William & Mary Law Review*, 47:1726.

5 Hofmeyr, K & N Ferreira. 2012. *Opinion for Centre for Environmental Rights on instituting class actions in respect of environmental damages arising from mining activities*; pdf of the paper available at <http://www.fse.org.za>, last accessed 29 April 2014.

ARTICLES

Class actions enable redress for large-scale claims where the value of an individual claim may be too small for a claimant to litigate individually – commonly referred to as a *negative value* claim. Although modern economies may usher in a number of benefits to markets and society, such economies also foster situations in which many people may be harmed by the same illegal practices.⁶ The persons harmed by these illegal practices often are in a poor position to seek legal redress on an individual basis, either because they do not have enough information to pursue a claim or because redress is disproportionately expensive.⁷ As Namibia's economy grows and expands, Namibians will likely find themselves more frequently exposed to these types of group injuries that class actions might effectively address.

As such, Namibia may need to begin focusing on a new generation of rights and protections for its people. In 1979, Karel Vasak, a Czech jurist, introduced his theory of the three generations of human rights at the International Institute of Human Rights.⁸ Vasak theorised that nation states focus on adopting particular rights at different points in time as their legal systems develop and grow. For example, Vasak explained that nation states initially focus on first-generation rights: civil and political rights. Once the nation state has established civil and political rights, it then turns to second-generation rights: social, economic, and cultural rights. Finally, nation states address third-generation rights, which encompass a broad spectrum of rights, including a right to self-determination, a healthy environment, participation in cultural heritage, and, most importantly for our discussion, the defence of collective interests.

Namibia has achieved significant progress in the development of both first- and second-generation rights and has achieved some progress on recognising third-generation rights. But Namibia has lagged somewhat in protecting the collective interests of its people, which may primarily be attributed to its strict standing rules. Currently, Namibia does not recognise class action standing.⁹ The availability of class action litigation, however, may be a key component of ensuring the protection of many first-, second- and third-generation rights for Namibians.

6 *European Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, at par. 2, C(2013) 3539 (11 June 2013); available at http://ec.europa.eu/justice/civil/files/c_2013_3539_en.pdf, last accessed 29 April 2014.

7 Weston (2006:1727).

8 See "Three generations of human rights"; available at <http://www.globalization101.org/three-generations-of-rights>, last accessed 29 April 2014.

9 Hinson, Z & D Hubbard. 2012. *Access to justice in Namibia: Proposals for improving public access to courts*. Locus standi: *Standing to bring a legal action*. Paper No. 2. Windhoek: Legal Assistance Centre.

Discussion

This article will explore class action litigation as a procedural tool that Namibia may wish to recognise and build into its legal framework. The article will proceed by –

- explaining the current standing rules that govern bringing a claim in Namibia's court system
- identifying the shortcomings of the procedural device of joinder in obtaining redress for collective interests
- providing an overview of class actions and the historical background of the development of class action litigation
- discussing the European Union's recognition of class action litigation, despite its civil law roots
- highlighting the various arguments that have been advanced both for and against class actions
- explaining the various approaches countries across southern and central Africa have adopted with class actions, and
- analysing whether class action standing is even possible under the current law in Namibia.

Finally, the article notes a number of considerations that Namibia should consider if it decides it is able and prepared to move forward on class actions.

Standing in Namibia

Before an individual may file a claim in court against another individual or company, s/he is obliged to satisfy the requirements of *locus standi*, or standing. In general, standing rules exist to ensure that the individual seeking relief has sufficient interest in the case. The Namibian Constitution addresses who may approach the courts. Under Article 25(2) of the Constitution, –

... [a]ggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require,

Namibian courts have interpreted the phrase *aggrieved person* under Article 25(2) as someone who would otherwise have standing under common law.¹⁰ Accordingly, the common law currently governs standing in Namibia.

10 *Labuschagne & Others v Master of the High Court of Namibia & Others*, (A283/2010) [2012] NAHC 187 (10 July 2012) at par. 14.

The ordinary common law principle for standing is that a litigant has a direct and substantial legal interest in the outcome of the proceedings.¹¹ A *direct and substantial* interest means an interest in the right that is the subject matter of the litigation. This interest needs to be a legal interest and not merely a financial one.¹² In addition, the litigant's interest should not be too remote from the relief requested, and the interest should not be abstract or academic in nature.¹³ In some instances, the threat of an infringement of rights may be enough to establish standing.¹⁴

Currently, for an individual to bring any type of claim in Namibia, s/he is required to establish a direct and substantial legal interest in the outcome of the proceedings. Furthermore, even if the claim involves a fundamental right or freedom under the Constitution, Namibian courts have interpreted the constitutional term *aggrieved person* as meaning someone who has standing under the common law.¹⁵ As a result, under the prevailing interpretation of the Constitution, a litigant must meet the same standing threshold for a claim involving a violation of a fundamental right or freedom under the Constitution as any other claim.

Moreover, the common law provides that an individual only has standing to protect his/her own interests.¹⁶ In other words, an individual may not initiate a lawsuit on behalf of another. In some instances, however, there may be limited exceptions to this rule, such as when an individual has been wrongfully deprived of his/her liberty and is unable to approach a court for relief.¹⁷

Inadequacy of joinder

In Namibia, multiple litigants may pursue a claim together under the procedural device of joinder. *Joinder* refers to the process of either –

- joining parties as applicants or respondents, or
- joining causes of action or defences.

11 *Trustco Insurance t/a Legal Shield Namibia & Another v Deed Registries Regulation Board & Others*, 2011 (2) NR 726 (SC) at par. 16.

12 *Alexander v Mbumba & Others*, (A 179/2007) 2012 NAHC 303 (6 August 2012) at par. 34; see *Trustco* at par. 16.

13 *MWeb v Telecom*, 2012 (1) NR 331 (HC), citing *United Watch Diamond Company (Pty) Ltd & Others v Disa Hotels Ltd & Another*, 1972 (4) SA 409 (C) at 415F–H; *Cabinet of Transitional Government for the Territory of South West Africa v Eins*, 1988 (3) SA 369 (A) at 388A–B.

14 *Gomes v Prosecutor-General*, (A61/2012) [2013] NAHCMD 240 (9 August 2013) at par. 7.

15 *Labuschagne* at par. 14, 15.

16 *Hinson & Hubbard* (2012:3), citing *Kerry McNamara Architects Inc. & Others v Minister of Works, Transport and Communication & Others*, 2000 NR 1 (HC).

17 *Trustco* at par. 16.

Considering a potential framework for class actions in Namibia

Namibia's High Court permits the joinder of claims, provided that the claims or defences depend on substantially the same questions of law or fact.¹⁸ With joinder, however, litigants first need to come forward with their complaints and then be joined together by the court. Consequently, joinder relies on litigants realising they have a claim and then approaching the court on an individual basis before they can be joined.

Joinder, as a form of collective redress, has a number of shortcomings, particularly for groups of individuals that have similar claims. In *Permanent Secretary, Department of Welfare v Ngxuza & Others*, the South African Supreme Court of Appeal discussed its concerns with joinder, noting –¹⁹

... the various parties who have the common interest are isolated, scattered, and utter strangers to each other.

The South African Supreme Court of Appeal thus recognised a need for a device or technique “over and above the possibility of joinder” otherwise litigants “may never come” forth on their own. The court called for an –²⁰

... affirmative technique for bringing everyone into the case and for making recovery available to all.

That affirmative technique is class action litigation.

Overview and historical background of class actions

Overview

Claimants most frequently use class action litigation to address rights arising under particular areas of law, i.e. environmental, employment, competition, consumer protection, and civil rights law. In the employment context, class actions serve as an important procedural vehicle to address patterns of civil rights violations and discrimination.²¹ Claimants in the United States (US) have historically used class actions in the civil rights context to seek injunctive remedies, such as the desegregation of schools or reform of prisons.²² In the consumer context, class actions are particularly effective because they allow

18 Hinson & Hubbard (2012:ii).

19 *Permanent Secretary Department of Welfare, Eastern Cape Provincial Government & Another v Ngxuza & Others*, 2001 (4) SA 1184 (SCA).

20 (ibid.).

21 Marcus, D. 2013. “The history of the modern class action, Part I: Sturm und Drang, 1953–1980”. *Washington University Law Review*, 90:639–643; Weston (2006:1714).

22 Weinstein, J. 2001. “Keynote address: Compensating large numbers of people for inflicted harms”. *Duke Journal of Comparative & International Law*, 11:172.

the enforcement of relatively small, yet widespread, illegal and unfair business practices that, otherwise, would likely go unremedied.²³

Furthermore, some countries have found class action litigation important in the enforcement of competition, or antitrust, law. For example, federal antitrust enforcers in the US have not always been able to achieve the optimal level of deterrence on their own, so class actions play a key role in antitrust enforcement.²⁴ In fact, approximately 90% of antitrust law enforcement in the US is by private right of action, particularly class action litigations.²⁵ As a result, the use of class actions in the US has helped shape antitrust law.

Class actions have proved effective in protecting rights arising under these areas of law because these laws generally implicate diffuse and collective rights, as opposed to individual rights. *Diffuse* rights belong to everyone in the community yet to no one in particular.²⁶ Diffuse rights often arise in the environmental and consumer protection context. *Collective* rights, on the other hand, link a group of persons by prior common legal relationship rather than by factual circumstances. Collective rights typically involve a contractual relationship that connects all class members with the opposing party.²⁷ For example, class actions involving collective rights include claims against banks, credit card companies, and medical aid schemes.

Jurisdictions around the world have adopted a variety of forms of class action litigation, rejecting a 'one size fits all' approach. One common form of class action litigation involves an individual initiating an action in his/her own name. That individual then acts as a representative party for other persons who have suffered similar harm as a result of the conduct by the same entity or related entities. Alternatively, a government official – such as a consumer protection enforcement authority – may initiate an action representing individuals who have suffered harm from similar conduct by the same entities. And some jurisdictions allow associations to initiate actions on behalf of a group of persons – commonly referred to as *organisational* or *associational* class actions. In *organisational* class actions, the law in the relevant jurisdiction may limit the types of representative who may represent the class party.²⁸

23 Marcus (2013:626); Weston (2006:1714).

24 Marcus (2013:635–38); Calkins, S. 1997. "An enforcement official's reflections on antitrust class actions". *Arizona Law Review*, 39:413–414.

25 Russell, T. 2010. "Exporting class actions to the European Union". *Boston University International Law Journal*, 28:162.

26 Gidi (2003:354).

27 (ibid.:355–356).

28 (ibid.:334); Organisation for Economic Co-operation and Development Committee on Consumer Policy, *Recommendation on Consumer Dispute Resolution and Redress*, 12 July 2007, p 11; available at <http://www.oecd.org/internet/consumer/38960101.pdf>, last accessed 29 April 2014.

In addition to class actions, jurisdictions recognise other forms of collective redress that also protect collective rights. For example, with *representative* litigation, an individual acts on behalf of another person who cannot act in his/her own name. Class actions differ from representative litigation because the claimant in a class action suit acts as a member of, or in the interest of, a group or class of persons.²⁹ *Public interest* litigation is another form of collective redress. With public interest standing, any member of the public may initiate a challenge alleging harm to the general public, without showing any sort of specialised injury.³⁰ Although these other forms of collective redress should also be studied and considered as part of an overall system of protecting collective rights, this article only focuses on class actions.

Historical development of class action litigation

Class action litigation first developed in the US. The US Congress recognised early on that the government alone would not have the resources to adequately enforce the nation's laws.³¹ As a result, the US has developed clear rules and procedures surrounding the use of class actions. Rule 23 of the US Federal Rules of Civil Procedure governs class action litigation in the US. The rule provides that a class suit may be brought if –

- the class is so numerous that joinder is impracticable
- there are questions of law or fact common to the class
- the claims or defences of the representing parties are common to those of the class, and
- the representative parties will fairly and adequately represent the interests of the class.

Even if the four above criteria are met, the class must still demonstrate one of the following:

- That prosecuting separate actions by or against individual class members would create a risk of inconsistent adjudications that would impair the interests of others not party to the individual adjudications
- That the party opposing the class has acted or has refused to act on grounds that apply to the class, or
- That questions of law or fact common to class members predominate over any questions affecting an individual class member and a class action is superior to other methods of adjudication.

If a class is able to satisfy the criteria under Rule 23, US courts will then play an active role in overseeing the class action litigation. The court's obligations include certifying the class, determining the adequacy of representation, overseeing notice, managing the litigation, and determining the fairness of any

29 Hinson & Hubbard (2012:iv).

30 (ibid.).

31 Russell (2010:158).

settlement. The US legal system views the role of the courts as particularly important in safeguarding absent class members' due process rights.³²

In general, class actions have historically been more common in common law jurisdictions, like the US.³³ The use of class actions has not been widespread in civil law jurisdictions because the latter have traditionally emphasised the individual nature of legal claims.³⁴ Class actions inherently conflict with the idea of adjudication as an individualised process by aggregating many claims into one action and disposing of the rights of absent class members.³⁵ As such, civil law jurisdictions frequently view class actions as infringing a non-representative plaintiff's right to decide when and how to exercise his/her right to a cause of action.³⁶ Nevertheless, there has been a growing trend in civil law jurisdictions of recognising collective redress. For example, many European and South American nations now allow some form of multi-claimant litigation, whether class actions, group actions, or representative actions.³⁷ Some commentators attribute this evolving trend to the growing emphasis on the protection of consumer interests.³⁸

The European Union and class actions

The recent movement on class actions by the European Union (EU) illustrates the growing acceptance of class action litigation in civil law jurisdictions. In June 2013, the EU Commission issued two important documents on collective redress: a Communication titled "Towards a European Horizontal Framework for Collective Redress" (2013 Communication) and a "Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in EU Member States concerning Violations of Rights granted under European Union Law" (2013 Recommendation). The 2013 Communication recommends that all member states establish collective redress systems at the national level. In addition, it encourages member states to follow the principles the EU sets forth in the 2013 Communication, but ultimately allows member states to decide whether or not to introduce collective actions in the context of private enforcement of competition law.³⁹ The EU explains that its purpose in recommending collective redress is to

32 Weston (2006:1728).

33 Strong, SI. 2008. "Enforcing class action in the international sphere: Due process and public policy concerns". *University of Pennsylvania Journal of International Law*, 30:24.

34 (ibid.:22).

35 Marcus (2013:624–25).

36 Strong (2008:22).

37 Behrens, M, G Fowler & S Kim. 2008. "Global litigation trends". *Michigan State Journal of International Law*, 17:167–168.

38 (ibid.:168).

39 2013 Communication, p 4.

facilitate access to justice and enable injured parties to obtain compensation in mass harm situations caused by violations of rights granted under EU law.⁴⁰

The issuance of the 2013 Communication and 2013 Recommendation is particularly significant for the EU because most of its member states have deeply held beliefs that parties to litigation should be present in actions concerning them.⁴¹ The recommendation to establish collective redress systems should not have come as a surprise, however, because the EU had already taken steps in that direction. Prior to the above Communication and Recommendation, the EU required member states to have procedures in place to allow claimants acting in a collective or representative way to seek injunctive relief for certain violations of law, including consumer protection and environmental violations.⁴² For example, Directive 98/27/EC required member states to allow actions by qualified entities seeking to protect the collective interests of consumers.⁴³ Article 3 of the Directive defined *qualified entity* as an independent public body or organisation whose purpose is to protect consumer interests. Furthermore, Directive 2009/22/EC expanded the scope of Directive 98/27/EC by specifically approximating the laws, regulations, and administrative provisions relating to injunctive actions for the protection of consumer interests.⁴⁴ The 2009 Directive, however, was limited to injunctive relief and did not enable those with claims to seek compensation.⁴⁵

In the environmental context, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention) serves as the foundation for environmental collective redress in the EU. Member states entered into the Aarhus Convention in October 2001. The Convention requires its signatories to ensure access to justice with regard to infringements of environmental standards.⁴⁶ As a result, EU member states are required to have procedures in place to allow claimant parties acting in a collective or representative way to seek injunctive relief.⁴⁷ But, as with the directives addressing consumer protection, the EU limited collective redress under the Aarhus Convention to injunctive relief.

In addition to injunctive relief, the EU has been developing European standards of compensatory collective redress. Since 2005, the EU has published several

40 2013 Recommendation, section I(1).

41 Russell (2010:178).

42 2013 Communication, pp 4–5.

43 Council Directive 98/27/EC, 19 May 1998 OJ L 166.

44 Council Directive 2009/22/EC, 23 April 2009 (L 110/30).

45 2013 Recommendation, par. 11.

46 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9(3)–(5), 25 June 1998, entered into on 30 October 2001(interpreted to require collective redress).

47 2013 Communication, p 5.

discussion papers addressing compensatory collective redress in the fields of competition and consumer law. The Commission adopted a Green Paper on the conditions for bringing damages claims for infringements of EC antitrust law in 2005, a White Paper on integrating collective redress as enforcement instruments by private parties in EU competition rules in 2008, and a Green Paper on consumer collective redress in 2008.⁴⁸

In 2011, the EU carried out a public consultation titled “Towards a more coherent European approach to collective redress”.⁴⁹ As a result of this consultation, the EU recognised a need to increase policy coherence and decided to adopt a horizontal approach to collective redress. In doing so, the EU acknowledged that collective redress is a procedural tool that is relevant in areas of law other than competition and consumer protection, and that collective redress may be appropriate to address issues that arise in financial services, environmental protection, data protection, and non-discrimination.⁵⁰ This conclusion drove the 2013 Communication and 2013 Recommendation, which was the first step at the EU level in recognising instruments on collective compensatory relief.⁵¹

The EU presented its specific recommendations regarding obtaining compensation through collective redress in the 2013 Recommendation. The 2013 Recommendation stipulates that only designated entities may bring representative actions.⁵² In the case of compensatory collective redress, the EU specified that the party should only be formed through an ‘opt-in’ process, member states should not allow contingency fees, and punitive damages are prohibited.⁵³ The EU also described how collective follow-on actions would proceed, stating that collective redress actions should only start after the proceedings of a public authority.⁵⁴

Although the EU has been slow to recognise class actions – particularly those actions involving compensatory relief – EU member states have been

48 (ibid.); *Green Paper on damages actions for breach of the EC antitrust rules*, COM(2005) 672 final, (19 December 2005) (“Beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money”); *White Paper on damages actions for breach of the EC antitrust rules*, COM(2008) 165 final (2 April 2008) (“With respect to collective redress, the Commission considers that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements”); *Green Paper on consumer collective redress*, COM(2008) 794 final (27 November 2008) (“Green Paper focuses on the resolution of mass claim cases and aims at providing effective means of collective redress for citizens across the EU”).

49 2013 Recommendation, par. 3.

50 2013 Communication, p 5.

51 (ibid.).

52 2013 Recommendation, Section III(4).

53 (ibid.:Sections V(21), V(30), V(31)).

54 (ibid.:Section V(33)).

implementing national legislation that permit collective actions in the areas of consumer protection, product liability, discrimination, environmental pollution, and capital market transactions, though this legislation has varied widely.⁵⁵ In fact, a number of member states already had established procedures allowing class actions for both compensatory and injunctive relief prior to the 2013 Communication and 2013 Recommendation. The EU's slow approach reflects its caution in allowing such expanded forms of collective redress – particularly class actions – at the EU level. The 2013 Communication specifically points to class actions in the US, noting that the –

... European approach to collective redress must thus give proper thought to preventing these negative effects and devising adequate safeguards against them.

In 2008, the EU Commissioner for Competition, Neelie Kroes, stated that “the single biggest challenge” for the Commission was getting the balance between private competition enforcement and litigation “precisely right, so that private actions are effectively facilitated without incentivizing unmeritorious litigation”.⁵⁶ Accordingly, the EU has sought to achieve a balanced solution that prevents frivolous litigations while ensuring greater access to justice.

Arguments for and against class actions

In considering whether class action litigation may be appropriate in Namibia, one needs to look at the arguments that have been advanced for and against class actions. By examining class actions from various perspectives, Namibia may better determine if it wishes to recognise class action standing, and if such actions would be feasible under the current legal system.

Arguments for class actions

Proponents of class actions advance a number of arguments for why class actions are desirable in a legal system, including supplementing public enforcement, the potential to overcome rational apathy, the reduction of litigation costs, minimising the burden on the court system, and the creation of a more level playing field.

(A) SUPPLEMENTING PUBLIC ENFORCEMENT

Many view class actions as an effective private enforcement vehicle that supplements public enforcement authorities. In general, government enforcement authorities will probably never have the resources to prosecute

55 Russell (2010:168).

56 Turner, V & M Whitener. 2008. “Making waves: Interview with EU Commissioner for Competition Neelie Kroes”. *Antitrust*, Spring, 22:47, 49.

all infringements that should be pursued.⁵⁷ Although individual litigation may enhance enforcement to a limited extent, it still leaves many laws unenforced or under-enforced.⁵⁸ Allowing plaintiffs or applicants to take on the role of 'private attorney-general' through class actions may achieve positive outcomes, such as providing compensation to victims and deterring violations.⁵⁹

In the US, for example, federal enforcers are restrained in their ability to obtain monetary penalties in civil antitrust matters. But private plaintiffs may recover treble damages – a remedy that federal enforcers certainly cannot pursue. As a result, many believe that the threat of treble damages through private class action litigation serves a needed enforcement role and deters a range of illegal conduct. In fact, some in the US have described this system as a 'tag team' model,⁶⁰ in which the government identifies the wrongdoers and the class action plaintiffs then follow with a suit.⁶¹

Although many view private enforcement as a positive outcome of class actions, some disagree whether the class action model fulfils the proper role of litigation in a democracy. The answer to this question probably depends on how a jurisdiction views the role of class actions: whether class actions are a mere procedural device or a regulatory instrument.⁶² Those favouring class actions as a regulatory instrument embrace the idea that class actions should be used to "maximize the substantive law's purchase, so as to compensate for inadequacies of public administration".⁶³ In other words, class actions may fill in the voids that the government has left. But using class actions as a regulatory instrument raises the issue of democratic legitimacy: should unelected judges spurred by private lawyers have the capacity to superintend litigation with significant regulatory consequences?⁶⁴

(B) POTENTIAL TO OVERCOME RATIONAL APATHY

In many contexts, an individual litigant will rarely have sufficient incentive to initiate a case on his/her own because the damage s/he has suffered may be low in comparison with the costs of litigating the action.⁶⁵ Thus, the cost of litigation deters many individuals from pursuing claims on their own. Furthermore, in some cases, individuals may not even realise that they have

57 Russell (2010:143); see Marcus (2013:593); 2013 Recommendation, par. 6.

58 Marcus (2013:593).

59 Russell (2010:143).

60 The term *tag team* is generally used to describe a pair of people working together towards a common goal.

61 Calkins (1997: 413–15, 440).

62 Marcus (2013:592).

63 (*ibid.*:623).

64 (*ibid.*:624).

65 Russell (2010:145).

suffered an injury and, even if they had known, probably would not have bothered to pursue the claim.⁶⁶ With class actions, individuals may aggregate their damages so that the cost of pursuing a claim is no longer prohibitively expensive. As a result, class actions have the potential to overcome this rational apathy problem and ensure violators are brought to justice.

(C) REDUCTION OF COSTS

In general, class actions reduce litigation costs in a number of forms. Firstly, and perhaps most obviously, class actions reduce the individual cost to bring a claim.⁶⁷ As discussed, an individual on his/her own may not be able to afford to bring a claim, particularly when the individual economic harm is not great. Class actions, however, allow individuals to pool their resources. By aggregating multiple claimants into one group, it becomes possible to initiate claims for harms that on their own are economically insignificant. Furthermore, because courts typically play a more active role in class litigations, they generally have the power to better control legal fees in class actions, ensuring that the costs to the class do not spiral out of control.⁶⁸

Secondly, class actions may reduce costs to the overall court system by consolidating a number of individual claims together as one.⁶⁹ For example, instead of multiple applicants coming forward to file claims against the same entity or group of entities, class actions consolidate all these individual claims into one.

Thirdly, class actions reduce transaction costs. With the procedural device of joinder, someone has to locate all the applicants who have filed claims. Once located, the group needs to decide who will make strategic decisions, how to resolve disagreements, and how the litigation will be funded. The joinder group also must determine whether it is even worthwhile to pursue claims individually, because the individual claims may be too small in value.⁷⁰ In contrast to a class action, joinder does not aggregate claims into one action. Thus, class actions minimise these transaction costs that accompany joinder.

Finally, class actions enhance the possibility of a global settlement, which may be beneficial to litigants in a variety of ways. Global settlements not only provide broad relief for the claimants, but also limit the costs to the respondents.

66 Weinstein (2001:173).

67 Russell (2010:143); Weinstein (2001:184). Cf. also Marcus (2013:596): “If Rule 23 has any role to play in civil litigation, it must apply when class members have undifferentiated, small-value claims that they would never litigate individually. ... Absent class certification, no one would sue to vindicate these claims, and the substantive law would have no regulatory force whatsoever”.

68 Strong (2008:15–16).

69 Russell (2010:145).

70 Hinson & Hubbard (2012:116).

(D) MINIMISING THE BURDEN ON THE COURT SYSTEM

Class actions promote overall judicial efficiency and minimise the burden on the court system.⁷¹ For example, class actions may reduce the duplication of discovery, motions practice, and pre-trial procedures. With joinder, on the other hand, each applicant is obliged to retain his/her own counsel or be consulted on each decision of shared counsel. Furthermore, when claims are joined, each applicant typically may still file his/her own motions, even if those motions conflict with other applicants' motions, and each counsel representing an applicant requires separate service. Class actions, however, reduce much of this unnecessary duplication to the judicial system.⁷²

(E) CREATION OF A MORE LEVEL PLAYING FIELD

When individuals pursue claims on their own, they may encounter significant power imbalances because respondents are frequently large companies that have more resources to litigate a matter. Class actions allow individual class members to pool their resources and information, which may lessen and even correct these power imbalances.⁷³

Even by pooling monetary resources, however, class members may not have enough financial resources in all instances to fully litigate a matter. As a result, various means of funding class actions have evolved around the world. For example, in the US, class action attorneys typically work on a contingency fee basis. With contingency fees, attorneys only get paid if there is some recovery or award in the case. Other jurisdictions use third-party funders or class action funds that the court establishes. These funding mechanisms generally permit representative attorneys to generate enough money – and, in some cases, an excess of money – to conduct the litigation on a more level playing field.⁷⁴ This article will discuss the various funding mechanisms in more depth under “Funding”.

(F) OTHER BENEFITS

Class actions achieve a number of other positive outcomes, including benefits to respondents and society as a whole. Class actions enhance the possibility that a single action will resolve all claims, obviating the need for repetitive litigation of similar issues. Consequently, respondents may bring a close to their disputes and avoid the costs of prolonged litigation.⁷⁵

71 See Mason, D. 1997. *Consumer law in South Africa*. Kenwyn: Juta & Co, Ltd, p 322.

72 Hinson & Hubbard (2012:115).

73 (ibid.:115–116).

74 Weinstein (2001:173).

75 (ibid.:174).

Considering a potential framework for class actions in Namibia

In addition, with class actions, a single judge may familiarise him-/herself with the legal and factual issues of the case. In contrast, if a number of different claimants brought individual actions involving the same issue, each judge would need to spend time and resources preparing to hear the case. Instead, class actions allow one judge to handle the case, saving valuable judicial resources. Moreover, the consolidation of claims also ensures consistency in results since multiple judges will not be issuing differing judgments on the same or similar set of facts.⁷⁶

Class actions also attract greater publicity than individual actions typically do. By generating media attention, members of the public may become aware of abuses that directly affect them. This publicity allows for a greater number of individuals to protect and assert their rights.⁷⁷

Finally, class actions may bring long-run benefits to society. By holding wrongdoers accountable for actions that individuals may not have pursued on their own, class actions weaken and eliminate incentives of unjust enrichment. As a result, wrongdoers may be less likely to engage in future illegal acts.⁷⁸

Arguments against class actions

Those who criticise the use of class actions have advanced a number of arguments to support their position, including principal-agent problems, forced settlements, the burden on individual courts, ethical dilemmas for representative attorneys, the frustration of equalisation, the deterrence of public enforcement, and a general fear of the US legal system.

(A) PRINCIPAL-AGENT PROBLEMS

Agency problems may arise with class actions when the incentives between the agent (the attorney) and the principal (the class) are not perfectly aligned. Class actions tend to foster this misalignment of interests. As a result, the attorney representing the class may make litigation decisions in accordance with his/her own economic interests rather than those of the class. Further, class members have limited ability to monitor and/or control the attorneys representing them, especially as the number of represented class members increases.⁷⁹ Agency problems frequently arise in the settlement context, in which attorneys may coerce class members into settlements out of fear they may not win the litigation (and in some circumstances not be paid).⁸⁰ This

76 (ibid.:172).

77 Mason (1997:322).

78 Russell (2010:156).

79 (ibid.:148); Weinstein (2001:174).

80 Russell (2010:148-51).

coercion may be more likely to occur when attorneys work on a contingency fee basis. As such, many criticise class actions as being too attorney-driven.⁸¹

(B) SETTLEMENTS

Although most generally view settlement as a positive outcome, settlement may not be the best outcome in all situations, particularly when one party may clearly be on the correct side of the law. Class action litigations, however, may compel parties to settle when they otherwise would not. For example, respondents may be forced into settling a claim that arguably has little or no merit just to avoid the risk of a large award and damages.⁸² In addition, large-scale claims – a regular feature of class actions – make holding a trial extremely difficult, if not entirely unfeasible.⁸³ Thus, the parties may be strongly inclined to settle, recognising that a trial may be logistically impossible.

(C) BURDEN ON INDIVIDUAL COURTS

Class actions greatly increase the complexity of litigation because they typically involve numerous class members and variations on similar claims.⁸⁴ Class actions also almost always present more factual and legal issues than any individual case, consuming time and resources.⁸⁵ Consequently, class action litigation places a significant burden on an individual court. So although class actions may save judicial resources for the court system as a whole by consolidating the actions, the burden on the particular court handling the litigation may be significant.

(D) ETHICAL DILEMMAS FOR REPRESENTATIVE ATTORNEYS

Class actions attenuate the normal individual attorney–client relationship.⁸⁶ Class members may have conflicting views on various aspects of the case and the approach to take in litigation. The representative attorney then faces the difficult situation of trying to serve the interests of all his/her clients. This situation creates an ethical dilemma that the representative attorney has to solve – that is, how best to represent the interests of the entire class where conflicting interests may exist.

(E) FRUSTRATION OF EQUALISATION

Class action litigation elevates the recoveries of those class members with the most modest claims above what they may have obtained in an individual

81 Weston (2006:1726).

82 Weinstein (2001:174).

83 Marcus (2013:624).

84 Weinstein (2001:173).

85 (ibid.).

86 (ibid.:174).

trial.⁸⁷ At the same time, class actions reduce the recoveries of those with the strongest claims because the claims are being spread among the class.⁸⁸ As a result, the recovery an individual class member receives in a class action does not necessarily reflect the actual value of that individual's claim. Of course, if an individual class member believes that his/her claim is greater than others in the class, the individual may choose not to join the class. But then the rational apathy problem arises, and the individual may ultimately decide not to pursue a claim.

(F) DETERRENCE OF PUBLIC ENFORCEMENT

Although many cite increased private enforcement as a positive outcome of class actions, some argue that the increase in private enforcement may actually deter public enforcement.⁸⁹ For example, government enforcers may decide not to initiate cases if they know that the private bar will pursue the respondents. Some, however, may see decreased public enforcement as a positive outcome because it saves government resources and allows those resources to be dedicated elsewhere. Separately, but on a related note, private litigants may have different motivations that do not necessarily align with the interests of society as a whole.

(G) FEAR OF THE US LEGAL SYSTEM

Many critics point to the US class action system as a reason to avoid allowing class actions. Class actions in the US are generally viewed as expensive, burdensome, and wasteful.⁹⁰ A number of features of the US system contribute to this impression, including the use of jury trials that lead to high damage awards, one-way shifting of costs, treble and punitive damages, broad pre-trial discovery rules that allow for fishing expeditions, opt-out procedures, and contingency fee arrangements.⁹¹

The EU has noted that class actions in the US are “an illustration of the vulnerability of a system to abusive litigation”. As a result, the EU has tried to avoid certain features of the US system in formulating its policies regarding the use of class actions in the EU.⁹² The EU has stated that —⁹³

... [e]lements such as punitive damages, intrusive pre-trial discovery procedures and jury awards, most of which are foreign to the legal traditions of most Member States, should be avoided as a general rule.

87 Mason (1997:323).

88 Weinstein (2001:174).

89 Russell (2010:144).

90 Gidi (2003:321); Russell (2010:144).

91 2013 Communication (2013:8); Gidi (2003:321); Russell (2010:174).

92 2013 Communication, p 8.

93 2013 Recommendation, par. 15.

Some critics believe a simpler class action model would avoid the pitfalls of the US system, but others argue that basic is not always better. In fact, some believe that the ambiguities in the US model have contributed to the expansion of the class action system.⁹⁴ Either way, if Namibia considers a class action framework, much may be learned from studying the successes and failures of the US model.

Rise of class actions in Africa

Class action litigation has emerged in recent years in Africa. Some African nations have chosen to enshrine class action standing in their respective constitutions while others have passed class action legislation. In addition, some countries have interpreted their common law standing rules broadly to allow for public interest litigation, although it is unclear if class actions would be recognised under public interest standing. This section provides an overview of the recognition and development of class action litigation in several African countries, beginning with a discussion of South Africa, which has probably been the most active African country in the class action space. The section then continues to discuss class action developments in Kenya, Uganda, and Zimbabwe, as well as indications that class action litigation may be emerging in Mozambique and Tanzania.

South Africa

South Africa has probably been the most active African country in recognising and using class actions. Section 38 of South Africa's Constitution provides for broad collective standing when a right enshrined in the Bill of Rights has been infringed or threatened. Subsection 38(c) specifically addresses class actions, stating "anyone acting as a member of, or in the interest of, a group or class of persons" may approach a court. South Africa's common law, however, does not recognise class actions. Because the Constitution has provided for a right – which the common law does not recognise – to approach courts collectively, there has been some confusion about the legality and contours of class actions in South Africa, which has impeded the development of the law in this area.⁹⁵

To resolve the conflict posed by the Constitution and the common law, South Africa contemplated class action legislation. In 1998, the South African Law Commission recommended that class actions be introduced in South Africa by means of legislation.⁹⁶ That legislation has yet to be realised. However, recent

94 Behrens (2008:171).

95 Hofmeyr & Ferreira (2012:3–4).

96 South African Law Commission. 1998. "The recognition of class actions and public interest actions in South African law"; available at http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf, last accessed 30 April 2014.

legislative reforms have granted standing to persons who institute actions on behalf of a class when enforcing rights or seeking certain remedies under that particular piece of legislation.⁹⁷ For example, section 157 of the Companies Act, 2008,⁹⁸ specifically provides for class actions, allowing a person “acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interests of its members” to bring a matter before a court, the Companies Tribunal, the Panel, or the Commission.⁹⁹ Similarly, subsection 4(1) of the Consumer Protection Act, 2008,¹⁰⁰ and section 32 of the National Environmental Management Act, 1998,¹⁰¹ also provide for class actions.¹⁰²

In 2001, the South African Supreme Court of Appeal gave effect to Section 38 of the Constitution in *The Permanent Secretary, Department of Welfare v MN Ngxuza*.¹⁰³ In *Ngxuza*, the court described the benefits of class actions and noted that joinder “may unduly complicate the attainment of justice”.¹⁰⁴ The Supreme Court of Appeal – in applying the criteria laid out under Rule 23 of the US Federal Rules of Civil Procedure – determined that the “quintessential requisites for a class action” were present in that case.¹⁰⁵ Although this decision established that South African courts would recognise class actions, South African litigants still had little guidance as to the procedure for initiating and litigating a class action case.

In 2012, the South African Supreme Court of Appeal finally set out the procedural requirements for the institution of class actions for the first time.¹⁰⁶ That case – *Trustees, Children’s Resource Centre Trust & Others v Pioneer Food (Pty) Ltd & Others* – answered the questions of when a class action may be brought and what procedural requirements should be satisfied before instituting the action.¹⁰⁷ The Supreme Court of Appeal stated that the party

97 Alp, N & N Hodkins. [n.d.]. “Class actions and collective redress litigation in South Africa”; available at <http://www.roylaw.co.za/class-actions-and-collective-redress-litigation-in-south-africa>, last accessed 30 April 2014.

98 No. 71 of 2008.

99 (ibid.:subsection 157(1)(b)). Subsection 157(1)(c) also allows for public interest standing.

100 No. 68 of 2008.

101 No. 107 of 1998.

102 These statutes also provide for public interest representation. The Consumer Protection Act separately provides for accredited consumer protection groups to initiate actions to protect the interests of a group of consumers.

103 2001 (4) SA 1184 (SCA); Alp & Hodkins [n.d.].

104 2001 (4) SA 1184 (SCA).

105 (ibid.).

106 Kron, J. 2013. “Class actions – Now a reality in South Africa.” *Norton Rose Fulbright*; available at <http://www.nortonrosefulbright.com/knowledge/publications/77139/class-actions-now-a-reality-in-south-africa>, last accessed 30 April 2014.

107 *Trustees, Children’s Resource Centre Trust & Others v Pioneer Foods (Pty) Ltd & Others*, 2012 ZAXCA 182 (29 November 2012).

ARTICLES

seeking to represent the class should first apply to the court for authority to do so.¹⁰⁸ The court then certifies the class at the outset before the issue of summons.¹⁰⁹ In certifying the class, the Supreme Court of Appeal presented the factors and criteria that a court is required to consider:¹¹⁰

This involves the definition of the class; the identification of some common claim or issue that can be determined by way of a class action; some evidence of the existence of a valid cause of action; a suitable representative to represent the members of the class; and a determination that a class action is the most appropriate procedure to adopt for the adjudication of the underlying claims.

Now that the Supreme Court of Appeal had provided some clarification surrounding class actions in *Trustees*, other South African litigants have emerged and begun filing class actions. For instance, a class action suit involving South African gold miners suffering from silicosis may result in the largest class action case to date in Africa.¹¹¹ On 21 December 2012, Attorney Richard Spoor filed a motion in the South Gauteng High Court of Johannesburg for class certification for 15,000 gold miners suffering from silicosis, naming 29 gold mining companies.¹¹² The applicants alleged that the defendant companies knew of the dangers posed to miners in exposing them to silica dust and that they failed to take adequate measures to protect them against such exposure.¹¹³ In March 2013, another group of gold miners filed a class certification application against Anglo American South Africa in the High Court of Johannesburg.¹¹⁴ These actions, as well as one other, have been

108 (ibid.:par. 23).

109 (ibid.).

110 (ibid.).

111 Cropley, Ed. 2013. "Anglo South Africa settles silicosis case with 23 gold miners", *Reuters*, 25 September 2013; available at <http://www.reuters.com/article/2013/09/25/us-angloamerican-silicosis-idUSBRE98O0GH20130925>, last accessed 30 April 2014.

112 Richard Spoor Inc Attorneys. 2012. "About the silicosis litigation", available at <http://goldminersilicosis.co.za/about-the-silicosis-litigation/>, last accessed 30 April 2014.

113 Reuters. 2012. "Ex-miners seek silicosis class action vs. South African firms", *Chicago Tribune*, 28 December 2012; available at http://articles.chicagotribune.com/2012-12-28/lifestyle/sns-rt-us-safrica-silicosisbre8br082-20121228_1_gold-mines-anglogold-ashanti-silicosis, last accessed 30 April 2014; Business & Human Rights Resource Centre. [n.d.]. "Case profile: Gold miner silicosis litigation"; available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/GoldMinerSilicosisLitigationreSoAfrica>, last accessed 30 April 2014.

114 Burkhardt, P. 2013. "Anglo American S Africa faces class action suit over silicosis", *Bloomberg*, 7 March 2013; available at <http://www.bloomberg.com/news/2013-03-07/anglo-american-s-africa-faces-class-action-suit-over-silicosis.html>, last accessed 30 April 2014; Legal Resources Centre, GMN, Leigh Day, & Legal Aid SA. 2013. "Gold miners launch silicosis class action against Anglo American"; available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=362956&sn=Detail&pid=71616>, last accessed 30 April 2014.

consolidated into one action, representing between 100,000 and 200,000 gold miners.¹¹⁵ Although the gold miners' class action suit has yet to be resolved, South Africa has clearly determined that class actions will play a role – and probably a large one – in its court system.

Kenya

In August 2010, Kenya adopted a new Constitution that contemplates class actions for the violation of a constitutional right.¹¹⁶ Before this new Constitution, Kenya did not recognise broad standing rights.¹¹⁷ Kenya's new Constitution, however, provides for class actions under Article 22 for infringement of a right or fundamental freedom in the Bill of Rights and under Article 258 for general infringement of the Constitution.¹¹⁸ In addition to class actions for constitutional infringements, Kenya has also recognised class actions under specific pieces of legislation. For example, Kenya's new Consumer Protection Act 2012 expressly provides for class actions.¹¹⁹

Consequently, the use of class action litigation has started to grow in Kenya, with actions ranging from insurance policy holders alleging that their insurers failed to pay claims on time, to 159 Kenyan girls accusing the Kenyan Government of failing to protect them from rape.¹²⁰ Most recently, a group of civil society organisations and victims of police shootings instituted a class action constitutional case in the Nairobi High Court against six Kenyan Government officials. These claimants argue that the police shootings following the Kenyan elections in 2008 and the failure of the Kenyan Government to punish the perpetrators and provide reparations to the victims violate Kenyan and international law.¹²¹ The outcome of these class actions could play a determinative role in the future, and frequency, of class action litigation in Kenya.

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- 115 De Waal, M. 2013. "The invisible women in silicosis class action suit"; available at <http://www.dailymaverick.co.za/article/2013-05-20-the-invisible-women-in-silicosis-class-action-suit/#.U2EJo8YgGA0>, last accessed 30 April 2014.
- 116 "Kenya president ratifies a new constitution", *BBC News Africa*, 27 August 2010; available at <http://www.bbc.co.uk/news/world-africa-11106558>, last accessed 6 May 2014.
- 117 See *Prof. Wangari Maathai v City Council of Nairobi*, Civil Case No. 72 of 1994.
- 118 Kenyan Constitution, Articles 22(2)(b) and 258(2)(b). Kenya's Constitution also provides for public interest, representative, and associational standing.
- 119 Kenyan Consumer Protection Act 2012, section 4(1).
- 120 "How these Kenyan girls are fighting for better rape prevention"; available at <http://www.chatelaine.com/living/real-life-stories/how-these-kenyan-girls-are-fighting-for-better-rape-prevention/>, last accessed 6 May 2014; Mbogo, S. 2010. "Unpaid claims land insurer class action court battle", *Business Daily*, 10 February 2010; available at <http://www.businessdailyafrica.com/Corporate-News/-/539550/858774/-/14wi7mrz/-/index.html>, last accessed 6 May 2014.
- 121 "*Citizens against Violence and Others v. the Attorney General of Kenya and Others*". *Open Society Foundations*, 13 February 2013.

Uganda

Uganda's Constitution provides for representative actions, but does not specifically reference class action standing. Article 50(2) of the Ugandan Constitution states that –

... [a]ny person or organisation may bring an action against the violation of another person's or group's human rights.

The High Court of Uganda, however, seems to have interpreted Article 50(2) to encompass both class and public interest actions.¹²²

In 2003, the High Court, in *British American Tobacco Ltd v Environmental Action Network Ltd*,¹²³ addressed the question of whether Article 50(2) authorised the filing of class actions as a form of representative action. The Ugandan High Court appears to conclude that its Constitution does authorise class actions, though its reasoning in arriving at this conclusion is not clear. In arguing that class actions fall within the Constitution's scope, the High Court cites Order 1, Rule 8, of the Ugandan Civil Procedure Rules,¹²⁴ which it views as the authoritative rule for representative suits.¹²⁵ Order 1, Rule 8, states the following:¹²⁶

Where there are numerous persons having the same interest in one suit, one or more such persons may, with the permission of court, sue or be sued in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement as the court may direct.

In discussing what sorts of representative actions Article 50(2) may encompass, the High Court addressed the distinction made by the respondent, British American Tobacco, to Section 38 of South Africa's Constitution.¹²⁷ The respondent had argued that Article 50(2) could not have envisaged public interest litigation to be brought by groups such as the Environmental Action Network, because the said Article did not list the types of specific litigants

122 *The Environmental Action Network Ltd v The Attorney General and National Environmental Management Authority*, HC Misc. Appl. 39 of 2001 (Uganda) (unreported), citing discussion in *Rev. Christopher Mtikila v The Attorney General* of public interest litigation ("Article 50 of the Constitution does not require that the applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought".)

123 HC Civil Appl. 27 of 2003 (Uganda).

124 (*ibid.*).

125 *Kamoga & 5 Others v Bank of Uganda*, HC Civil Suit 62 of 2009 (Uganda).

126 *British American Tobacco Limited* (Uganda).

127 (*ibid.*).

who could bring actions, in contrast with Section 38 of the South African Constitution.¹²⁸ Section 38 lists the range of litigants who may approach a court alleging that a right in the Bill of Rights has been infringed. Subsection 38(c) specifically addresses class action litigants. The Ugandan High Court, however, rejected the respondent's argument, noting that the only difference between the two constitutional standing provisions was that the South African provision was specific while Uganda's was not.¹²⁹ Accordingly, if the scope of Article 50(2) is the same as Section 38 of South Africa's Constitution, then Uganda's Constitution does recognise class action standing. Nevertheless, it does not appear that a higher Ugandan court has addressed this issue, and the use of class actions does not seem to be widespread at this time.

Zimbabwe

In May 2013, President Robert Mugabe of Zimbabwe signed a new Constitution into law that provides for class actions. Article 85(1)(3) of Zimbabwe's new Constitution states that –

... [a]ny person acting as a member, or in the interests, of a group or class of persons ... is entitled to approach a court, alleging that a fundamental right or freedom ... has been, is being or is likely to be infringed.

Article 85 also provides for representative, public interest, and associational standing.

In addition to its Constitution, Zimbabwe has a class actions statute – the Class Actions Act 10 of 1999 – that was promulgated on 24 January 2003. This statute presents some of the procedural mechanisms for instituting and litigating class actions in Zimbabwe. The Class Actions Act requires those seeking to initiate a class action in Zimbabwe to obtain leave of the court before bringing the action. In considering whether to allow a class action to proceed, the statute specifies various factors that Zimbabwean courts should consider, including whether the issues of fact or law are likely to be common to the claims of individual members of the class; the existence and nature of the class; the extent to which members of the class may be prejudiced in being bound by a judgment; the nature of the relief claimed; and the availability of a suitable person to represent the class.¹³⁰ When a court grants an application for leave to institute a class action, the court is then required to approve a

128 (ibid.).

129 (ibid.) (“It is elementary that ‘persons’, ‘organizations’ and ‘groups of persons’ can be read in article 50(2) of the Constitution to include ‘public interest litigants’, as well as all the litigants listed down in (a) to (e) of Section 38 of the South African Constitution. In fact, the only difference between the South African provision (i.e. Section 38) and our provision (under Article 50(2) is that the former is detailed and the latter is not.” [sic]).

130 Class Actions Act, section 3(3).

class representative.¹³¹ Finally, the court will exercise a supervisory role over the action, and a Class Action Fund will assist representatives in funding the litigation.¹³²

The Zimbabwean Supreme Court provided some clarity on class actions under the Class Actions Act in *Petho v Minister of Home Affairs & Another*.¹³³ In *Petho*, the Zimbabwean Supreme Court addressed whether a lower court had correctly dismissed an application to institute a class action. In its analysis, the Zimbabwean Supreme Court found that, if a court granted an application for leave to institute a class action, the law obligates the court to appoint a suitable person to represent the class and to do so even if the applicant him-/herself was not an appropriate representative. The Supreme Court also stated that the certifying court has a duty to specify the manner and the period in which notice is to be given of a class action. The Supreme Court offered some examples of notice that it considered appropriate, including notice through newspapers or in various languages over the radio.¹³⁴ Zimbabwe's legal framework surrounding class actions ensures that it may be a leader on the African continent in recognising broader forms of standing.

Mozambique and Tanzania

Currently, it is unclear whether Mozambique and Tanzania allow or recognise class actions, though each country does seem to at least authorise public interest actions.

Article 79 of Mozambique's Constitution provides for public interest actions, stating –

... [a]ll citizens shall have the right to present petitions, complaints and claims to the competent authority in order to demand the restitution of their rights violated or in defence of the public interest.

Article 81 of Mozambique's Constitution specifically addresses what is termed the "Right of Popular Action", providing as follows:

All citizens shall have the right to popular action ... either personally or through associations ... [which] shall consist of (a) the right to claim for the injured party or parties such compensation as they are entitled to; (b) the right to advocate the prevention, termination or judicial prosecution of offences against the public health, consumer rights, environmental conservation and cultural heritage; (c) the right to defend the property of the State and of local authorities.

131 Class Actions Act, section 5.

132 Feltoe, G. 2006. *A guide to Zimbabwean law of delict*. Harare: Legal Resources Foundation.

133 2003 (3) SA 131 (25).

134 (ibid.).

Considering a potential framework for class actions in Namibia

Although Mozambique's Constitution recognises broader forms of standing, there is insufficient information to determine if the citizens of Mozambique are actually pursuing collective actions.

In Tanzania, the common law governs standing.¹³⁵ Article 26(2) of Tanzania's Constitution states that –

... [e]very person has the right, in accordance with the procedure provided by the law, to take legal action to ensure the protection of this Constitution and the laws of the land.

The Tanzanian courts have interpreted Article 26(2) to encompass public interest standing.¹³⁶ Although Tanzania does not yet appear to have squarely addressed whether class actions would also fall within Article 26(2), it seems possible the Tanzanian courts may eventually arrive at that conclusion.

Although class actions may pose more logistical hurdles than public interest actions, the latter could be seen as a more expansive form of standing because any person may initiate the legal challenge without showing a specialised injury. If that is the case, then class actions may easily fall within the bounds of Mozambique and Tanzania's current law. At this moment, however, it is not clear whether these two countries' legal regimes would allow class actions.

Class actions under current Namibian law

Before Namibia may start seriously considering the use of class actions, it first needs to assess whether its current state of law could possibly authorise class actions. Thus, it is necessary to closely analyse the Constitution and the common law rules on standing. In recent years, Namibian courts have been more vocal on what must be proved to establish standing. As discussed, courts have accepted the common law principle of "direct and substantial interest" as the standard to demonstrate standing. Most of the lower Namibian courts have not interpreted this common law principle as encompassing class actions, and the Supreme Court of Namibia has yet to squarely address the issue.

In *Arthur Frederick Uffindell t/a Aloe Hunting Safaris v Government of Namibia & Others*,¹³⁷ Judge Maritz of the High Court discussed the protection and

135 *God Bless Jonathan Lema v Mussa Hamis Mkanga*, Civil Appl. 47 of 2012 (Court of Appeal, Tanzania).

136 (ibid.) ("First, we wish to state categorically that the rule of *locus standi* is governed by common law. ... Currently the rule in Tanzania has been extended to cater for matters of public interest under Article 26(2) of the Constitution then a citizen of this country has *locus standi* to sue for the benefit of society" [sic].)

137 2009 (2) NR 670 (HC) at par. 13.

promotion of human rights after Namibia adopted its Constitution. Judge Maritz declared that –¹³⁸

... a more purposive approach must be adopted to accord individuals and classes of individuals standing to enjoy the full benefit of their entrenched rights and to effectively maintain and enhance the values expressed therein.

In advocating for a more purposive approach, Judge Maritz argued that the common law principle of “direct and substantial” is “an important reference, but not the true criteria” for standing involving constitutional rights and freedoms.¹³⁹ Instead, Judge Maritz explained that Article 5 of the Constitution (Protection of Fundamental Rights and Freedoms) required Article 25 (Enforcement of Fundamental Rights and Freedoms) to be interpreted in a broad, liberal, and purposive way.¹⁴⁰ He acknowledged, however, that interpretation of the phrase “aggrieved persons” in Article 25(2) required further judicial elaboration to determine which persons and classes of persons have the right to seek protection or enforcement of their fundamental rights from courts.¹⁴¹

Judge Smuts of the High Court supported the position advocated in *Uffindell*, stating in *Petronet International Glencor Energy UK Ltd & Another v Minister of Mines and Energy & Others*¹⁴² that he “agree[s] with this fundamental approach” that standing “should be viewed more widely in the context of constitutional challenges”. Judge Smuts continues to advocate for a broader interpretation of standing in constitutional matters in two other High Court cases: *Lameck & Another v The President of the Republic of Namibia & Others*¹⁴³ and *Jack’s Trading CC v The Minister of Finance*.¹⁴⁴

Not all judges of the High Court agree that Article 25 should be interpreted broadly to allow expanded standing under the common law. For example, in *Maletzky & Others v Attorney General & Others*,¹⁴⁵ Judge Naomi Shivute stated that Article 25(2) of the Constitution –¹⁴⁶

... was not intended to widen the ambit to include persons who would otherwise not have had standing to bring proceedings.

138 (ibid.).

139 (ibid.).

140 (ibid.:par. 15).

141 (ibid.).

142 A24/2011 [2011] NAHC 125 (28 April 2011).

143 2012 (1) NR 255 (HC) (“This court has correctly stressed that a broad approach to standing should be adopted in constitutional challenges”).

144 2013 (2) NR 480 (HC), 2013 (2) NR 491 (HC).

145 (A244/2009) [2010] NAHC 173 (29 October 2010).

146 (ibid.:par. 29).

Considering a potential framework for class actions in Namibia

In illustrating her point, Judge Shivute contrasted the Namibian Constitution with the South African Constitution, explaining that –¹⁴⁷

... [t]here is no provision in the Namibian Constitution which expressly authorises *locus standi* to persons acting as a member of or in the interest of a group or class of persons or acting in the public interest.

She noted that the South African Constitution, on the other hand, reflected a deliberate intention to widen the scope of standing under the common law.¹⁴⁸

The Supreme Court addressed standing to a limited extent in *Trustco Insurance t/a Legal Shield Namibia & Another v Deed Registries Regulation Board and Others*, though the judges of the High Court have disagreed over whether the Supreme Court determined that standing is broader in Constitutional matters. In *Trustco*, the Supreme Court ultimately found that the appellant did have standing because the appellant had “a direct and substantial legal interest in the outcome of the proceedings”, satisfying the common law requirement of standing.¹⁴⁹ The appellant had argued that *aggrieved persons* within the meaning of Article 25 encompassed a broader class of potential litigants than the class created by the common-law concept of a *direct and substantial interest*.¹⁵⁰ Because the Supreme Court found the common law requirements of standing to be satisfied, it determined that it was –¹⁵¹

... unnecessary to consider the argument raised by the appellants concerning the scope of the phrase “aggrieved persons” in Article 25 of the Constitution.

Judge Smuts of the High Court has cited the Supreme Court’s decision in *Trustco* as supporting a broad approach to standing in constitutional challenges.¹⁵² Other High Court judges, however, have not interpreted the Supreme Court’s decision in *Trustco* in that way. For example, Judge Corbett of the High Court in *Labuschagne* emphasised that he –¹⁵³

... [did] not understand the Court to have broadened the scope of standing in that the Court found that the appellant indeed had a direct and substantial interest in the outcome of the proceedings.

A close read of the *Trustco* case supports Judge Corbett’s view that the High Court did not squarely answer the question of whether a broader approach to standing should be adopted in constitutional cases. Although the Supreme

147 (ibid.:par. 29–31).

148 (ibid.:par. 31).

149 (ibid.:par. 18).

150 (ibid.:par. 15).

151 (ibid.:par. 19).

152 *Lameck* at par. 11; *Jack’s Trading* at par. 10.

153 *Labuschagne* at par. 14.

ARTICLES

Court did not directly address the issue, the Court did, however, indicate in dicta that it might be inclined to support a broader standing approach.¹⁵⁴

The rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements.

In *Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd*,¹⁵⁵ the Supreme Court offered more favourable dicta that indicated its possible support for a broader approach to standing for violations of fundamental rights or freedoms.¹⁵⁶

[T]he exercise of the power to summarily dismiss an action on account of the abuse of process constitutes a departure from the fundamental principle that courts of law are open to all. ... A court should be slow in closing its doors to anyone who desires to prosecute an action or to interfere with the fundamental right of the access to the court.

Although it is possible that the Supreme Court may eventually embrace a broader approach to standing under the Constitution, it remains unclear whether this broader approach would encompass class actions. To determine whether Namibia's law recognises class actions, a group of individuals could bring a test case to the High Court, which presumably would be appealed to the Supreme Court for a final determination. Alternatively, the Namibian Parliament could pass class action legislation, similar to Zimbabwe's, that lays out the procedures for instituting and litigating class actions. Of course, this statute could face a constitutional challenge and similarly involve prolonged litigation. The safest option would be to amend the Constitution to explicitly broaden the standing requirements, similar to the approach adopted in the Constitutions of Kenya, South Africa and Zimbabwe.

Considerations

Before deciding on a class action framework that is appropriate for Namibia's legal system and that fits within Namibia's view of the proper role of litigation, it is necessary to first step back and decide whether –

- Namibia wishes to interpret *standing* broadly and allow class actions
- class actions should be limited to constitutional violations, and
- Namibia's legal system can currently handle such mass claimant actions.

If Namibia ultimately interprets its standing rules broadly and allows class actions – whether now or in the future – it should carefully explore a number

154 *Trustco* at par. 18.

155 (SA 23/2010) [2012] NASC 15 (13 August 2012).

156 (*ibid.*:par. 26).

of considerations in developing its class action framework. This section presents the various issues that arise with the introduction of class actions and discusses the pros and cons of each.

Namibia's legal system and view of the role of law

As an initial matter, the effectiveness of class actions depends heavily on the peculiarities of a nation's system of substantive law and rules of civil procedure. Ideological, cultural, political, and philosophical attitudes towards the law will influence the acceptance and effectiveness of class action litigation.¹⁵⁷ Thus, importing class action systems from other jurisdictions will rarely be the most prudent decision. Instead, Namibia should study these other systems, observing what has been successful in that jurisdiction and what may be effective in Namibia.

Goal of class actions

In addition to looking at what has been effective in other jurisdictions, Namibia should determine what it hopes to achieve in allowing class action litigation. Is the purpose to achieve an optimal level of deterrence by supplementing public enforcement? Or is the purpose to achieve compensation for Namibians?¹⁵⁸ Allowing class actions may fulfil a variety of goals, and Namibia should carefully consider its overarching aim in recognising expanded forms of standing. This determination will drive other decisions relating to class actions, so establishing a clear purpose from the outset will assist Namibia in its analysis of other considerations.

Opt-out v Opt-in

One of the most important decisions in implementing a class action framework involves deciding whether to adopt an opt-out or opt-in system. An *opt-out* system means that a class judgment binds all members of the class unless potential class members take specific steps to exclude themselves.¹⁵⁹ In other words, judgments in opt-out class actions automatically encompass all members unless the members affirmatively ask to be excluded. In contrast, *opt-in* class actions mean that judgements are binding only on those class members who opted in, while all other potential class members harmed by the same infringement may still pursue their claims individually.¹⁶⁰ As a result, all individuals that wish to be a part of the class suit are required to come forward affirmatively under an opt-in system.

157 Gidi (2003:321).

158 See Russell (2010:157).

159 Russell (2010:160); Weston (2006:1729).

160 2013 Communication, p 11.

ARTICLES

The US utilises an opt-out system. For the judgment to be binding on all members of the class, however, class members must have received notice of the action and their right to opt out. Furthermore, the parties' interests and rights must be adequately represented in the proceedings. Other examples of countries that use opt-out class actions include Bulgaria, Denmark, the Netherlands, and Portugal.¹⁶¹

Opt-out class actions raise a number of difficulties, including how to notify all class members, how to finance the suit, and how to distribute damages.¹⁶² Notice becomes a critical issue with opt-out actions. If the judgment will bind class members unless they affirmatively come forward to opt out, it is crucial that such class members be informed of the litigation. The Organisation for Economic Co-operation and Development (OECD) recommends that countries using opt-out class actions ensure reasonable measures are taken to inform potential class members of the initiation of the case so that those potential members may exclude themselves if desired.¹⁶³

In addition, opt-out class actions are generally larger litigations than opt-in actions. As such, litigation costs with opt-out class actions tend to be higher because they require lawyers and judges to be more actively involved in managing the action.¹⁶⁴

Most EU member states use opt-in class actions in their national systems.¹⁶⁵ At the EU level, the 2013 Recommendation adopted an opt-in system.¹⁶⁶ As with opt-out actions, the OECD recommends that countries using an opt-in procedure ensure reasonable measures are taken to inform class members of the initiation of the case so that they may take the necessary steps to include themselves.

Both means of class actions have supporters and critics. Some argue that, to achieve the optimal level of deterrence, a more aggressive form of class action litigation is needed, such as an opt-out system.¹⁶⁷ On the other hand, supporters of an opt-in system claim that an opt-in system better respects an individual's right to decide whether to participate in an action. Thus, opt-in supporters argue that opt-in systems better preserve the autonomy of the parties in deciding whether to join the litigation.¹⁶⁸

161 (ibid.).

162 Russell (2010:178).

163 2007 OECD Recommendation, p 11.

164 Russell (2010:178).

165 2013 Communication, p 11.

166 2013 Recommendation, p 21.

167 Russell (2010:176).

168 2013 Communication, p 12.

Brazil has steered away from the traditional opt-out/opt-in classifications and adopted a hybrid system, particularly as pertains to *res judicata* – or claim preclusion. If a judgment rendered in a class action in Brazil is favourable to the class, all absent class members may benefit from the decision; if the judgment is decided against the class, class members may still pursue individual cases for damages, but they may not bring another action as a class.¹⁶⁹ Brazil serves as an example of a country that has chosen to craft its own system that does not necessarily follow the traditional opt-out/opt-in classification. Namibia could similarly explore a system that better fits its needs.

Notice

With either opt-out or opt-in systems, providing notice of the action to potential class members is critical.¹⁷⁰ In the US, notifying potential class members of the litigation is fundamental to ensuring procedural due process because judgements will bind absent class members. US courts scrutinise both the content and manner of the notice. In fact, US courts rarely consider simple publication of notice to be constitutionally adequate.¹⁷¹ In Brazil, however, notice is satisfied by a single publication in an official newspaper.¹⁷²

Notice may be particularly difficult in economically undeveloped or geographically vast countries, such as Namibia. Furthermore, the difficulty of notice may be exacerbated in situations where citizens lack full political consciousness, are poor, and are ill-educated.¹⁷³ As such, Namibia should analyse whether it has the means and resources to notify all potential class members of a class action. This analysis entails considering the following questions, among others:

- How would Namibia go about notice?
- What would Namibia's notice standards be?
- Could Namibia meet notice standards?
- What are the means to provide notice to the many regions?
- Is notice via newspaper publication enough?

These questions represent a small subset of considerations that should be studied on the issue of notice alone.

Overlapping enforcement

With class actions, situations of dual enforcement – where both public authorities and private claimants pursue actions – will occur. In regulated

169 Gidi (2003:388–89).

170 See 2007 OECD Recommendation.

171 Strong (2008:42).

172 Gidi (2003:341).

173 (ibid.:395).

policy areas in particular, class actions typically follow the actions brought by public authorities.¹⁷⁴ If public authorities have already initiated an action that private applicants then pursue, courts may need to stay the private action proceedings so as not to conflict with decisions in the government's case.¹⁷⁵ It is generally preferable to allow the government action to run its course before private proceedings commence or continue in most cases. In addition, public authorities will probably have more information than private claimants at the outset because the government may have already conducted an investigation.

The EU's 2013 Recommendation provides that collective actions should begin after the launch of any public authority proceedings. If a public authority launches proceedings after commencement of a private collective action, the EU holds that courts should avoid giving a decision that would conflict with an action contemplated by a public authority.¹⁷⁶ Through these measures, the EU has sought to avoid the potential for conflicting judgments that may arise from a court issuing a decision in a private collective action when a public action is pending or on the horizon. Although this consideration does not require as much reflection as some of the others, it still warrants a determination as to how the court system might handle potentially conflicting actions.

Funding

With the number of claimants involved, legal fees in class actions may be quite high. The breakdown of the fee on an individual basis decreases significantly with class actions, but the total cost of the litigation will probably be much higher than any individual action. Because the individual claims that comprise a class action may be small, other means of funding class actions have developed so that the class members do not have to fund the case themselves. For example, in the US, class actions frequently operate on a contingency fee basis. With contingency fee arrangements, the attorney representing the class only gets paid if the class wins or settles. Estimates of contingency fees in the US are 30–40% of the award of the class.¹⁷⁷ As can be imagined, the use of contingency fees has generated a great deal of controversy. Some argue that contingency fees force settlements, which may not be appropriate in all situations; others criticise the large payouts that class action attorneys receive under contingency fees – overshadowing the amount that individual claimants' receive.

174 2103 Communication, p 13.

175 Russell (2010:167).

176 2013 Recommendation, p 33.

177 Fowler, G. M Shelley & S Kim. 2009. "Emerging trends in international litigation: Class actions, litigation funding and punitive damages". *Dispute Resolution Journal*, 3:118.

Considering a potential framework for class actions in Namibia

Civil law countries traditionally have prohibited contingency fee arrangements.¹⁷⁸ The EU strongly recommends that member states do not permit contingency fees, reasoning that doing so may create an unnecessary incentive to litigate, and arguing that it is against the interest of the parties.¹⁷⁹ If its member states choose to allow contingency fees, the EU recommends that they provide for appropriate national regulation of those fees.¹⁸⁰

In addition to contingency fees, other means of funding class actions have emerged. Some jurisdictions create a pool of money from unclaimed rewards that are then distributed to finance class litigations.¹⁸¹ Other jurisdictions, such as Australia, utilise professional litigation funders.¹⁸² Professional litigation funders are companies or individuals, but not licensed attorneys, who contract with plaintiffs to sponsor their lawsuit. These funders take a percentage of the award if the plaintiffs prevail, or nothing if they lose.¹⁸³ A professional funder may sometimes be referred to as a *Contingent Legal Aid Fund*. The use of professional litigation funders helps lessen the misalignment of interests between the representing attorneys and the class. In the EU, if a private third party funds the class action, the EU prohibits remuneration on the amount of the settlement reached or the compensation awarded unless a public authority regulates that funding arrangement.¹⁸⁴

This discussion illustrates that contingency fees – while a potentially attractive option under the right circumstances – are not the only means of funding class actions. Jurisdictions around the world have creatively crafted various funding mechanisms that serve as useful examples for analysis.

Fee shifting

When a judgment has been issued in a class action, questions regarding fee shifting arise. For example, does the loser pay all the legal fees under the 'loser pays' principle? Or does each party pay its own fees?

The EU has adopted the 'loser pays' principle and provides that its member states must ensure that the losing party reimburses the legal costs of the winning party.¹⁸⁵ In the US, on the other hand, each side to a lawsuit bears its own costs, regardless of who wins. This is sometimes referred to as the

178 (ibid.).

179 2013 Recommendation, pp 29–30.

180 (ibid.:30).

181 Russell (2010:180).

182 Fowler et al. (2009:120).

183 (ibid.).

184 2013 Recommendation, p 32.

185 2013 Recommendation, p 13.

'American rule'.¹⁸⁶ Similarly, Mexico holds that each party is responsible for its attorney's fees.¹⁸⁷ Many believe that the 'loser pays' rule would make it difficult for representative plaintiffs to bring class actions because they could rarely afford to take on a representative role if they faced the possibility of being individually responsible for paying for the defendants' fees.¹⁸⁸

Brazil has adopted a variation of the 'loser pays' system. In Brazil, the loser does not just pay legal fees based on the time the attorney spends on the case, but instead pays a percentage of the amount in controversy, such as 10–20%.¹⁸⁹ Such a fee structure may raise the stakes for all the parties.¹⁹⁰ The Brazilian class actions statute, however, protects class representatives from the responsibility of paying defendants' attorney's fees, costs, and expenses in the event of loss, except in the case of bad-faith litigation.¹⁹¹

Namibia should not feel constrained to the already established fee shifting rules, but should instead consider creating its own fee shifting rules that best meet its goals.

Representation

Countries have developed different means of representation in class actions. In some countries, such as the US, class members represent the class. In the EU, on the other hand, the law limits standing to certified entities that meet certain criteria: EU member states are required to designate these representative entities in advance for them to be able to bring actions.¹⁹²

In addition to determining the types of class representatives who will be authorised to initiate actions, it also should be decided how the counsel representing the class will communicate with the class. Attorneys in the US have developed ways of dealing with large numbers of claimants through TV advertisements, no-charge calls, the establishment of claimant committees, and meetings with claimants where feasible.¹⁹³ If class actions ultimately do manifest in Namibia, communication between representative counsel and class members will be of utmost importance.

186 Alexander, J. 2000. "An introduction to class action procedure in the United States"; paper presented at the Conference entitled "Debates over group litigation in comparative perspective", 21–22 July 2000, Geneva, Switzerland, p 11; available at <http://law.duke.edu/grouplit/papers/classactionalexander.pdf>, last accessed 7 May 2014.

187 Mexico's Federal Code of Civil Procedure, Article 616.

188 Alexander (2000:12).

189 Gidi (2003:340).

190 (ibid.).

191 (ibid.:340).

192 2013 Recommendation, Section III(4).

193 Weinstein (2001:176).

Certification of class

Most jurisdictions around the world require certification before instituting a class action or, at a minimum, at an early stage of the proceedings.¹⁹⁴

*Certification typically involves –*¹⁹⁵

- the definition of the class
- the identification of some common claim or issue that can be determined by way of a class action
- the presentation of at least some evidence of the existence of a valid cause of action
- an assessment of the suitability of the representative, and
- an evaluation of whether a class action is the most appropriate procedure for adjudication of the underlying claims.

The South African Supreme Court of Appeal in *Trustees* determined that certification should occur before the issue of summons. In reaching this conclusion, the Supreme Court of Appeal explained that certifying the class at the outset ensured class interests were properly protected and represented as an initial matter. It also noted that determining certification so early in the litigation enabled the defendant to demonstrate at the outset why the action should not proceed. Moreover, early class certification enabled the court to oversee the procedural aspects of the litigation, such as notice and discovery, and facilitated the litigation by addressing issues that might cause delays at an early stage.¹⁹⁶ This discussion illustrates that, although class certification merits some deliberation, Namibia should consider following the trend of most jurisdictions in certifying the class at an early stage in the litigation.

Procedure for approving settlements

Generally, individual litigation may be settled without judicial approval. In the US, however, judges in a class action case are obliged to scrutinise the fairness of a class settlement, which again reflects the active role US courts play in class actions to protect due process rights.¹⁹⁷ Depending on the type of class action framework adopted in Namibia, court approval of settlements may not always be necessary. Nevertheless, it may still be prudent for courts to approve class action settlements – at least in some circumstances.

Damages

When considering class actions, questions about damages always arise, specifically as to the types of damages that will be allowed and how such

194 *Trustees* at par. 24.

195 (ibid.:par. 23).

196 (ibid.:par. 24).

197 US Federal Rules of Civil Procedure, Rule 23(e).

damages will be assessed. The US allows punitive damages, i.e. damage awards that go beyond compensation and serve as punishment and deterrence. The EU, however, stipulates that punitive damages should be prohibited, reasoning that punitive damages lead to overcompensation of the claimant party. The EU has determined that the compensation awarded in a mass harm situation should not exceed the compensation that would have been awarded if the claim had been pursued by individual actions.¹⁹⁸

Assessing the damage to each claimant in a class action raises a number of difficulties. Jurisdictions have developed different means of assessment. In Brazil, each individual class member is required to bring an individual action to prove causation and the amount or extent of individual damages suffered.¹⁹⁹ Mexico has adopted a similar system to Brazil.²⁰⁰ In the US, the court typically appoints someone to administer the claims process. Class members must submit claims forms, and then the amount is generally divided on a pro rata basis. In some instances, the amount each claimant receives will already have been established in advance.²⁰¹

Large damage awards should not always be seen as a negative result: in some instances, they may even generate benefits. For example, experience has shown that some companies react to large damage awards against one company in an industry by changing their own business practices.²⁰² As such, careful consideration should be given to what types of damages serve the purpose of class action litigation.

Conclusion

This article explored and discussed the benefits and risks that arise with class action litigation as well as the class action frameworks that other jurisdictions around the world have adopted. The purpose of this article, however, was not to persuade Namibia to immediately recognise class action standing and adopt a class action framework. Instead, the discussion sought to encourage Namibia to explore whether allowing class action litigation would ensure more effective enforcement of its laws and would better protect the rights of Namibian citizens.

198 2013 Recommendation, p 31.

199 Gidi (2003:333).

200 Jones Day Commentary. 2012. "New class action rules in Mexico create significant risks for companies doing business in Mexico". *Jones Day*; available at <http://www.jonesday.com/files/Publication/cf053c5d-a25f-46f0-b9ae-8096920fb05a/Presentation/PublicationAttachment/c4aafb0a-e676-4d93-b271-8f1b62004fbd/New%20Class%20Action%20Rules%20in%20Mexico.pdf>, last accessed 7 May 2014.

201 Alexander (2000:15).

202 Fowler (2009:104).

Considering a potential framework for class actions in Namibia

As discussed, before Namibia embarks on developing a class action framework, it should first determine whether the current standing law in the country would authorise class action standing. This determination may require bringing a test case or passing legislation that may then be subject to constitutional challenge. If Namibia ultimately recognises class action standing, it then needs to give careful consideration to a number of issues – such as notice, funding, and representation – and determine what type of system best fits the unique ideological and cultural aspects of Namibia. To avoid a period of uncertainty – like that experienced by South Africa – Namibia should proactively make these determinations and clearly enshrine them in legislation.

ARTICLES

The need to reform the Namibian public procurement system: A comment on the Neckartal Dam saga

Anne Schmidt*

Introduction

The saga associated with the award of a tender for the construction of the Neckartal, which would be the biggest dam in Namibia, has been dragging on for about three years now. The delay involves costs that could otherwise be used for the country's socio-economic development. This issue reveals many of the underlying shortcomings and weaknesses of the current public procurement system and exemplifies the urgent need for its comprehensive reform. Besides procedural shortcomings, the institutional and organisational structure of this system also needs rethinking. In addition, a lack of transparency leaves room for corruption and bribery. Moreover, judicial review and the general rules for challenging administrative actions, as a single review mechanism, have proved unsuitable for the peculiarities of public procurement cases.

The following observations outline the Neckartal Dam saga and the basic shortcomings it reveals in the current legislation on public procurements.

Background

The tender for the construction of the Neckartal, the biggest dam in Namibia, was awarded to the China Henan International Corporation on 16 December 2011. Five days later, on 21 December 2011, the decision was overturned in an emergency Tender Board meeting, and the tender was awarded to another bidder, namely Impreglio.¹ It is not known what caused this change of mind, but it is assumed that the Tender Board was evenly split in two camps regarding the tender award, with one half favouring China Henan and the other Impreglio. The reasons for this change of mind are, however, unclear, since the Tender Board has not provided reasons for its decision. It has further been criticised that the Tender Board was not properly constituted and, therefore, did not have a quorum when it took the second decision at the emergency meeting on 21 December 2011. Moreover, only a handful of permanent members were present at the latter meeting; the others were represented by their alternate members. Although this is not contrary to the currently applicable law, it raises the question why so many permanent members did not attend such an

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1 It was awarded to Salini SpA in the end.

important Tender Board meeting but sent their representatives. A division of viewpoints within the Tender Board in this specific procurement case seems to be part of the problem and might explain the reversal of the first decision. The Tender Board's stand-off from its first decision in the second meeting led to allegations of corruption and bribery, which are still under investigation by the Anti-corruption Commission (ACC).²

In January 2012, it became clear that there had been disagreements between the Ministry of Agriculture, Water and Forestry and the Tender Board with respect to the Ministry's recommendation to the Tender Board regarding the pre-selection of tenders. This recommendation had been referred back to the Ministry due to vagueness and some technical issues that had required resolution. However, because the Ministry was unable to clarify these issues to the Tender Board's satisfaction, the documents passed back and forth between them. The Tender Board then set 20 January 2012 as the deadline for the Ministry to rectify the shortcomings of the recommendation.³ This scenario exposes the difficulties entailed by the current distribution of competencies and powers: whereas the experience and knowledge about the subject matter of procurement are based in the Ministry, the Tender Board is responsible for the award decision in respect of the subject matter. In the case of the Neckartal Dam, the current allocation of responsibilities not only led to confusion between the line ministry and the Tender Board, but also to a delay of the tender evaluation and award process. Due to allegations of corruption – the Ministry was alleged to have favoured Impreglio – the tender was cancelled and readvertised.⁴

In early 2013, the tender was finally awarded to Salini – a company which had absorbed Impreglio, the one who had initially been awarded the contract – despite only scoring second i.e. behind Vinci-Orascom, in the overall evaluation of the tender. In a pre-qualification process, three companies – Vinci-Orascom, Salini and CSC Neckartal Dam Joint Venture⁵ – were found to have the technical capacity and experience to carry out the project.⁶ The Tender Board justified the decision to award the contract to Salini rather than to Vinci-Orascom, the company scoring first in the evaluation process, by arguing that the latter had inexperienced key personnel.⁷

2 See Mongudhi, T. 2013a. "Neckartal heads for Court". *The Namibian*, 28 March 2013.

3 VonAlten, C. 2012. "Neckartal: Sieben Firmen noch im Rennen – Vergabekommission wartet auf Landwirtschaftsministerium – Entschluss steht noch nicht fest". *Allgemeine Zeitung*, 20 January 2012.

4 Mongudhi, T. 2013b. "Salini gets the nod for Neckartal". *The Namibian*, 14 March 2013.

5 This is a joint venture between Stefanutti Stocks and CMC de Ravenna (Italy).

6 *CSC Neckartal Dam Joint Venture v The Tender Board of Namibia & Others*, (A109/2013; A76/2013) [2013] NAHCMD 186 (4 July 2013), par. 9.

7 Mongudhi (2013a).

Court case

The court documents revealed inconsistencies within the evaluation report which was submitted to the Tender Board by the Ministry. It also differed from the consulting engineer's evaluation report, which recommended that Vinci-Orascom be awarded the tender on condition that the three senior site positions⁸ be filled by persons with suitable dam-building experience – especially with respect to the Roads Contractor Company (RCC) representative.⁹

Vinci-Orascom approached the court to award the tender to them or, alternatively, to instruct the Tender Board to reconsider the tender. The company claimed that the –¹⁰

... agriculture ministry's decision to reject its bid was unreasonable and irrational as it ignored the outcome of a carefully constructed evaluation process just because of false claims of inexperienced personnel.

Vinci-Orascom also alleged that the Tender Board had simply rubber-stamped the Ministry's recommendation instead of applying its own mind, and that the Board meeting which had approved the Ministry's recommendation had not been properly constituted and had, hence, lacked a quorum.¹¹ A hearing was subsequently set in the Windhoek High Court for 22 May 2013. Vinci-Orascom also asked the High Court to halt the implementation of the tender pending the outcome of the court hearing.¹² Both applications were decided around a month later, in *CSC Neckartal Dam Joint Venture v The Tender Board of Namibia & Others*.¹³ Vinci-Orascom, however, pulled out of the challenge at the last minute, but the third company shortlisted went ahead with it.¹⁴

The High Court set aside the tender award and referred the matter back to the Tender Board for review. In regard to the contention that the weightings attached to the technical, financial, risk and social components of the tender evaluations were inconsistent with the principles of fairness, reasonableness, competitiveness and cost-effectiveness because too much weight has been

8 Site Agent, Production Manager for Concrete, and the Roads Contractor Company Superintendent.

9 Mongudhi, T. 2013c. "Government to answer on Neckartal queries today". *The Namibian*, 30 August 2013.

10 Mongudhi (2013a).

11 (ibid.).

12 Menges, W. 2013. "Date set for Neckartal challenge hearing". *The Namibian*, 26 April 2013.

13 (A109/2013; A76/2013) [2013] NAHCMD 186 (4 July 2013).

14 Mongudhi (2013c).

attached to the technical component and too little to price,¹⁵ the Court held as follows:¹⁶

Whilst price should in our view always remain an important consideration in a competitive tender process, we do not consider ourselves to be in a position to assess the precise weighting it and the other factors should have received and thus not in a position to find that the weighting of the factors decided upon by the evaluation committee was unfair or unreasonable in the circumstances.

Nevertheless, although the Court denied being in the position to decide whether the weighting of the evaluation criteria was fair and reasonable, it found that the identification of only 4 of the 17 designated core personnel positions – one of which was not even specifically listed – for the purpose of evaluation was not fair and reasonable.¹⁷

Requiring adherence to the principles of fairness and reasonableness in the evaluation process, which is not sufficiently regulated in Namibian public procurement legislation, is a great step forward, since it limits the discretion of the Tender Board to conduct evaluation in a manner that favours a specific tenderer, and in terms of deviating from the designated evaluation components. The selection of a limited number of designated criteria had been justified by time constraints, but these should never be accepted as justification for not considering designated criteria in the evaluation of tenders. The Court's ruling that the evaluation process was unfair and cannot be justified is, therefore, to be welcomed.

Regarding the failure of the decision-maker, the Tender Board, to apply its mind and, hence, the difficulty for the Tender Board to take a decision regarding a matter requiring technical expertise and experience and, therefore being dependent on the evaluation report from the Ministry, the Court acknowledged that, especially in highly technical matters, the Tender Board might seek –¹⁸

... expert assistance in evaluating, assessing and comparing competing bids as long as it retains its decision[-]making capacity and exercises it.

The Court, indeed, brought some clarification on what is required of the Tender Board in order to have applied its mind independently and exercised its discretion fairly and impartially. The Court held that –¹⁹

15 *CSC Neckartal Dam Joint Venture*, par. 59.

16 (*ibid.*:par. 69).

17 (*ibid.*:par. 95).

18 (*ibid.*:par. 70).

19 (*ibid.*:par. 73).

The need to reform the Namibian public procurement system

... where the board seeks and relies upon a summary of the advice of a technical nature, that summary of a technical assessment provided to it must accurately and fairly reflect the views of those who gave it.

In other words, the evaluation process is obliged to be fully transparent and entirely comprehensible for the Tender Board in order to enable it to make a decision.

In this case, firstly, the committee who evaluated the tenders consisted of ministerial staff on the one hand and external experts on the other, who had diverging views on which bid was to be recommended and why. The Tender Board, however, was only informed of the ministerial grouping's recommendations. The Court considered the withholding of the diverging view as material non-disclosure.²⁰

Secondly, the Tender Board had not been alerted to the evaluation committee's proposal for the tenders to be clarified in respect of the key personnel.²¹ The Court found as follows in this regard:²²

The failure to disclose a matter of a material nature would not in our view amount to a mere internal irregularity in the preceding process which can be overlooked as not affecting the validity of the ultimate decision. The cumulative effect of the failure to disclose those first three facts is in our view devastating to the legality of the decision[-]making and deprived the tender board from being able to apply its mind properly to the enquiry before it.

Shortcomings in the Namibian public procurement system revealed by the Neckartal Dam case

Although Namibian legislation covers some basic transparency requirements, it often does not provide for the high degree of transparency that characterises an effective and efficient public procurement system. Important tender information is not required to be published and various processes can be carried out in secrecy. These facts conspire to make it easy to veil corrupt activities. The combination of potential rewards in public procurement, where high amounts of money are spent and many different interests are involved with a low risk of detecting irregular activities, makes it likely that the system is abused for personal gain.²³ Indeed, several of the shortcomings of the

20 (ibid.:par. 85).

21 (ibid.:par. 83f).

22 (ibid.:par. 87).

23 Cf. Quinot, G & S Arrowsmith. 2013. "Introduction". In Quinot, G & S Arrowsmith (Eds). *Public procurement regulation in Africa*. Cambridge: Cambridge University Press, p 19.

Namibian public procurement system have been exposed by the Neckartal Dam tender awards case, as will be outlined below.

One remark the Court made in the Neckartal Dam case is that the identification of only 4 out of 17 designated core positions of personnel for the purpose of evaluation is unfair and unreasonable. However, as the Namibian public procurement legislation does not require the Tender Board to specify, in the title of tender, the criteria and procedures for the evaluation of tenders, the Tender Board has a lot of discretion in this respect. Nonetheless, the publication of all evaluation criteria and their weighting is seen as a basic requirement for facilitating transparency and fairness in public procurement procedures: otherwise, the specifications or evaluation criteria may be designed – or, in the course of the tender process, altered – to slant the bid in a way that favours the eventual bid winner.²⁴ Furthermore, the selection of evaluation criteria for disqualifying certain bidders also flies in the face of transparency and fairness standards. Situations like this could be avoided if legislation required the Tender Board to establish and publish all criteria and their weighting in the tender documentation.

Additionally, to date there has not been an effective mechanism to investigate and scrutinise corruptive behaviour. In the Neckartal Dam tender awards case, the investigation by the ACC is still under way, while the same people who stand accused of having favoured Impreglio have now awarded the tender to Salini, the group which incorporated Impreglio. These facts raise questions about the efficiency of the ACC: their investigation should have been completed already. Indeed, the effectiveness of the ACC is controversial: while it has been assigned a very important role in the fight against corruption, there have been instances where the ACC has appeared unwilling to expedite its investigations. Moreover, it seems to be overburdened and only becomes active on request, rather than being proactive on its own. Nevertheless, it has conducted investigations in several tender cases,²⁵ although the allegations have often been found to be false. In other cases, such as the tender dispute about the construction of the new headquarters for the Ministry of Lands and Resettlement, although the ACC is rumoured to have probed the tender, it has never published a report on its investigation.

24 See e.g. Mosoti, V. 2005. "Reforming the laws on public procurement in the developing world: The example of Kenya". *International and Comparative Law Quarterly*, 54:626f.

25 See e.g. *Allgemeine Zeitung*, "Vorwurf unbestätigt – Keine Korruption bei Namibia Liquid Fuel", 28 July 2007; Smit, N. 2011. "ACC clears N\$2 billion Namport tender". *The Namibian*, 6 December 2011; Springer, M. 2012. "Ex-NWR-Chef in Erklärungsnot – Schwimmbad-Finanzierung setzt Aupindi dem Verdacht der Bestechlichkeit aus". *Allgemeine Zeitung*, 8 February 2012.

The need to reform the Namibian public procurement system

The institutional and organisational framework governing public procurement has proved to be dysfunctional as well. The Tender Board and its staff are overburdened and there is a lack of skills and qualification among them. Both practice and case law have revealed that the regulation for the Tender Board to obtain recommendations from the respective government office, ministry or agency (OMA), but then having to take the decision regarding awarding the tender itself, is problematic. Since the line OMA basically evaluates tender bids and then makes recommendations to the Tender Board for the latter's decision, the Tender Board walks a thin line between acting *ultra vires* and meeting its responsibilities under the State Tender Board Act.²⁶ Section 18(2) of the Act provides that the Board can –

... require a staff member of any other ministry or of any office or agency to assist the Board with the evaluation of any tender or to make recommendations to the Board in connection with any tender.

In addition, Article 19(1) of the 1997 Tender Board of Namibia Code of Procedure²⁷ obliges the Board, after having opened and listed all tenders, to submit such tenders to the relevant OMA for its recommendation. Several previous Namibian cases have disclosed that the practice of seeking recommendations from OMAs is problematic and that the Tender Board often does not fulfil its duty to take the award decision but acts *ultra vires*.²⁸

Furthermore, many permanent secretaries who are members of the Tender Board also chair OMA committees which make recommendations to the Tender Board under section 18(2) of the State Tender Board Act and Article 19(1) of the Code of Procedure. Hence, those permanent secretaries not only participate in making the OMA's recommendation, but are also responsible for scrutinising such recommendation, which constitutes a conflict of interest. Moreover, it is quite common that some ministers, deputy ministers and permanent secretaries have been serving in government for quite a long time in different OMAs. Therefore, the Tender Board, which is basically made up of these leaders, can be described as a largely exclusive group of people with a disproportionate amount of influence on public procurement procedures.²⁹

26 No. 16 of 1996.

27 No. 191 of 1997.

28 *Disposable Medical Products v Tender Board of Namibia*, 1997 NR 129 (HC); *Minister of Education & Others v Free Namibia Caterers (Pty) Ltd*, (SA 37/2010) [2013] NASC 8; *AFS Group Namibia (Pty) Ltd v Chairperson of the Tender Board of Namibia & Others*, (A 55/2011) [2011] NAHC 184).

29 See Tjirera, E. 2011. "Public procurement in Namibia – The role of codes of conduct in reducing corruption". In IPPR/Institute for Public Policy Research (Eds). *Anti-corruption Research Programme*. Windhoek: Institute for Public Policy Research, p 5.

This discloses the difficulty of the distribution and separation of competencies and powers in regard to the different stages of public procurement processes and demands a reformation of the institutional and organisational structure of the Namibian public procurement system.

Another shortcoming of the Namibian public procurement system, which has been exposed by the Neckartal Dam case, is the unsuitability of general judicial review as single review mechanism in public procurement cases. For example, for any public procurement system to function properly, provision should be made, inter alia, for tenderers to be given reasons for their bids' acceptance or rejection and to have an adequate opportunity to challenge the decision. Thus, section 16 of Namibia's State Tender Board Act requires that the Tender Board, –

... on the written request of a tenderer, give reasons for the acceptance or rejection of his or her tender.

Unsatisfied tenderers can, therefore, request the Tender Board to clarify its decisions and to provide reasons for them. However, as the Chief Control Officer of the Tender Board recently stated in an interview, "If [tenderers] are not happy with that, they can only go to court".³⁰ There is – beyond the right to request reasons – no other option to gain access to information about the decision-making process other than challenging it in court: there is neither a proper internal nor an independent review mechanism unsatisfied tenderers can use to challenge a Tender Board decision and to get information on the evaluation process.

With respect to several aspects such as time and costs involved, judicial review is, however, not always suitable a review mechanism in public procurement cases. This is exposed by the following problem: after the Court had set aside the Tender Board's decision in the Neckartal Dam case and referred the matter back to the Tender Board, the Tender Board again awarded the tender to Salini. Vinci-Orascom requested reasons for this decision and, since the Board failed to give a satisfactory explanation, it initiated another challenge.³¹ However, the Ministry rushed both the conclusion of the contract as well as the start of its implementation.³² This reflects an –³³

... emerging trend in public procurement for contracting authorities to conclude and implement public contracts in a rush and under a

30 Pers. comm., Ms M Jonga, Chief Control Officer, Tender Board, 26 March 2013.

31 Cloete, L & T Mongudhi. 2013. "Govt declares war over Neckartal". *The Namibian*, 23 September 2013; Mongudhi (2013c).

32 Cloete & Mongudhi (2013); Mongudhi (2013c); see also Mongudhi (2013b).

33 Quinot, G. 2008. "January to March 2008(1) – JQR Public Procurement 2008(1)". *Juta's Quarterly Review of South African Law*, 1–15, section 2.1.

The need to reform the Namibian public procurement system

protracted veil of secrecy, with the intention of reaching a critical stage of advanced performance beyond which judicial review will no longer be feasible.

In the South African case, *Actaris South Africa (Pty) Ltd v Sol Plaatje Municipality*,³⁴ the High Court indeed granted temporary relief to the applicant, suspending the implementation of the tender contract at issue despite the award of the tender having been made several months prior and that work apparently worth R82 million (of the total R94 million contract price) had already been done.³⁵ According to Quinot,³⁶ this judgement would counter the trend of contracting authorities to rush contract conclusion and implementation in order to render judicial review unfeasible. But, nevertheless, an advanced stage of contract implementation in the Neckartal Dam case might make it more difficult for the Court to decide setting aside the decision again as it would have severe implications for Salini and raise questions in regard to compensation. It would further be problematic with respect to the progress of the building of the dam and be contrary to the public interest as it would be a waste of taxpayers' money.

Several Namibian cases³⁷ have only been decided after the contract has been (partly) implemented, which exemplifies that the available judicial remedies such as interim interdicts cannot prevent detrimental effects for public procurement stakeholders in all cases. As this poses a major problem, it reveals the need to establish other review mechanisms that are more suitable for the particular nature of public procurement disputes and appropriate procedural provisions. To avoid the unsatisfying situation of tender awards being challenged and needing to decide whether the contract should be halted awaiting the outcome of the proceedings, it might, for example, be advantageous to make a provisional award, held in abeyance, and allow for an appeal period. Only if no appeal is issued or after appeals have been finalised should the final tender be awarded.³⁸ The establishment of an appropriate internal review

34 Unreported, Northern Cape Division case No. 213/2008, 29 February 2008.

35 N\$82 million and N\$94 million, respectively.

36 Quinot, G. 2008, section 2.1.

37 See e.g. *Shetu Trading CC v Chair, Tender Board of Namibia & Others*, (SA 26/2011) [2011] NASC 12 (4 November 2011), and the unpublished judgement on *Namibia Construction Industries & Murray and Roberts v The Chairman of the Tender Board & the Ministry of Works, Transport and Communications*, 2007, A 283/2007, High Court.

38 The 2011 UNCITRAL Model Law on Public Procurement provides for such a standstill period (see e.g. Articles 22(2) and 67(1)). See also *Total Computer Services (Pty) Limited v Municipal Manager Potchefstroom Local Municipality & Others*, (29416/07) [2007] ZAGPHC 239; 2008 (4) SA 346 (T) (19 October 2007), section 62ff, which refers to section 49 of the Transvaal Municipality's Procurement Policy providing for such an appeal period.

mechanism and an independent review mechanism are, furthermore, of utmost importance in the Namibian public procurement system.

Conclusion

The Neckartal Dam tender awards case clearly displays the necessity to reform the institutional and organisation structure of the public procurement system, to enact stricter regulations on the use of evaluation criteria and their weighting as well as to require comprehensive recording and full transparency of the evaluation process. It is of specific importance that those conducting the evaluation and those taking the decision, respectively, can be held accountable for their actions and that there are effective review mechanisms available.

Although this case only reveals some of the many shortcomings and weaknesses of the current public procurement system, it should be reason enough to expedite and finalise public procurement reform in order to allow an effective and efficient spending of resources in view of enhancing socio-economic development.

Accountability (or the absence thereof) in the Namibian public sector: A look at legislation and policies in place

Dennis U Zaire*

Introduction

The wider public has become concerned by what it perceives to be a lack of accountability in the Public Service of Namibia (PSN)¹ because there is a trend of slow service delivery, corruption, fraudulent tendencies and maladministration of public offices which affects the public and private sector alike. Such counterproductive practices disadvantage Namibia's competitiveness in the short and long term.

The article argues that the status quo is unsustainable. New thinking and action are needed to address the problem head-on. The argument contends that the legal mechanisms and policy guidelines in place in the PSN are ineffective, inadequately implemented, or simply disregarded by civil servants.² Therefore, a complete mind shift, i.e. a sea change in attitude and approach, from civil servants and the political leadership in the country is imperative. Such change, if it ever happens, will have a positive impact and would promote accountability, efficiency, transparency and professionalism as good values and practices, especially for those individuals charged with public office and, hence, responsible for service delivery to the public. The wider benefits of these changes are heightened accountability and transparency across the civil service, an enhanced quality of service delivery that will match the needs of its citizens, and improved economic competitiveness in the region and further afield.

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1 For the purpose of this article, the terms *Public Service of Namibia (PSN)*, *civil service* and *public sector* include SOEs, and are synonymous with each other.

2 In this article, *civil servant* and *public servant* are synonymous with *official*, as defined in Article 93 of the Namibian Constitution, namely as including “any elected or appointed official or employee of any organ of the central or local Government, any official of a para-statal enterprise owned or managed or controlled by the State, or in which the State or the Government has substantial interest, or any officer of the defence force, the police force or the correctional service, but shall not include a Judge of the Supreme Court or the High Court or, in so far as a complaint concerns the performance of a judicial function, any other judicial officer”.

The article first considers the concept of *accountability*. Secondly, it addresses the bureaucratic means and some of its advantages as regards accountability. Thirdly, it looks at why an absence of accountability is bad. Finally, it looks at the legal and policy framework in place before concluding what can be done to improve matters. To this end, the article delivers a small contribution on the subject of accountability in an attempt to highlight Namibia's plight.

The concept of *accountability*

In simple terms, *accountability* refers to the obligation to render account for a responsibility that has been given or assigned. It means taking responsibility for one's activity or conduct.

Keohane gives a broader definition of *accountability*, specifying it as a political system:³

The accountability relationship is one in which an individual, group or other entity makes demands on an agent to report on his/her activities and has the ability to impose costs on the agent.

This definition shows a close semantic relation to the term *responsibility* as well as to the occurrence of an interaction between two or more entities. Keohane goes on to say that *democratic accountability* within a constitutional system is a relationship in which power-wielders are accountable to the broad public.⁴ Besides *democratic accountability* there is *hierarchical accountability*, in which subordinates are accountable to superiors, and *pluralistic accountability*, in which different branches of government are accountable to one another. Constitutional democracies contain all of the above-mentioned forms of accountability, but also rely on horizontal supervision, with its checks and balances.⁵

Accountability is an important factor in social discipline and efficiency. If accountability is absent in a political system, it is impossible to create an efficient work process. In this sense, then, *accountability* is a cornerstone of good governance and is closely connected to the term *transparency*. *Transparency* refers to operating in such a way that it is easy for others to see

3 See Keohane, Robert O. 2002. *Global governance and democratic accountability*, available at <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan034133.pdf>, last accessed 30 April 2014.

4 (ibid.).

5 (ibid.).

what actions are taken.⁶ Transparency is an important factor in government work. If one could take responsibility for one's action or work (accountability), and perform the allocated tasks in such a way that others are able to follow the methods one has used (transparency), then efficiency and performance could improve significantly. Enhanced efficiency and performance would solve the long delays that people experience when it comes to the delivery of key services by many public institutions in Namibia. The long delays experienced at the Ministry of Home Affairs and Immigration in processing identification documents (IDs), passports, visa applications,⁷ birth and death certificates, etc. are classic examples.⁸

The continuous review of government work through public discussions, court decisions, elections and parliamentary oversight through the established Parliamentary Committee is one of the ways in which transparency in government in general and in its offices, ministries and agencies (OMAs) in particular could be ensured. Institutions that assess government work, such as the Office of the Auditor-General, which is tasked with investigating, examining and auditing government books per the State Finance Act,⁹ need to be empowered. OMA's are widely known for not submitting the required documents to the Auditor-General on time.¹⁰ Penalties such as naming and

6 There are many ways to define *transparency*. For example, it could also refer to a lack of hidden agendas and conditions, accompanied by the availability of full information required for collaboration, cooperation and collective decision-making; see e.g. <http://www.businessdictionary.com/definition/transparency.html>, last accessed 27 May 2014.

7 Outcry in the press about the visa section of the Ministry of Home Affairs and Immigration is captured in an article entitled "Home Affairs Ministry accused of 'prejudice'", *Namibia Sun*, 14 July 2014, in which a certain Dr Shikongo states that "we have great concern with how things seem to be done at the visa section at Home Affairs".

8 On 23 May 2014, the Minister of Home Affairs and Immigration, Pendukeni Iivula-Ithana, launched an 18-month (N\$126.3-million) turnaround strategy. According to the Minister, "It is hoped that the project will help to eliminate backlogs at all processing steps for each service; provide required tools and processes to manage programmes; reduce average queue times; and develop processes and implementation plans"; see http://www.namibian.com.na/index.php?id=13184&page_type=story_detail, last accessed 25 May 2014.

9 No. 31 of 1991; available at http://www.parliament.gov.na/acts_documents/97_state_finance_act_31_of_1991.pdf, last accessed 30 April 2014.

10 For example, according to the Auditor-General's report on the accounts of the Ministry of Home Affairs and Immigration for the financial year ended 31 March 2012, informal requests as well as formal letters dated 2 May 2012 and 20 September 2012 addressed to its Permanent Secretary asking for information for the annual report were still outstanding when the report was tabled on 31 March 2013; see http://www.oag.gov.na/report/reports/45_2013_HomeAffairs_2011-12.pdf, last accessed 14 July 2014. In "Geingob proposes new ministry", *The Namibian*, 10 July 2014, the Prime Minister, Dr Hage Geingob, was quoted as saying the following:

shaming them for non-compliance need to be instituted because their lack of accountability is detrimental to their own operations as well as the efficacy of the work conducted by the Auditor-General.

Furthermore, the benefit of assessing government work is that ordinary civil servants as well as political office-bearers, who act on behalf of the country's citizens, need to know that they are under constant scrutiny to perform as the country's laws and the electorate require. Assessment will encourage them to perform effectively, transparently and accountably in order to avoid being negatively criticised or, at worst, being removed from office by their superiors or the electorate. This encourages compliance with the rules and obligations in place, and discourages the abuse of delegated power.

One could argue that, should the political office-bearers and the top structure of government not set an example by being accountable to the public and the electorate, as is often the case in Namibia, this sets a bad and dangerous precedent that erodes important values and principles in the administration of public institutions.¹¹ Public offices are institutions set up as a transmission belt between the government and the general public to deliver essential services to the latter. Therefore, the public is entitled to these services – without having to beg the civil servants responsible for delivering them to do their job. This was echoed by the Under Secretary of the Department of Public Service Management at the Office of the Prime Minister during Round Table discussions on the implementation of the Public Service Charter some 14 years ago:¹²

The current attitude of workers negates the achievement of the desired goals of rendering value[-]for[-]money service to the people. Workers see themselves as masters of the people rather than servants. There is also the negative propensity to look at the employment or job merely as a means to earn a living rather than to render services.

“It was reported in 2013 that out of 72 State Owned Enterprises (SOEs), 43 failed to submit any documentation on their operations for audit purposes. SOEs fail to submit their annual reports to the SOEGC on time as well as to Parliament and thus they interfere with the effectiveness of the statutory functions of these institutions”.

11 Article 41 of the Namibian Constitution states the following: “All ministers shall be accountable individually for the administration of their own Ministries and collectively for the administration of the work of the Cabinet, both to the President and to Parliament”. In addition, Article 45 clearly indicates that “[t]he members of the National Assembly shall be representative of all the people and shall in the performance of their duties be guided by the objectives of this Constitution, by the public interest and by their conscience”. Thus, any Minister or other civil servant behaving in an unaccountable manner is in breach of the constitutional provisions and has misunderstood his/her role and responsibilities towards the Namibian public.

12 George Simataa, 28 November 2001; available at <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN007930.pdf>, last accessed 4 May 2014.

Accountability (or the absence thereof) in the Namibian public sector

Furthermore, civil servants who fail to deliver services to the public act against the spirit of section 17(1)(a) of the Public Service Act, which states the following:

Every staff member or member of the services shall place the whole of his/her time at the disposal of the government.

By virtue of section 6(1)(b) of the Public Service Act, the Prime Minister is empowered to enquire into the efficiency of any staff member. Thus, the law makes enough provisions that could be used to improve matters in the administration of public institutions. The question is why these legal provisions are not properly utilised.

Bureaucratic means towards accountability

Bureaucracy refers to a system of administration distinguished by its clear hierarchy of authority; rigid division of labour; written and inflexible rules, regulations and procedures; and impersonal relationships.¹³ Bureaucracy is one of the most efficient means of guaranteeing accountability, especially when it comes to clear structures in a system such as a government. One of the major theoretical assumptions that affirm the efficiency of bureaucratic means is that rationality and control result in organisational structure – or are essential for it. In this sense, *bureaucracy* can be seen or understood as a rational tool for executing the commands of elected leaders while assuring effectiveness and transparency in governance.¹⁴ The bureaucratic system derives and nourishes constitutional democracy and the principle of the separation of powers.

As noted above, one of the main elements of a bureaucratic system is the division of labour. A *division of labour* means that work is divided into units that are organised; in the case of the work of an institution, the organised units are led by bureaucrats. Another important feature is that the employees do not own their offices, but hold them based on their abilities and skills.¹⁵ Thus, nepotism – the practice among those with power or influence of favouring relatives or friends, especially by giving them preferential treatment for jobs¹⁶ – is avoided in the best possible way, while the quality of the work and its outcome are assured. The employees are professionals in their specific area, and they usually have lifelong employment, an appropriate salary and

13 See <http://www.businessdictionary.com/definition/bureaucracy.html#ixzz32p1mE56K>, last accessed 25 May 2014.

14 Olsen, Johan P. 2006. "Maybe it is time to rediscover bureaucracy". *Journal of Public Administration, Research and Theory*, January, 16(1):1–22.

15 (ibid.).

16 See <http://www.oxforddictionaries.com/definition/english/nepotism>, last accessed 24 May 2014.

a pension in order to secure their loyalty towards the institution. As motivation is a core issue when it comes to efficiency and responsibility, the system of lifelong careers and adequate salaries are essential for bureaucracy.

Responsibility assumes accountability, but, in order to feel responsible for certain work processes and outcomes, it is necessary to establish a well-structured system of hierarchy in which everyone knows his/her position. In combination with rule-based procedures which every bureaucrat is expected to follow, the possibility exists to address and avoid arbitrary actions; hence there is only a slight margin for bribery and other forms of corruption. Another advantage of a hierarchy is the potential for everyone to be promoted on the basis of qualitative work – which can be seen as a motivation resulting in accountability.

Bureaucrats are not permitted to act freely or make decisions on their own, but they follow a set of legal rules. In this sense they are the guardians of constitutional principles¹⁷ and the law, and warrantors of professional standards.¹⁸

Bureaucrats manage institutions based on written documents that are preserved in order to track back decisions. Due to its technical superiority, bureaucracy is one of the most efficient forms of structuring and managing modern institutions. A bureaucracy's characteristics – such as a hierarchy and impersonal, rule-based construction – result in precision, speed, knowledge of the files, discretion, strict subordination, and reduction of material and personal costs, besides diminishing the range of arbitrary actions.¹⁹ Thus, the chances that accountability can be secured are increased immensely when bureaucratic means are introduced in modern administration and governance. This is the theoretical advantage of bureaucracy. However, this is not the case in practice.

Short notes on why the absence of accountability is bad

What are the negative implications associated with a lack of accountability? Firstly, it creates a bad image for the Namibian Government in terms of the services it provides. Secondly, it affects the work ethic and professional standards in the public sector. Thirdly, it undermines public confidence in the

17 For instance, Article 18 of the Namibian Constitution compels administrative bodies and administrative officials to act fairly and reasonably and to comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions have the right to seek redress before a competent court or tribunal.

18 (ibid.).

19 Stillman (2010).

government and its delivery of public services, especially to the poor,²⁰ and it erodes investor confidence in the country. Finally, it affects the poor negatively, as it makes it expensive for them to access the services they need. Indeed, a lack of accountability impedes national development as it negatively affects the country's economic performance and competitiveness in the region and beyond.²¹

This lack of accountability has led to the poor performance of many bureaucratic institutions in Namibia and has increased their reliance on public funds to stay afloat.²² In response, the government has, over the years, introduced various measures aimed at improving efficiency in its service delivery and instilling a culture of accountability among civil servants. Such measures include the Public Service Charter launched in 1996 and the Performance Management System launched in 2009. This is in addition to the various pieces of legislation such as the Public Service Act, 1995,²³ passed by the National Assembly to provide for the establishment, management and efficiency of the PSN; the regulation of the employment, conditions of service, discipline, retirement and discharge of public servants; and other incidental matters.²⁴ Due to lack of adequate data, it is difficult to assess with certainty whether the introduction of these measures has had a positive impact on performance and efficiency in the PSN. Furthermore, given that the government continues to introduce more measures, although some are practically duplications of what already exists, one would not be blamed for assuming that the previous measures did not achieve the desired results, i.e. to make the civil service an effective and accountable one.

20 For instance, in 2009, the residents of an informal settlement in Mariental expressed anger over the lack of basic services in their area; see <http://allafrica.com/stories/200901230576.html>, last accessed 15 April 2014.

21 According to the World Economic Forum's 2010 Global Competitiveness Index, Namibia ranked 80th out of 134 countries. In 2010, Namibia came 74th out of 131 countries. In the 2011–2012 ranking, Namibia came 92nd out of 144 countries; see <http://reports.weforum.org/global-competitiveness-report-2012-2013/#=>, and http://www.namibian.com.na/index.php?archive_id=70485&page_type=archive_story_detail&page=2831, both sites last accessed 4 May 2014.

22 Some of the institutions bailed out by the government include Air Namibia, the Namibian Broadcasting Corporation and Namibia Wildlife Resorts. In total, the government has transferred N\$15.1 billion to state-owned corporations (SOEs) since 2001, with Air Namibia, the University of Namibia and the Polytechnic of Namibia being the biggest recipients; see Jauch, Herbert. 2012. "Reforming state owned enterprises: Past experiences and challenges ahead"; paper prepared for the Namibia Economic Society/Friedrich-Ebert-Stiftung panel discussion, 16 August 2012; available at <http://vivaworkers.org/wp-content/uploads/2013/02/SOE-Reform-2012.pdf>, last accessed 4 May 2014.

23 No. 13 of 1995.

24 See Preamble to the Act.

From all of the above, it appears that the problems associated with the lack of accountability and poor service delivery persist, regardless of the measures taken to solve them. This persistence could arguably be attributed to the type of civil service Namibia has, i.e. one that does not see the people as a precious resource in the country's drive to achieve economic independence and development: a civil service, that is, in a nutshell, not fit for its purpose. This type of civil service perpetuates a lack of accountability and is not geared towards assisting in government of the people, by the people and for the people in its mandate of making Namibia a better place for all who live in it, as per national long-term development goals expressed in Vision 2030.²⁵

The legal framework governing the PSN

Given the issues raised above as regards accountability (or lack thereof), how does the legal framework look in the PSN?

Namibia's occupation by colonial powers meant that laws were designed to suit the needs of those administrations. A principal feature of such laws was their complete discrimination against the majority of the population in favour of the ruling minority. After Namibia's Independence in 1990, the government embarked on rooting out discriminatory laws to ensure the legal framework complied with the supreme law, the Namibian Constitution, and reflected the views of the changed society.²⁶ The process of accommodating these changes in the civil service after Independence was a serious challenge. As a result, the Public Service Commission Act, 1990,²⁷ was enacted to regulate matters of public service.

The Public Service Act, 1995 (No. 13 of 1995)²⁸

The Public Service Commission Act mandated the Commission to advise the President on, among other things, issues related to discipline, remuneration,

25 The overarching objective of Vision 2030 is to "achieve a prosperous and industrialised Namibia, developed by her human resources, enjoying peace, harmony, and political stability"; available at http://www.npc.gov.na/?wpfb_dl=36, last accessed 24 May 2014.

26 A study in 2010 showed that, 20 years after Independence, Namibia still had many laws and statutes in its books that contained discriminatory language which seems to reinforce the notion of apartheid; see Groenewaldt, Angeliq. 2010. *Discriminatory and un-repealed legislation in Namibia, 20 years after Independence*. Windhoek: Konrad-Adenauer-Stiftung & Office of the Ombudsman; also available online at www.kas.de/namibia/publications, last accessed 18 July 2014.

27 No. 2 of 1990; the Act came into force on 1 November 1995 (GN 210/1995, GG 1185).

28 Amended by the Public Service Amendment Act, 2012 (No. 6 of 2012). The amendment is meant to empower the Secretary to Cabinet to establish a disciplinary

setting of standards and performance, and general conduct in the PSN. As noted above, the Act is generally aimed at ensuring the efficient administration of the PSN. The Act was amended and replaced by the Public Service Act, 1995, which governs employment in the PSN. The question, therefore, is whether the latter Act still contains provisions that satisfy bureaucratic requirements to help achieve accountability in the PSN as an ultimate objective. Judging by the level of public outcry and complaints in the press about the lack of service delivery and accountability in the PSN, the answer seems to be in the negative.

Bureaucratic criteria require that employees hold office based on their ability and skill. To this end, section 18(2) of the Public Service Act states the following:

No person shall be appointed permanently as member of staff, whether on probation or not, unless such a person is in all respects suitable for permanent appointment in a post ...

Section 18(3) of the same Act states that –

... in the filling of any post in the Public Service or the employment of any person additional to the establishment, only qualifications, experience, level of training, relative merit, efficiency and suitability of the person(s) or staff member(s) being considered for appointment, promotion or transfer, shall be taken into account.

The rationale behind section 18 is to avoid instances of nepotism and corruption in order to ensure that all individuals are treated fairly and equally. Moreover, section 17(1)(a)–(b) of the Public Service Act states the following:

Every staff member or member of the services shall place the whole of his/her time at the disposal of the government; and no staff member or member of the services shall perform or engage himself or herself to perform remunerative work at any time outside his/her employment in the public service.

The rationale of the two subsections of section 17(1) is to ensure that working hours are not utilised to attend to private matters that may easily lead to corruption and a conflict of interest between private and work-related matters. Another reason is to curb private dealings and oblige staff members to obtain permission from the authorities before engaging in such dealings. To ensure compliance and serve as a motivation, public servants are paid adequate salaries and allowances.²⁹ However, it appears that there is little, if any, compliance with the two sections above as civil servants continue to use

committee consisting of persons, who may or may not be staff members, in cases of disciplinary proceedings instituted against a Permanent Secretary; see <http://www.lac.org.na/laws/2012/4972.pdf>, last accessed on 13 July 2014.

29 Section 13(1), Public Service Act.

ARTICLES

public offices and working hours to attend to private matters. For instance, it is difficult to find government employees at work on Fridays, especially, after lunch and at month-end: they appear to knock off early. Some public servants also continue to operate businesses while in government employ, dividing their time between official and private commitments. Often, official commitments suffer as there is little supervision. A case in point here is doctors who have private consulting rooms while on the government payroll.³⁰

Furthermore, the Public Service Act provides for sanctions in case of non-compliance with the law and ministerial policy guidelines. Under section 25(1) (h), any staff member will be found guilty of misconduct if s/he should –

... conduct himself or herself in a disgraceful, improper or unbecoming manner causing embarrassment to the government or to the public service or, while on duty, is grossly discourteous to any person.

Furthermore, under section 24(4)(e) and (f) of the same Act, any staff member may be discharged from the PSN on account of misconduct or inefficiency. The April 2012 dismissal by the Board of TransNamib, a public institution, of its Chief Executive Officer Titus Haimbili and Chief Operating Officer Charles Funda for dishonesty and gross incompetency is a case in point here.³¹ However, this case is an exception as many civil servants who commit serious misconduct get away without any penalty or harsh punishment being imposed on them. In fact, there is a perception among the public that disciplinary action in the PSN is very rare and dismissal happens only once in a blue moon.

The above shows that the Public Service Act contains provisions which, if correctly implemented, have the potential to increase performance and accountability in the PSN. This piece of legislation is complemented by another, namely the State-owned Enterprises Governance Act, 2006,³² which deals specifically with state-owned entities. However, this Act does not govern employment in the PSN – the Public Service Act does. This explains why the dismissal of the two former TransNamib employees was dealt with under the latter Act and not under the State-owned Enterprises Governance Act, even though TransNamib is an SOE.

30 These issues are reported in the papers daily; see e.g. <http://sun.com.na/health/private-doctors-clash-health-ps.53097> and <http://allafrica.com/stories/201304120780.html>, both sites last accessed 27 May 2014.

31 See <http://www.namibian.com.na/news/full-story/archive/2012/may/article/haimbili-dishonest-and-untrustworthy-transnamib-board/>, last accessed 25 June 2012.

32 No. 2 of 2006.

State-owned Enterprises Governance Act, 2006 (No. 2 of 2006)

This Act makes provision for the efficient governance of SOEs³³ and the monitoring of their performance. It also provides for the establishment of the State-owned Enterprises Governing Council. The rationale behind this Act is to provide for good and better governance of SOEs as well as to improve their efficiency and accountability.

SOEs can be classified as *regulatory*, *service-rendering*, *economic and productive*, and *general* enterprises.³⁴ Schedule 1 of the Act lists 52 such entities. Namibia's SOEs have diversified responsibilities in key areas, such as energy,³⁵ telecommunications³⁶ and water.³⁷ They are aimed at reducing the government's workload through the provision of jobs and services. Ideally, the charge of SOEs is also to assist the government in distributing wealth and, in so doing, alleviate poverty and achieve economic emancipation. This will hopefully reduce the gap between the 'haves' and the 'have-nots'. Unfortunately, this does not seem to be happening, as Namibia continues to be a state with one of the highest levels of inequality as regards income distribution in the world.³⁸

The creation of the Council is provided for under section 2(1) of the Act. The Council regulates, monitors and reports on the work of SOEs, and has broad powers to establish generally accepted common principles of corporate governance and good practice for these bodies.³⁹ The Council is also empowered to develop a common policy framework for SOEs,⁴⁰ determine criteria for measuring their performance⁴¹ and develop appropriate means for monitoring it.⁴² The governance agreement with an SOE board,⁴³

33 SOEs are institutions that are 100% owned by the state. The only exception to date is Meatco, which also falls under the State-owned Enterprises Governance Act. The state currently has no shareholding or direct financial interest in the corporation, although this may change; see <http://www.meatco.com.na/overview-financial-year-20132014>, last accessed 6 July 2014.

34 State-owned Enterprises Governance Act, section 4(2).

35 Such as Nampower.

36 Such as Telecom Namibia.

37 Such as NamWater.

38 See World Bank Human Development Report, 2011, <http://www.worldbank.org/en/country/namibia>.

39 State-owned Enterprises Governance Act, section 4(1)(a).

40 (*ibid.*:section 4(1)(b)).

41 (*ibid.*:section 4(1)(c)).

42 (*ibid.*:section 4(1)(c)).

43 (*ibid.*:section 17).

the performance agreements with individual board members,⁴⁴ and the performance agreements with SOE management staff⁴⁵ are all dealt with in the Act as well. However, the full implementation of the Act has proved to be a daunting task for the Council. As a result, the Act was amended by the promulgation of the State-owned Enterprises Governance Amendment Act, 2008.⁴⁶ The amendment provided clarity on the dates from which the constitution of SOE boards had to be effected in order to comply with the Act and validate the appointment of certain board members. Furthermore, it obliges SOE boards to submit statements of investment policies to their respective portfolio ministers for approval. This measure aims at ensuring accountability by SOE boards to their line ministries and, ultimately, to Cabinet and the Parliamentary Standing Committees.

To strengthen capacity and training in the civil service, Parliament also enacted the Namibia Institute of Public Administration and Management Act, 2010,⁴⁷ which created the Namibia Institute of Public Administration and Management (NIPAM).

Namibia Institute of Public Administration and Management Act, 2010 (No. 10 of 2010)

This Act creates NIPAM, whose mandate is to provide administration and management training to instil a culture of service in the PSN, as well as for coordination, partnership-building, operational research and capacity evaluation. NIPAM is also mandated to serve as a think tank in the public sector.⁴⁸ Section 2(1) of the Act specifically provides for NIPAM's establishment as a –

... [p]ublic institution for training, operational research, capacity evaluation and consultancy ...

To this end, the institution aims at transforming the PSN through improving management, leadership and professional competencies. It also aims to foster a climate of purpose, values and professional tradition amongst public servants.

Under section 27(1)(a–c), the Act requires the Executive Director and other senior management staff to enter into performance agreements with the SOE Governance Council. These agreements should set out the following:

44 (ibid.:section 18).

45 (ibid.:section 21).

46 No. 5 of 2008.

47 No. 10 of 2010.

48 See section 5, NIPAM Act.

Accountability (or the absence thereof) in the Namibian public sector

- The terms and conditions of appointment
- Objectives to be achieved and the time frame for their achievement, and
- Measures necessary to evidence such achievement.

NIPAM also plays a role in creating a culture of accountability in the PSN as it is mandated to develop a sense of holistic management among a new generation of leaders, with the capacity to manage public policies, strategies and projects in dynamic and complex environments,⁴⁹ as well as to collaborate and strengthen partnerships between public administrations and civil society organisations at central, regional and local levels, and with other institutions and bodies having similar objectives.⁵⁰ To achieve these objectives, NIPAM has rolled out the following initiatives:⁵¹

- **Foundation Programme:** This Programme aims to impart basic knowledge as well as a fundamental understanding of Namibia's national philosophy, and its political and economic values.
- **Management Development Programme:** This Programme aims to invest participants with the competencies required at middle management levels in the public sector.
- **Senior Management Development Programme:** This Programme offers participants the required personal and professional strategic skills in cognitive, emotive and attitudinal scopes in order to increase their understanding of, among other things, good governance, public finance for good governance, leadership and organisation.
- **Executive Leadership Programme:** This Programme aims to sharpen the strategic leadership and management skills of senior leaders in the PSN, SOEs and the private sector.
- **SOE Forum:** The creation of this Forum, spearheaded by NIPAM, is a platform on which the leading minds at SOEs are able to share best practices and common challenges, and discuss strategic issues facing their enterprises as agencies of the state.

Other legislation

Reference could also be made to two other pieces of legislation, namely, the Anti-corruption Commission Act, 2003,⁵² and the Ombudsman Act, 1990.⁵³ Although these two laws do not directly govern the administration of the PSN, they complement those that do. The two Acts are important as their absence may create loopholes and challenges for the efficient administration of the PSN and, ultimately, for the quality of public service delivery in Namibia.

49 See section 5(j), NIPAM Act.

50 See section 5(k), NIPAM Act.

51 "NIPAM Bulletin", *New Era*, 21 May 2014.

52 No. 8 of 2003.

53 No. 7 of 1990.

The Anti-corruption Commission, established under the Anti-corruption Commission Act, was created to, among other things, —⁵⁴

- receive, initiate or investigate allegations of corrupt practices anywhere in the country
- investigate any conduct of a person employed by a public or private body which, in the Commission’s opinion, may be connected with or conducive to corrupt practices, and to report on its findings to an appropriate authority within the public or private body, and
- take measures for the prevention of corruption in public and private bodies.

The Commission has successfully investigated some corrupt officials in the public sector as well as individuals in the private sector, although much remains to be done to improve the Commission’s efficiency.⁵⁵ In *S v Nakale & Others (No. 1)*,⁵⁶ a magistrate and a prosecutor were convicted for receiving bribes in exchange for corruptly releasing accused persons on bail.

On the other hand, the Ombudsman has a crucial role to play in ensuring that aggrieved members of the public have someone to turn to in cases where their human rights have been compromised. For example, a civil servant might for some reason depart from the set standards and behave in an unprofessional, unfair, impolite or insensitive manner: officials might – and do, in certain cases – abuse the power entrusted to them by infringing on the rights of a member of the public.⁵⁷ In all these instances, the Ombudsman has the legal duty to offer the necessary protection to the aggrieved party.

Regulations, policy frameworks and other guidelines in the PSN

To complement the above pieces of legislation, the Namibian Government has introduced regulations, policy frameworks and other guidelines that aim

54 Section 2(3)(a), (e) and (f), Anti-corruption Commission Act.

55 See e.g. *S v Nakale & Others (No. 1)*, 2007 (2) NR 405 (HC), where a successful conviction was achieved; *S v Nakale & Others (No. 2)*, 2007 (2) NR 427 (HC), which dealt with sentencing after conviction; and *Prosecutor-General v Lameck & Others*, 2009 (2) NR 738 (HC), which dealt with sections 32–33 and 42(2) of the Act. See also “Say no way to corruption: Be patriotic!”, available at www.accnamibia.org, last accessed 27 May 2014.

56 *S v Nakale & Others (No. 1)*, 2007 (2) NR 405 (HC).

57 See Walters, John. 2008. “The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsman”. In Horn, N & A Boesl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia; also available at www.kas.de/proj/home/pub/8/2/year-2009/dokument_id-16045/index.html, last accessed 27 May 2014; Ruppel-Schlichting, Katharina G. 2008. “The independence of the Ombudsman in Namibia”. In Horn, N & A Boesl (Eds). *The*

at strengthening issues of accountability, performance, good governance and quality service delivery in the PSN. These guidelines are outlined in more detail below.

Public Service Charter

The Public Service Charter outlines certain general principles to which the public administration should adhere. In summary, the Charter provides for the following:

- **Standards:** Setting, monitoring and publishing clear benchmarks of good service that individual members of the public can expect
- **Accountability:** Supplying details of performance against targets, and identifying who is responsible for meeting such targets, and
- **Quality of service:** Publishing a complaints procedure with independent reviews of procedures, where possible.

These principles provide guidance on how public institutions should ply their trade. The principles are complemented by OMA Customer Service Charters, which inform the public about the standards of service that can be expected from each OMA. OMA Customer Service Charters also set out a client's rights and obligations, e.g. to provide feedback on enquiries. These Charters are implemented by the Office of the Prime Minister.

Other performance initiatives

In addition to the Public Service Charter and Customer Service Charters, the Namibian Government – through the Office of the Prime Minister under the Strategic Public Service Reform Programme – introduced the following initiatives:

- **Performance and Effective Management Programme:** This enables the government to judge, on the basis of detailed information, the performance of individuals in management positions in most fields of influence, including budgeting.
- **Customer Service Training:** These are tailor-made courses aimed at creating awareness of quality service delivery.
- **Code of Conduct for the Public Service:** This provides guidance to public servants on the behaviour expected of them, both in their individual conduct and in their relationship with others.
- **Being a Public Servant in Namibia: The Pocket Guide:** This booklet helps new and seasoned staff alike to quickly refer to information required by members of the public or for their own reference.

independence of the judiciary in Namibia. Windhoek: Konrad-Adenauer-Stiftung; also available at www.kas.de/proj/home/pub/8/2/year-2008/dokument_id-15058/index.html, last accessed 27 May 2014.

ARTICLES

- **The E-Handbook** contains crucial information in electronic form that a civil servant needs to know about the PSN.
- **National Integrity Promotion Programme:** Among other things, this Programme aims at determining public servants' commitment to accountability, effectiveness and transparency.
- **Public Expenditure Tracking Survey** and **Qualitative Service Delivery Survey:** These two surveys were designed to help determine the efficiency of public service delivery, and
- **Performance Management System:** This system serves as a comprehensive way to manage the performance of civil servants.

Conclusions

This discussion has shown that, to some extent, there is indeed a lack of accountability in the PSN. The following are some of the possible causes, although the list is not exhaustive:

- Poor or non-existent implementation of laws, policies and standards
- Poor and/or inadequate understanding of laws, policies and standards in place
- Non-adherence to laws, policies and standards in place
- Poor and/or inadequate supervision of civil servants
- Carelessness and poor work ethics
- Lack of understanding of service and purpose
- Poor training
- Absence of leadership at public institutions
- Lack of skill and sophistication in performing tasks, and
- Sense of entitlement derived from political alliances.

Given the above weaknesses, possible solutions could include the following:

- Continued training to create an understanding of what is meant by the term *civil servant*
- Enhanced supervision of civil servants and better adherence to procedures and rules in place
- Inculcating the notion among civil servants that working for the government is not a right but a privilege
- Enforcing disciplinary measures for misconduct, non-compliance and or any malfeasance
- Reducing the bloated civil service and creating a flexible and competent organ that is ready to respond to the various challenges posed by modern global realities
- Creating awareness among civil servants about accountability, transparency and other key values such as efficiency to ultimately address ills such as nepotism, corruption and maladministration in the public service
- Better implementation of laws and policies, and control to ensure adequate compliance with such laws and policies

Accountability (or the absence thereof) in the Namibian public sector

- Improving the work ethic through motivation and other means at government level, and
- Creating awareness about the distinction between *state*, *government* and *ruling party*, and also potential punishments for abuses of public office and/or non-compliance with the law in place.

What Namibia needs is a strong, single-minded civil service that is geared to achieving improved service delivery to Namibians and non-Namibians alike, and to completing economic emancipation. To these ends, a mind shift is needed to help address the shortcomings identified above so that Namibia can stand out above the rest.

ARTICLES

JUDGMENT NOTES

Melancholic medical law: Namibian medical practitioners may get away with homicide – The story of Mr H

Clever Mapaure*

Abstract

This article is based on a true life story. The story centres on the predicament of a patient, Mr H, who had a swab left in his abdomen by a certain Dr S in a Windhoek hospital. The presence of the swab in Mr H's abdomen for more than half a decade has not only caused him pain, but it has also caused his body to try to reject the foreign object. Indeed, the swab poses a threat to Mr H's life, but the law has given him a morose attitude and does not seem to favour his side. It seems that the favourable principles of law were rejected decades ago. This means that medical practitioners literally have the chance of getting away with homicide – culpable or otherwise. Against this backdrop, this article starts by narrating the Mr H's story so as to present a clear picture of what happened and the law that applied to his situation. It then moves on to consider medical practitioners' liability in such cases by analysing the law of contract and delict applicable to medical practice in the light of medical law and ethics. A detailed discussion then follows on the *res ipsa loquitur* doctrine, which literally means that the facts speak for themselves. However, this doctrine has tended to be controversial, which prompts an exploration of the reasons for the controversy. Moreover, since South African courts appear to have rejected the application of this doctrine since 1924, the implications of various international judgments for Namibia are immense – especially the Namibian constitutional dispensation where there is a temptation to violate the right to health in protection of old precedent. Recognising the problems in our own laws, the investigation considers South African and other foreign judgments in a bid to make reasonable recommendations for Namibian medical law, and lays out a philosophy which should permeate and preside over medical policy and practice.

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The factual setting

This article assesses the real-life situation affecting Namibian patients, medical practitioners and Namibian medical law in general. The story of Mr H is a real one dealt with by a certain Windhoek law firm and later withdrawn due to financial constraints on the part of the patient. Not only was Mr H vulnerable due to his financial position, he also had to endure the pain of a seven-year-old swab left in his abdomen due to a mistake made in the operating theatre. The swab remains inside Mr H to this very day, and pains the poor patient who also groans at the conflict between law and medicine. A sad story indeed!

The story of Mr H is simple to comprehend, but it raises complex medico-legal issues. Due to the ethics of both legal practice and medical practice, Mr H's real name will not be disclosed. On the same basis, the names of the institutions involved in both the legal and medical fraternity will not be mentioned; they, too, will simply be referred to as Nurse M, Dr S and X Hospital. These pseudonyms will be used for the sake of protecting the privacy, dignity, goodwill and integrity of those involved. However, the reality of the gaps that exist in Namibian medical law will be expounded on here.

The fuller story of Mr H

Mr H had some pains in his abdomen; he went to X Hospital in Windhoek for some tests. After a series of medical examinations, Dr S of X Hospital recommended that Mr H undergo an operation to relieve him of the pain in his abdomen. A day before the scheduled procedure, Mr H signed the medical papers consenting to the operation by the doctors at X Hospital.

A day after signing the consent and other medical forms, Mr H went to hospital for the agreed operation. Dr S, who was responsible for Mr H's operation, attended to it with one theatre nurse, Nurse M. Nurse M prepared the theatre and brought all the utensils needed for the operation. She had by then also taken an inventory of all the utensils and other items like swabs to be used in the operation. Dr S was then informed that the utensils were ready, and he inspected whether the prepared items were adequate for the operation he was going to perform on Mr H. After all inspections and preparations had been completed, Dr S was satisfied that the theatre had been well prepared and arranged for the operation.

At the appointed time for the operation, the patient was wheeled into the theatre, groaning from his abdominal pains. The patient was placed on the operating table and all operating utensils were brought into close proximity, as is required in medical practice. Mr H was duly anaesthetised, so he did not see or sense in any other way what was happening during his operation. During the operation, Dr S used the relevant equipment and, of particular

importance to this discussion, Dr S used swabs to prevent blood loss and to close blood vessels he had cut. Nurse M followed medical procedure and handed operating equipment to Dr S as he performed the operation.

The operation lasted about two hours, during which time Dr S was able to remove the cause of Mr H's abdominal pain. Dr S cleaned the area he had operated on and packed up the operating equipment. This constituted the termination of the operation, at which point Nurse M again had to take an inventory of all the equipment employed as well as count the number of used and unused swabs, which had to equate the number brought into the operating theatre.

Nurse M then reported to Dr S that all swabs were accounted for. Dr S, without verifying or recounting the swabs, relied on Nurse M's report that no swabs had been left inside the patient. Thereafter, Dr S sewed up the wound and resuscitated Mr H. Mr H stayed in hospital for some time so that the operation wound could heal and his condition could be monitored by the medical practitioners. Mr H was later discharged and then went home to recover.

Mr H felt very relieved after his recovery, and regarded doctors at X Hospital as having saved his life. He returned to work, since he had never felt better. After about two years, however, he started feeling sharp abdominal pains. He was very concerned about this as it disturbed him at work and when he was with his family. Mr H thus approached Hospital X again. Although the doctors there could not identify the problem, Mr H was adamant there was something wrong so he went to a different doctor, independent of X Hospital.

The independent doctor, Dr T, subjected Mr H to some X-rays. The X-rays clearly showed that, a swab had been left in Mr H's abdomen. Furthermore, Dr T proved that it was an operation swab that had been left inside Mr H during the time of the operation performed on him by Dr S at X Hospital. Dr T further explained that the swab had been positioned in the abdomen for about 18 months, by which time the abdominal tissues began treating it as a foreign object. This process of trying to reject the needle as a foreign object caused septic reactions to start around the swab. Mr H's post-operative abdominal pain, therefore, had been induced by the septic reaction.

Mr H was naturally concerned about this state of affairs and asked whether Dr T could remove the swab. Dr T advised that Mr H should approach X Hospital to do so. Mr H did as he had been advised, but X Hospital said they did not have the capacity to remove the swab and suggested that the operation could instead be done in South Africa. However, for this, Mr H would have had to raise N\$300,000.¹ Infuriated, Mr H demanded that X Hospital pay for the

1 US\$27,680.97 as at 4 July 2014.

JUDGMENT NOTES

subsequent operation since, in his view, X Hospital was liable for the mistake committed by their medical practitioners. X Hospital was adamant in return, saying that he could choose to live with the swab and the pain it was causing, or pay for its expensive removal in South Africa. Mr H turned to the law for a remedy, therefore, and approached S Law Firm for legal advice.

To S Law Firm, the events were so compelling that they prepared a case for Mr H to sue X Hospital for damages arising from his pain and suffering, and claim the amount required for a second operation to remove the swab. Several letters were exchanged between S Law Firm and X Hospital. Because X Hospital had links in South Africa, it employed a legal team there.

The correspondence resumed, but now it was with X Hospital's legal practitioners. Mr H was claiming N\$300,000 for medical expenses and additional sums for pain and suffering as well as a loss of income for some months. The claim was filed in the High Court of Namibia. In total, the claim amounted to around N\$500,000.² Before the matter could go to court, however, Mr H – in his pain and diminished working capacity – ran out of money. Thus, he could not finance the legal process which now required the employment of an advocate or senior counsel to square up with the South African legal team employed by X Hospital. The matter was subsequently withdrawn from the court roll on Mr H's instructions because of his lack of finances. Today, the swab remains in him and the pain it causes persists; furthermore, Mr H may be forced out of work since the now six-year-old swab remains in him and the associated pain increases by the day.

Background to the legal analysis

The case at hand, at face value, shows that somebody in the operating theatre is liable, but there are controversies regarding the basis of liability. If it is negligence, the act of negligence implies and applies an objective standard as a measure of professional conduct, although it is often referred to as *fault liability*. There is no necessary correlation between a judgment that a doctor was negligent in law and a finding that his/her conduct was morally blameworthy. This makes the resolution of the legal issues in this case even more convoluted. Mistakes are made in all areas of professional life and some of these are negligent whilst others are not. Some cause harm, but most do not. This one indeed caused harm, but it is rather intricate to ascertain who, if anyone, is liable for the harm.

On the face of it, there seems to be no problem with assigning liability to X Hospital since we can use the concept of *vicarious liability* for our argument. On the other hand, it should be noted that the law, as it stood from 1924 on, removed

² US\$46,134.96 as at 4 July 2014.

liability from the doctor for failing to verify that there was no swab left in the patient. This exclusion obtains till today and the medical profession has taken advantage of it. On the basis of this understanding, the ethics regulations and codes of conduct drafted for medical practitioners in South Africa, for example, remove any liability on the part of such practitioner for leaving a swab, for example, in the part of the body being operated on. It is intriguing that this 1924 exclusion has persisted till today; but the question is whether it will ultimately survive the latest developments in the common law and, indeed, constitutional muster regarding the right to health – which is, in itself, a bundle of rights. That this case did not go to court is unfortunate because the legal position in Namibia could have been clarified. Be that as it may, the old position should be critically analysed in the light of current common law and constitutional imperatives.

In recent years in Namibia, there has been an increasing interest in – and, indeed, incidence of – medical malpractice, with some cases getting wide media coverage. Notably, the concept of *medical malpractice liability* is not strictly confined to the award of damages flowing from professional negligence, but incorporates a range of other causes as well, such as liability for breach of contract or professional ethics. The case of Mr H was not necessarily a delictual case. As we shall see in the analysis below, other issues specific to medical law and contract feature as well.

The analysis below will concentrate on the doctor's liability. This stance is taken because the law with regard to a hospital's liability for its employees is much clearer than the doctor's liability for the nurse's mistake, especially considering the well-developed principle of vicarious liability in Namibian law. Indeed, it would be superfluous to emphasise such an easy principle. Instead, the principal focus will be on the protection granted here to doctors in the medical profession vis-à-vis the delictual liability of medical practitioners. The apparent strain between the two has caused considerable problems, and it seems the protection rooted in common law has suffered from much criticism; moreover, the application of such protection today appears to be discordant and out of kilter with patients' rights under the new constitutional dispensation.

On what basis can the doctor be held liable?

The contractual basis

It is clear that a medical operation consent contract was signed before the operation. The question is whether Dr X was in breach of contract when he left the swab in Mr H's abdomen. This question arises as we note that, although Mr H signed the agreement to consent to the operation, common sense dictates that Mr H would not have consented in writing or otherwise to a swab being left inside him: he agreed to a medically competent operation being performed on him, i.e. one free from any mistake.

Moreover, who were the parties to the existing agreement: Mr H and Dr S, or Mr H and X Hospital? A similar question arose in the case of *Meyer v Abrahamson*,³ where it was held that the contractual relationship was between the doctor and his/her patient.⁴ Furthermore, it was held that an implied term of the contract was that a doctor would exercise the reasonable skill and care of a practitioner in his/her field.

In *Castel v De Greef*⁵ and in *F v K*,⁶ it was decided that, in determining what was reasonable, the evidence of qualified physicians as expert witnesses would be of great assistance. However, as the court stated in both cases, what was reasonable under the circumstances was ultimately a matter for the court and not for individuals to say as regards what should be decided in terms of contract or delict. In *Lillicrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd*,⁷ the court elucidated that, should a practitioner fail in his/her duty and should the patient suffer damages as a result, the practitioner would be bound to compensate the patient for the damages caused by his/her breach of contract. Unlike damages for delict, however, damages for breach of contract are normally not intended to recompense injured parties for their loss, but rather to put them in the position they would have been in if the contract had been properly performed. Subject to the qualification of this rule, as explained in more detail below, this means that Mr H could also sue Dr S for breach of contract, and claim compensation for the damage caused, i.e. he could sue for damages for delict as well as for damages for breach of contract.

A qualification to this general rule has been accepted in South Africa since the 1920s in a series of decisions culminating in *Jackie v Meyer*.⁸ In these early decisions, damages were awarded for inconvenience, discomfort or loss of time, provided the inconvenience, discomfort or loss of time were directly associated with the breach. However, these earlier decisions were overruled. The case of *Jackie* was distinguished in the more recent case of *Administrator, Natal v Edouard*,⁹ in which contractual damages were awarded for patrimonial or tangible loss only – and not for discomfort, pain and suffering, or loss of

3 1951 (3) SA 438 (C), and 1952 (3) SA 121 (C).

4 See also Giesen, D & I Fahrenhorst. 1984. "Civil liability arising from medical rare-principles trends". *International Legal Practitioner*, 1:80–85; McQuoid-Mason, DJ & SA Strauss. 1999. "Medicine, dentistry, pharmacy and other health professions". In Joubert, WA & JA Faris (Eds). *Laws of South Africa*, 17:129, 144.

5 1994 (4) S.4 408 (c) at 426H–J.

6 (1983) 33 SASR 189.

7 1985 (I) SA 475 (A).

8 2 1945 AD 354, which refers to previous decisions, including *Smith & Wahmger v Kinion Steamship Co.*, (1867) 5 S 311 at 322; *Ward v Gardner*, (1902) 13 EDC 73; *Burnett v Shaw*, (1902) 19 SC 248 at 251; *Commissioner of Public Works v Drayer*, 1910 EDL 325; *Reed v Eddles*, 1920 OPD 69.

9 1990 (3) SA 581 (4).

amenities of life – caused by the birth of a child resulting from a breach of contract to perform a sterilisation operation. In English law today, for example, contractual damages can be extended to non-patrimonial loss.

However, the Appellate Divisions of the Supreme Court of South Africa departed from English cases such as *Jarvis v Swan Zurs Ltd*¹⁰ by holding that contractual damages be confined strictly to patrimonial loss. The English court refused to extend the common law to allow contractual damages for any form of intangible loss, commenting that any such extension could only be effected by the legislature.

Because Namibian common law is derivative of its South African counterpart, it can be concluded here that Namibian contractual law is similarly incapable of awarding realistic damages against a party who is in breach of a contractual undertaking to provide convenience, comfort or basic enjoyment of life to another party. This obviously has a direct effect on the doctor–patient contract under consideration in the *Edouard* case. Therefore, in Mr H's case, given the obvious restrictions on the type of damages claimed, the patient – as was held in *Blyth v Van den Heever*¹¹ – *Edouard* would have to allege and prove –

- the existence of a contract or, possibly, a prior doctor–patient relationship
- the negligent or intentional breach of such contract or relationship
- causation, and
- damages.

What could be difficult to prove in the case of Mr H is the second point, namely the negligent or intentional breach of the contract or doctor–patient relationship. The question which stalls the claim would be whether or not the doctor was negligent in leaving the swab in the complainant. The defence would most probably be raised that the negligence was not his but the theatre nurse's. If negligence has to be proved at all, the defence will impute to the sister any liability deriving from negligence. This raises another issue, i.e. whether or not Dr S was negligent in not having verified the count made by Nurse M in the first place. In old medical law in South Africa, with *Van Wyk v Lewis* being a case in point,¹² it was held that the doctor had been under no obligation to verify the inventory count made by the theatre nurse before he sewed up three wounds after the operation in question. In Mr H's case, Dr S is relying on the dictum by Wessels AJ, which reads as follows:¹³

10 [1973] 1 All ER 72 (A), which held that a person could recover damages for “disappointment, the distress, the upset and frustration caused by the breach”. The court said that the previous limitations on damages for distress and disappointment were “out of date” (ibid.).

11 1980 (1) SA 191.

12 1924 AD 438.

13 (ibid.:464).

The mere fact that a swab is left in a patient is not conclusive of negligence. Cases may be conceived where it is better for the patient, in case of doubt, to leave the swab in rather than to waste time in accurately exploring whether it is there or not, as for instance where a nurse has a doubt but the doctor after search can find no swab, and it becomes patent that if the patient is not instantly sewn up and removed from the operating table he will assuredly die. In such a case there is no advantage to the patient to make sure that the swab is not there if during the time expended in exploration the patient dies. Hence it seems to me that the maxim *res ipsa loquitur* has no application to cases of this kind.

Dr S wanted to rely on this dictum, which has not only found exoneration in the medical profession, but also found application through codification in medical codes of conduct and codes of ethics in South Africa. This dictum cannot, however, be a conclusion to the whole case. We can bring in other authorities to challenge it and, if it is the law now in Namibia, then the law has to be changed. This will be clear after we look at the liability under delict, to which we now turn.

Being held liable under delict: Procedural aspects

A *delictual* action is basically one intended to recover damages or satisfaction for a wrong act committed by a wrongdoer. In Namibian law of delict, the aggrieved party has three main actions through which s/he may recover damages:

- The *actio legis Aquiliae* for the recovery of damages
- The *actio injuniarum* for the redress of intentional injury to personality, and
- The action for pain and suffering arising from negligence causing physical injury.

It arises from here that, for Mr H to succeed in his claim under delict, he had to show that he had suffered damages through a wrongful and negligent act by Dr S, i.e. that the leaving of the swab was wrongful and had caused damages on Mr H's part. Therefore, Mr H had to allege and prove –

- **the existence of a duty of care and the breach of that duty:** The specific nature of the duty has to be proved, meaning that a doctor-patient relationship has to be stated in such a case
- **negligence:** The particular grounds of negligence are to be detailed. In *Blyth v Van den Heever*,¹⁴ it was stated that it was not sufficient to simply allege negligence, but also a legal duty not to be negligent
- **causation:** The plaintiff has to allege and prove the causal connection between the negligent act relied on and the damages suffered. In *Whitney Erf Thirteen (Pty) Ltd v Loth Waste Paper Dealers*,¹⁵ the court

14 1980 (1) SA 191.

15 1978 (3) SA 832.

held that, since patients relied on the duty of care owed to them by their doctor, they would have to set out the facts that could or should have been foreseen by the defendant. In *Buls v Tsatsarolakis*,¹⁶ *Van Wyk v Lewis*,¹⁷ and *Pringle v Administrator Transvaal*,¹⁸ the court held that the onus was on the patient to establish that a *bonus paterfamilias* in the position of the doctor –

- (a) would foresee the possibility of the doctor's conduct injuring the patient and causing the latter patrimonial loss, and
- (b) would take reasonable steps to guard against injury, and
- that the doctor had been negligent in failing to take those steps.

Thus, damages will not be recoverable by Mr H if the extent or nature of injury caused to him could not be foreseen by or were too remote, as viewed from Dr S's position. In *Pringle v Administrator Transvaal*,¹⁹ the court elucidated that foreseeability was, normally, a legal question unless the plaintiff alleged and proved special facts that made the damages in question foreseeable. Plaintiffs also needed to allege and prove their damages. In the same case, the court went on to say that the plaintiffs were entitled to sue the doctor for the amount by which their patrimony had been diminished as a result of the latter's conduct. The court added that, for personal injuries, the plaintiff was entitled to claim for –

- actual pecuniary loss, e.g. medical expenses and loss of earnings²⁰
- pain and suffering,²¹ and
- prospective loss, e.g. future medical expenses and loss of earnings.²²

The legal basis for Dr S's liability

There are two major bases of medical liability: *delictual* and *contractual*. Since the latter has already been dealt with, the former will now be explored in more detail.

It has been established on authority above that the mere fact that a swab is left in a patient is not conclusive evidence of negligence on the part of the doctor. Therefore, we cannot simply conclude that Dr S was indeed negligent in leaving the swab in Mr H's abdomen. This raises an intricate point regarding whether our law adequately protects vulnerable and desperate patients. Dr S could not definitely be held liable on the basis of negligence if we are to follow the case law cited above – especially the *Van Wyk v Lewis* case.

16 1976 (2) SA 891 (T).

17 1924 AD 438.

18 1990 (2) SA 379 (T).

19 (ibid.:397G–398C).

20 *Buls v Tsatsarolakis*, 1976 (2) SA 891 (T).

21 See *Castell v De Greef*, 1994 (4) SA 408 (C).

22 (ibid.).

Namibian cases do not provide any precedent on this subject. Therefore, Mr H's case would have gone to court as a test case. Since the case was not heard in court, the discussion below offers an analysis of Namibian common law as derived from South African common law, and compares well with what other courts across the world have said on the subject.

The United States (US) has the highest number of medical malpractice claims per year in the world. There is great authority on the subject, therefore. As for liability, the Supreme Court of Idaho in *Billing v Sisters of Mercy of Idaho*²³ said “the gist of a malpractice action is negligence”, and this is evident from an appraisal of the above procedural aspects. Negligence is the most common and most ‘potent’ basis of liability in medical malpractice cases, whether the claim lies in contract or delict. The rule is the same in at least the English, American and Roman–Dutch law jurisdictions mentioned above.

Wrongfulness

GENERAL PRINCIPLES

There cannot be liability for medical damage if the act by the medical doctor is not wrongful. It is sometimes said that the criterion for determining wrongfulness is “a general criterion of reasonableness”, i.e. whether it would be reasonable to impose a legal duty on the person who has harmed the patient.²⁴ Where that terminology is employed, however, *reasonableness* in the context of *wrongfulness* is notably something different from the reasonableness of the conduct itself: reasonableness of the conduct is an element of negligence.

Wrongfulness concerns the reasonableness of imposing liability on the defendant.²⁵ Similarly, the *legal duty* referred to in this context should not be confused with the *duty of care* in English law which straddles both elements of *wrongfulness* and *negligence*.²⁶ In fact, with hindsight, even the reference to “a legal duty” in the context of wrongfulness was somewhat unfortunate.²⁷ As was pointed out in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*,²⁸ reference to a *legal duty* as a criterion

23 389 P2d 224 at 230 (Idaho 1964).

24 See e.g. *Government of the Republic of South Africa v Basdeo & Another*, 1996 (1) SA 355 (A) 367E–G; *Gouda Boerdery Bpk v Transnet* 2005 (5) SA 490 (SCA) par. 12.

25 See e.g. Fagan, A. 2005. “Rethinking wrongfulness in the law of delict”. *South African Law Journal*, 122:90–141, at 109.

26 See e.g. *Knop v Johannesburg City Council*, 1995 (2) SA 1 (A) 27B–G; *Local Transitional Council of Delmas v Boshoff*, 2005 (5) SA 514 (SCA) par. 20.

27 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*, unreported case No. 459/04, 9 September 2005, par. 14.

28 (*ibid.*).

for wrongfulness can lead the unwary astray. To illustrate, the court gave the following example:²⁹

[T]here is obviously a duty – even a legal duty – on a judicial officer to adjudicate cases correctly and not negligently. That does not mean that the judicial officer who fails in the duty because of negligence, acted wrongfully.

When the law says that a particular omission or conduct causing pure economic loss is *wrongful*, it means that public or legal policy considerations require that such conduct, if negligent, is actionable, and that legal liability for the resulting damages to the environment should follow. Conversely, when the law says that negligent conduct causing pure economic loss or consisting of an omission is *not wrongful*, it intends to convey that public or legal policy considerations determine that there should be no liability, and that the potential defendant should not be subjected to a claim for damages – his/her negligence notwithstanding. In such event, the question of fault does not even arise. Thus, the defendant enjoys immunity against liability for conduct that caused pure economic loss, whether such conduct was negligent or not.³⁰

Here, it would perhaps have been better in the context of wrongfulness to have referred to a *legal duty not to be negligent* instead of reference only to a *legal duty*, thereby clarifying that the question being asked is whether, in the particular circumstances, the negligent conduct that harmed Mr H, for example, is actionable.³¹ When a court is asked to accept the existence of a *legal duty* of a doctor in the absence of any precedent, in reality, the court is being asked to extend delictual liability for a patient to a situation where none existed before. The crucial question in that event is whether there are any considerations of public or legal policy which require that extension in the interests of protecting the rights and welfare of patients. As was held in *Minister of Safety and Security v Van Duivenboden*,³² in answering that question, what is called for is not an intuitive reaction to a collection of arbitrary factors, but rather a balancing of identifiable norms with each other.

Generally, when it comes to acts of negligence causing damage to the patient, the cause of action arises at the time when the plaintiff actually suffers the medical damage, even though the health consequences of the defendant's actions may not become apparent until later and not on the date of the negligent act or omission – as happened in the case of Mr H. Either way, it is a question of fact as to whether actual damage has been established and, if so,

29 See also *Knop v Johannesburg City Council*, 33D–E.

30 See e.g. *Telematrix (Pty) Ltd*, par. 14; *Local Transitional Council of Delmas*, par. 19; Fagan (2005:107–109).

31 In other words, reference should be made to both a legal duty and the duty not to be negligent, i.e. the legal duty not to be negligent.

32 2002 (6) SA 431 (SCA) at par. [21].

JUDGMENT NOTES

when it occurred.³³ Normally, the injury to the patient or patient's future health in general is contemporaneous with the wrongful act, but it is not necessarily so. However, because negligence leading to damage to the patient does not become actionable without proof of damage to the patient's health, it is only after damage has been suffered that the cause of action becomes complete, and time to file a claim against the person causing such harm begins to run.³⁴

In the law of delict, the concept of *wrongfulness* has its roots in the *boni mores* and legal convictions of the society which it serves. Many examples from South African – and, more recently, Namibian – case law emphasise this concept. Generally, the *boni mores* test has been accepted as a criterion or guideline for wrongfulness.³⁵ In *Clarke v Hurst NO & Others*, Thirion J remarked as follows:³⁶

If it is accepted, as I think it should, that law is but a translation of society's fundamental values into policies and prescripts for regulating its members' conduct, then the Court, when it determines the limits of such a basic legal concept as wrongfulness, has to have regard to the prevailing values of society. I can see no reason why the concept of wrongfulness in criminal law should have a content different from what it has in delict.

A number of consequences flow implicitly from the aforesaid. Firstly, the test for wrongfulness is determined with reference to society's perception of justice, equity, good faith and reasonableness.³⁷ In this regard, public reaction is not necessarily indicative of society's legal convictions and perception of reasonableness: courts will not be blindly ruled by such reaction.³⁸ Also, courts –³⁹

... are not concerned with what the community regards as socially, morally, ethically or religiously right or wrong, but whether or not the community regards a particular act or form of conduct as delictually wrongful.

33 *Sasfin (Pty) Ltd v Jessop & Another* 1997 (1) SA 675 (W).

34 (ibid.:694F–H), approving Charlesworth, J & RA Percy. 1990. *Charlesworth and Percy on negligence* (Eighth Edition). London: Sweet & Maxwell, par. 3–136.

35 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*, 1977 (4) SA 376 (T) at 387; *Marais v Richard & 'n Ander*, 1981 (1) SA 1157 (A) at 1168; *Schultz v Butt*, 1986 (3) SA 667 (A) at 679; *Administrateur, Transvaal v Van der Merwe*, 1994 (4) SA 347 (A) at 358 and 364; *Cape Town Municipality v Bakkerud*, 2000 (3) SA 1049 (SCA); *SM Goldstein and Co. (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd*, 2000 (4) SA 1019 (SCA) at 1024.

36 1992 (4) SA 630 (D) at 652H–653A.

37 See *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*, 1990 (2) SA 520 (W) at 528–529.

38 See *Van Eeden v Minister of Safety and Security*, 2003 (1) SA 389 (SCA) at 396 D.

39 *Van Eeden*, par. (10).

Secondly, society's *boni mores* regarding protection of the rights and welfare of patients are not static, but evolve over time to accommodate "changing values and new needs".⁴⁰ In a heterogeneous society, *boni mores* may also differ from community to community. *Boni mores* can also vary from one country to another.⁴¹

Thirdly, it is trite that the values and norms reflected in the Namibian Constitution now also have to permeate the common law and influence the content of *wrongfulness*.⁴² It follows that, if public policy expressed in our common law conflicts with the values underlying our Constitution, then the latter is to prevail in terms of its Articles 1(6) and 25.

Fourthly, the test regarding wrongfulness of action that harms the patient is an objective one.⁴³ That is, the whims and personal preferences of presiding judges or judiciary officers hearing the case are irrelevant, generally speaking, and play no role in the adjudication process. Furthermore, this means that an objective weighing up of the benefits that the exercise of patient's and doctor's respective rights could be done by any court adjudicating such case. The reasonableness, thus, depends on the degree of disproportion between the benefit and the prejudice.⁴⁴

Fifthly, in determining objective reasonableness as an antithesis for wrongfulness, the test is not that of an exceptionally medically sensitive person who truthfully complains about pain and finds such pain to be intolerable, but the reaction of –⁴⁵

... the reasonable man ... who according to ordinary standards of comfort and convenience, and without any peculiar sensitivity to the peculiar problem causing the dispute.

What emerges from the above is that the legal concept of *wrongfulness* in respect of a medical practitioner is a value judgment pronounced by the court based on considerations of morality, the *boni mores* and legal convictions of

40 See *Amod v Multilateral Motor Vehicle Accidents Fund*, 1999 (4) SA 1319 (SCA) at 1330 A.

41 See Taitz, L. 1993. "Euthanasia and the 'legal convictions of society' in a South African context". *South African Law Journal*, 110:440; Taitz questions the use of a single *boni mores* criterion in a heterogeneous society.

42 *Carmichele v Minister of Safety and Security*, 2001 (4) SA 938 (CC) at par. 56.

43 See *Gien v Gien*, 1979 (2) SA 1113 (T) at 1122; *Dorland v Smits*, 2002 (5) SA 374 (C) at 384.

44 See *Gien*, at 1121; *Rand Waterraad v Bothma & 'n Ander*, 1997 (3) SA 120 (O) at 136; *Dorland*, at 384; *Vogel v Crewe & Another* [2004] 1 All SA 587 (T) par. 4; *Tiffin v Woods NO & Others* [2007] 3 All SA 454 (C) at 458–459.

45 *De Charmoy v Day Star Hatchery (Pty) Ltd*, 1967 (4) SA 188 (D) at 192E–F.

society, reasonableness and fairness, and policy. As was held in *Wingardt & Others v Grobler & Another*,⁴⁶ this test defines the conduct necessary for an orderly, peaceful and harmonious community, and it transforms conduct not consistent with society's norms and values into an actionable delict or a criminal offence, as the case may be, which attracts the sanction of the court. In this sense, the wrongfulness of action which may have caused damage to Mr H is not conduct which some may regard as unethical, immoral or unreasonable, and which does not attract legal sanction on the part of Dr S, but as conduct which is socially abominable, medically unacceptable, and legally actionable and punishable.

IS IT A FAULT TO LEAVE A SWAB IN A PATIENT?

The element of fault connotes blameworthiness or a guilty state of mind. However, a medical doctor who harms or causes damage to a patient cannot be held liable if, in addition to other elements of a delict, such action falls short of a fault. *Fault* can take the form of intention (generally referred to as *dolus*), or it can take the form of negligence (generally referred to as *culpa*). Therefore, when a medical practitioner has caused harm to a patient, the type of fault that can be attributed to the polluter has to be ascertained, i.e. it has to be proved whether the pollution was done intentionally or negligently. In this light, the plaintiff needs to prove not only his/her locus standi as a patient, but also that the possibility of the harm to the patient should have been foreseen, and that there were reasonable steps which should have been taken by the medical doctor to avert the damage. The common law is replete with cases on these principles. In *Kruger v Coetzee*⁴⁷ for example, it was held that, for the purposes of liability, *culpa* arises if –

- (a) a *diligens paterfamilias* in the position of the defendant –
 - (i) would foresee the reasonable possibility of his/her conduct injuring another in his/her person or property and causing him/her patrimonial loss, and
 - (ii) would take reasonable steps to guard against such occurrence, and
- (b) the defendant failed to take such steps.

Requirement (a)(ii) is sometimes overlooked. Whether a reasonable person – a *diligens paterfamilias* – in the position of the medical doctor would take precautionary measures to protect the rights of the patient and, if so, what steps would be reasonable, will always depend on the particular circumstances of each case. No hard-and-fast basis for (a)(ii) can be laid down. This explains the general futility of seeking guidance from the facts and results of other cases. This is because, as we can see, there have been many cases from

46 2010 (6) SA 148 (ECG).

47 1966 (2) SA 428 (A).

other jurisdictions dealing with culpability through negligence that leads to medical harm. In those foreign jurisdictions, there have also been many general delict or medical negligence cases dealing with the degree of foreseeability which a plaintiff is obliged to establish before a person who has harmed the environment can be held liable for such harm and its consequences.⁴⁸ These foreign cases show that the essential attribute of the law of negligence in medical practice in particular is that it should be flexible enough to provide an answer to the infinite variety of situations in which negligence causing damage to the patient is alleged. Once inflexible rules are adopted as the test of the existence of negligence, either generally or in a special type of case, a quite unwarranted inroad is made into the basic concepts of medical law.

The sort of circumstances, however, to which the courts often look in cases such as this, i.e. in deciding what degree of foreseeability of harm to the patient the plaintiff has to prove before a defendant can be held responsible for such patient's health or medically resultant damage are these:

- How real the risk is of the medical harm eventuating
- If the medical harm does eventuate, what the extent of the damage is likely to be, and
- What the costs or difficulties involved are in guarding against the risk or the medical harm.

Therefore, if the risk of medical harm eventuating is very great indeed, amounting almost to a certainty, even though in such a case the damage to the patient or his/her person which is likely to result may only be very slight, and even though the costs of eliminating the risk might be very great, Dr S would still be liable if he took that risk in those circumstances, as the risk of harm eventuating to Mr H was so great that he should not have taken that risk at all.⁴⁹

Logically, in a case in which medical harm eventuating is very slight indeed, the odds against it eventuating will be almost astronomical; then, even though, in such a case, the medical damage possibly resulting from the risk eventuating might be reasonably extensive, if the difficulty of eliminating the risk was almost insurmountable, the defendant would not be blamed for taking that risk, should the medical harm – such as leaving the swab in the patient in this case – actually eventuate.⁵⁰

48 *Herschel v Mrupe* 1954 (3) SA 464 (AD), *King v Dykes* 1971 (3) SA 540 (RAD). *Goldman v Hargrave*, (1967) 1 AC 645.

49 *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson*, 1973 (4) SA 523 (RA).

50 An example is the famous cricket ball case of *Bolton & Others v Stone*, (1951) 1 All ER 1078, and 1951 AC 850. In that case, a batsman hit a cricket ball right out of the ground, something that rarely happens. The ball fell on vacant land where people rarely passed, but an old woman was passing over the land at the time and the ball

Awarding damages

Apart from the requirement for proving medical negligence, under Namibian common law, damages for damage caused to a patient can only be awarded where there has been patrimonial loss as opposed to non-patrimonial loss. In this light, negligent conduct giving rise to damages is not actionable per se: such conduct is only actionable if the law recognises it as wrongful. Negligent conduct manifesting itself in the form of a positive act – such as the leaving of a swab in Mr H, which then caused physical damage to him – is prima facie wrongful.

In these kinds of cases, therefore, *wrongfulness*, as discussed above, is seldom contentious. Where the element of wrongfulness becomes less straightforward is with reference to liability for negligent omissions and for negligently causing pure economic loss.⁵¹ In these instances, *wrongfulness* depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms.⁵²

Causation

It is apparent that what caused the pain in the abdomen of Mr H is the swab which was left inside him during the operation performed by Dr S, as was revealed by Dr T, the independent medical practitioner. In delict, there cannot be liability for damage to a patient if, in addition to the above requirements, it cannot be proved that the medical practitioner caused the damage to that patient. The common law of medicine requires proof of a causal nexus between the medical/health damage to a patient and the harmful and blameworthy act of a medical practitioner. Although the issue of causation for medical damage often receives the least attention in a trial based on medical delictual conduct, it is at times worth disposing of it at the very outset of the trial. This is because, in practice, claims often fail only for want of a causal connection between the unlawful conduct and the loss suffered.⁵³ As far as causation is concerned, one needs to bear in mind what was held in the case of *Minister of Police v Skosana*,⁵⁴ namely –

hit her. The cricket club was not held liable for the injury caused to her. Notably, the only effective way of eliminating the risk of such harm eventuating would have been to have stopped playing cricket on the ground. Between these two extremes there is an infinite combination of circumstances which may influence a court. I propose to apply these very broad tests to the instant case.

51 See e.g. *Minister of Safety and Security v Van Duivenboden*, 2002 (6) SA 431 (SCA) par. 12; *Gouda Boerdery Bpk*, par. 12.

52 See e.g. *Administrator, Natal v Trust Bank van Afrika Bpk*, 1979 (3) SA 824 (A) 833A; *Van Duivenboden*, par. 22, and *Gouda Boerdery Bpk*, par. 12.

53 *First National Bank of South Africa Ltd v Duvenhage*, 2006 (5) SA 319 (SCA).

54 1977 (1) SA 31(A) at 34–35.

[c]ausation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question whether the negligent act or omission in question caused or materially contributed to ... the harm giving rise to the claim. If it did not, then no legal liability can arise and *caedit quaestio*. If it did, then the second problem becomes relevant, viz[.] whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part.

The test for factual causation, otherwise known as that of *causa (conditio) sine qua non*, is whether, but for the negligent act or omission of Dr S, the event giving rise to the harm to Mr H would have occurred: generally speaking, no act, condition or omission can be regarded as a cause in fact unless it passes this test. Thus, regarding factual causation, —⁵⁵

... one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such a hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise.

Because of these intricacies which accompany factual causation, our courts often apply legal causation. The question in regard to legal causation is whether there is a sufficiently close link between the medical harmful act and the consequence.⁵⁶ Courts have applied various tests to determine this link such as the degree of foreseeability, the direct consequences test, and the adequate causation test, but the courts have decided against a strict approach to the tests. Instead, they have adopted what has been described as a “flexible” or “supple” test to delictual actions.⁵⁷ This was elaborated upon as follows in the *Fourway Haulage* case:⁵⁸

What Van Heerden JA said in that case [*S v Mokgethi & Andere*, 1990 (1) SA 32 (A) at 40I–41D] is not that the “flexible” or “supple” test supersedes all other tests such as foreseeability, proximity or direct consequences, which were suggested and applied in the past, but merely that none of these tests

55 *Trotman v Edwick*, 1951 (1) SA 443 (A) 449B–C.

56 *S v Mokgethi*, 1990 (1) SA 32 (A) at 40–41 and 45G–H, approved in *International Shipping Co (Pty) Ltd v Bentley*, 1990 (1) SA 680 (A) 701, and applied in *S v Counter*, 2003 (1) SACR 143 (SCA) par. 29.

57 See e.g. *International Shipping Co (Pty) Ltd*, 701A–F; *Smit v Abrahams*, 1994 (4) SA 1 (A) 15E–G.

58 *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*, 2009 (2) SA 150 (SCA).

can be used exclusively and dogmatically as a measure of limitation in all types of factual situations. Stated somewhat differently: the existing criteria of foreseeability, directness, et cetera, should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable.

It is clear from the quotation above that a two-stage process is employed in Namibian medical law to determine whether a preceding act gives rise to responsibility for a subsequent condition or harm to the patient. The first involves ascertaining the facts, the second imputing legal liability. Thus, it first needs to be established whether the perpetrator of the medical/health harm to the patient as a matter of fact caused the said harm or damage. The practical inquiry here is whether, without the act by Dr S, Mr H would have been harmed: that is, whether the operation by Dr S was a *conditio sine qua non* of the damage or harm to the elements of the environment, including people. But the perpetrator cannot be held responsible for all consequences of which his act is an indispensable precondition. So the inquiry needs to go on in order to determine whether the act of Dr S is linked to the harm which Mr H suffered sufficiently closely for it to be right to impose legal liability on Dr S or his employer. This is a question of law, which raises considerations of legal policy,⁵⁹ and remains controversial since the case never went to court.

The difficulty of proving medical negligence: Is *res ipsa loquitur* applicable?

Namibian law of delict is heavily dependent on English common law and has developed around notions of *liability* based on moral wrongdoing and the right to damages historically established by showing that the defendant deserved to pay for the damage s/he caused. As the law developed, fault became the basis for liability. A duty to compensate has grown out of a moral duty to pay recompense for morally blameworthy conduct. Whether conduct falls short of a required standard is assessed objectively. It is accepted that accidents, in the purest sense, cannot attract blame. In medicine, outcomes are not always what may have been hoped for.

Furthermore, there are, of course, risks inherent in all medical and surgical treatment. Sub-optimal outcomes may or may not be avoidable. But if a patient has concerns that a poor outcome could or should have been avoided and wishes to seek compensation, s/he is obliged to bring a negligence claim. This can be done through the application of the *res ipsa loquitur* doctrine. The *res ipsa loquitur* doctrine means that the facts of the case speak for themselves. However, South African courts denied the application of the *res ipsa loquitur*

59 *Minister of Police*, at 34G–H per Corbett JA: “This is basically a juridical problem, in which considerations of legal policy may play a part”.

doctrine in medical negligence cases. In the medical field, this doctrine was elucidated well in *Van Wyk v Lewis*,⁶⁰ in which Wessels AJ said the following, as cited earlier herein:

The mere fact that a swab is left in a patient is not conclusive of negligence. Cases may be conceived where it is better for the patient, in case of doubt, to leave the swab in rather than to waste time in accurately exploring whether it is there or not, as for instance where a nurse has a doubt but the doctor after search can find no swab, and it becomes patent that if the patient is not instantly sewn up and removed from the operating table he will assuredly die. In such a case there is no advantage to the patient to make sure that the swab is not there if during the time expended in exploration the patient dies. Hence it seems to me that the maxim *res ipsa loquitur* has no application to cases of this kind.

This case is, however, to be distinguished from the one involving Mr H. In *Van Wyk*, the doctrine was denied because the doctor performed the operation under difficult and urgent conditions. Innes CJ, in that case, summarised the facts in the following words:

On the 3rd February, 1992, the respondent, a physician and surgeon practising at Queenstown, received a telegram from Dr Louw of Sterkstroom asking him to meet the appellant who was arriving by train, with a view to an operation. He arranged on her behalf for admission, to the Frontier Hospital, where he examined her the same afternoon. He found her condition so critical as to necessitate an immediate operation. This he performed at 8 o'clock the same evening. The operation was conducted under the conditions and in accordance with the practice prevailing at the hospital. The anaesthetic was administered by Dr Thomas, and Sister Ware, a qualified nurse on the hospital staff, acted as theatre sister. The matron and nurse De Wet were also in attendance. The appendix, being inflamed and adherent, was removed. The gall bladder he found in a state of acute inflammation, much distended, with necrosis on the surface and he decided to drain it. Having packed off the field of operation with swabs handed him by the sister, he made an incision and inserted a tube. This was attended with difficulty. There was a rush of highly septic matter to be dealt with and owing to the friability of the bladder, it was impossible to suture the opening so as to draw it round the tube. He put in more packing to prevent the spread of sepsis. At this stage he was warned by the anaesthetist that the patient should be got off the table as soon as possible. The operation having concluded, he removed all the swabs he saw or felt, and being satisfied, on grounds presently to be discussed, that they had all been accounted for to the satisfaction of the sister, he proceeded to stitch up.

This, evidently, was a rushed operation. In the *Van Wyk* case, there was an alarm from the anaesthetist that the patient was supposed to leave the table as soon as possible or else her life was under threat. The leaving of the swab

60 (ibid.:464).

JUDGMENT NOTES

could, therefore, be expected where continuing to remain on the table risked the patient's life. Ines CJ recognised this point:⁶¹

Now the practice itself is consistent with the surgeon either counting or not counting the swabs himself. The respondent who gave his evidence very candidly stated that he was not in the habit of attempting any count, where he had a competent sister as a collaborator. His use was, at the conclusion of the operation[,] to remove all the swabs he could find and if the sister intimated that they had all been [ac]counted for he made no further search. To do so would, in his opinion, likely to [sic] expose the patient to unnecessary risk. And he admitted that on this occasion he followed that course: he left the counting to the sister. In connection with this part of the case, regard must be had to the conditions under which operations are performed in a modern hospital. These may be gathered from the medical evidence.

The same was said by Kotze AJ:⁶²

All this evidence, together with the special circumstances connected with the operation, have [sic] been fully set out and dealt with by the Chief Justice and my brother Wessels, and I need not now repeat them. I agree with the other members of the Court that, under the particular circumstances of this case, the leaving of the swab in the body of the patient should not be regarded as negligence on the part of the defendant.

The reason for the decision in that case was elaborated by Wessels AJ, the one who had refuted the plaintiff's argument to apply the *res ipsa loquitur* doctrine. The acting judge reasoned this way:

This brings me to the very important question whether it was negligence on the part of the defendant to leave a packing swab in the patient's abdomen under the circumstances of the case. As I have said before we must place ourselves as nearly as possible in the very circumstance under which the operation was conducted.

The plaintiff was in a very delicate condition when she entered the hospital. She arrived after a train journey. She was in a state of collapse. She was suffering from an appendix in a chronic state of inflammation which was adherent and had one or two concretions in it. Her gall bladder was acutely inflamed: there was dead tissue in it and mortification was beginning to set in with respect to the remaining live tissue. Therefore, it was necessary to operate both on the appendix and the gall bladder. In order to operate on the gall bladder, however, it was packed off with swabs (about half a dozen packing swabs were used). A lot of pus rushed out when the incision was made into the gall bladder. Its walls were in a bad state, so it could not be

61 (ibid.:448–449).

62 *Van Wyk v Lewis*, 1924 AD 438.

sutured. Swabs were used for mopping up the liquids exiting the bladder, as the doctor testified at the time:⁶³

I expected a discharge and there was a rush and it poured out under great pressure. Tarry looking matter came out as though there had been haemorrhage and pus and mucus. That was highly septic. I mopped the septic matter up but it went all round the field of operation. ... I could not fix the sutxire [sic; *suture*?]: it tore out owing to the friability of the gall bladder. The strings came away twice and I made two attempts at it. I did not try to suture the gall bladder to the peritoneum and I could not for the same reason. ... I tried to prevent the spread of sepsis by putting a tube in and I packed round the gall bladder with my gauze.

It was a very critical operation indeed. It was doubtful whether she would come through it: it was doubtful the whole way through and I was very anxious the whole time and I asked my anaesthetist how she was and he said: "Get her off as soon as possible." It was very much against her interest that the surgeon operating should have his attention distracted to count swabs. It would be impossible to count afterwards because he would have to pick up any swabs he had thrown on the floor and it would mean he would have to resterilize before stitching her up and that would not be in the interest of the patient. It would mean a delay: a considerable delay. In such an operation delay would probably be fatal ...

I removed all the swabs I discovered myself. I exercised reasonable care and skill in so doing. So far as I am concerned it is possible in such an operation using due skill and care to miss a swab inside. The causes which may induce that are first of all the forceps may have become detached, the swab may become so discoloured as not to be recognized from the surroundings; a loop of bowel may cover it: the swab may shift and become displaced. In any one of these [circumstances] a careful surgeon may miss a swab.

The acting judge justified the reasoning on the evidence as follows:⁶⁴

Now there is no doubt that this was a very difficult operation conducted by artificial light and one in which it was imperative to get the patient off the operating table as soon as possible. Swabs may hide themselves in the intestines in such a way that they are difficult to find if perchance, as must have happened in this case, the forceps is not attached or becomes detached and the tape slips into the cavity. The swab is after all a bit of thin gauze and is easily discoloured so as to take on the colour of the surrounding intestines and tissues and thus escape detection. If a surgeon has used due care in endeavouring to extract all swabs and is told by the nurse that they are all out he is justified in placing reliance upon her count and in proceeding to sew up the wound and remove the patient. The more exacting and difficult the operation the more likely such an accident may happen. ... In these circumstances the appeal must be dismissed.

63 (ibid.:468–469).

64 (ibid.:470–471).

It is evident from the *Van Wyk* case that the leaving of the swab was justified by the circumstances. The difficulty that surrounded the operation and the urgency that arose in the process of operation – compounded by the use of artificial light for clear vision and identification of the swabs on the patient – exonerated the doctor.

Similar circumstances to those in *Van Wyk* are found in *Mitchell v Dixon*,⁶⁵ where the South Africa Appellate Division expressly rejected the *res ipsa loquitur* principle when deciding on the question of the alleged negligence of a surgeon who broke off a hypodermic needle in a patient's back. As explained, a skilful art of distinguishing cases has to be employed here for the South African case law, which is in favour of Dr S, yet the result thereof appears absurd.

In Mr H's case, there was no urgency. Furthermore, no difficulty in the operation process was alleged in any correspondence. The issues of artificial light carry the same logic indicating the urgency and difficulties connected to the operation, as Innes CJ noted in the *Van Wyk* case. It follows, therefore, that the operation performed on Mr H occurred under normal circumstances – in contradistinction to the elucidated circumstances in the *Van Wyk* case. Thus, Mr H's case is heavily against Dr S.

Implications of denying the application of the doctrine

The denial of the application of the *res ipsa loquitur* doctrine should not overshadow our analysis of what ought to be the position in Namibia. As highlighted above, the *res ipsa loquitur* doctrine simply means that the facts of the case speak for themselves. Taken simply, having distinguished the *Van Wyk* case from Mr H's case, one could say that the fact that Dr S left the swab in his patient indicates this doctor's negligence. The doctrine is part and parcel of Namibian law, and the South African courts apply it where the facts clearly speak for themselves that there has been negligence. As explained in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*,⁶⁶ the doctrine of *res ipsa loquitur*, although developed in South Africa, only gives rise to an inference of negligence and, up until recently, never a presumption. Thus, the inference shifts the burden to the doctor to adduce evidence to the contrary – that is, defending his case. It does not necessarily shift the burden of proof to the doctor: the applicant patient still has to prove the doctor's negligence.

The denial of *res ipsa loquitur* in *Van Wyk* and the two *Pharmacare* cases is more or less coterminous with the necessity for expert testimony. Therefore,

65 (ibid.:525).

66 2003 (4) SA 285 (SCA).

in cases where the facts are susceptible to being readily understood by the layperson, *res ipsa loquitur* is usually applied. In the United States, the doctrine has been given application in “sponge cases”.⁶⁷ However, the *res ipsa loquitur* doctrine is not applicable unless it is shown that the operation was under the exclusive control of the doctor – as it was in Mr H’s case, where Dr S was in exclusive control of the process. Nor is the doctrine applied where the jury cannot, of common knowledge, know that such an injury is not reasonably to be expected even where due care has been exercised. Since a layperson does not know whether or not a hypodermic needle can reasonably be expected to break off in a patient’s body, *res ipsa loquitur* cannot be applied in those cases. These exclusions do not come into question in simple and non-urgent cases such as Mr H’s.

The implications of the *res ipsa loquitur* doctrine, when applied, are sometimes confused in the terminology of the court. The doctrine’s only effect is to permit a plaintiff such as Mr H to establish his/her prima facie case by proof of the injury.⁶⁸ It was held in *Niebel v Winslow*⁶⁹ that the burden of producing evidence to the contrary shifts to the defendant, e.g. Dr S, but the burden of proof remains with the plaintiff. Therefore, the doctrine cannot transform the Dr S’s general denial of negligence into an affirmative denial. Nor is Dr S compelled to justify his conduct to equalise Mr H’s evidence of Dr S’s negligence to the court’s satisfaction.⁷⁰ When matters of technical competence are at issue, the injured patient needs to upset the presumptions in favour of Dr S by affirmative proof of specific acts of negligence. Fridman explains the rule in the following words:⁷¹

If[,] in an action based on negligence, in which only the fact that the accident has occurred is known to the plaintiff, *res ipsa loquitur*, then a presumption of guilt is raised against the defendant. This is the result of the absence of any plausible or reasonable explanation of the cause of the event which is the basis of a claim in negligence. But the event in question must be an unusual one, must be one which would be unlikely were there not negligence, so that the fact that the event occurred must be capable of suggesting to the ordinary reasonable man that there was a failure to take due care.

67 *Ales v Ryan*, 8 Cal. (2d) 82, 61 P. (2d) 409 (1936); *Funk v Bonham*, 204 Ind. 170. 183 K. E. 312 (1932), *Davis v Kerr*. 239 Pa. 351. S6 Atl. 1007 (1913). *Cassingham v Berry*, 67 Okla. 131. 150 Pac. 139 (1915).

68 See *Sweeney v Ewing*, 228 US 233, 239 (1913); *Ales v Ryan*, 80 Cal. (2d) 82, 64 P (2d) 409, 417 (1936).

69 88 NJL191, 95 Atl. 995 (1915); see *Sweeney v Ewing*, 228 US 233, 238 (1913).

70 In weighing the difficulties of proof which beset the plaintiff against the presumption of skill and care of the defendant, the courts have favoured the latter. Thus, the doctrine of *res ipsa loquitur* has been restricted to issues of negligence involving not standards of professional capacity, but standards of reasonableness required of the common man.

71 Fridman, GHL. 1954. “The myth of *res ipsa loquitur*”. *University of Toronto Law Journal*, 10:233–244.

Moreover, the injurious medium has to be solely within the control of the party charged with negligence or within the control of persons for whose acts or omissions that party is vicariously liable, especially when the case is against the hospital – X Hospital in this case – and Mr H as the complainant who alleges that Dr S was negligent. The justification for enabling Mr H in this case to rely upon the *res ipsa loquitur* doctrine, and to start with the presumption that the defendant was negligent, is Mr H's ignorance of the causes of the event, coupled with the assumption that Dr S had exclusive knowledge of the facts bearing on causation. Dr S could rebut this presumption either by showing what the true cause was and that he was without blame, or by showing that he was not negligent: a mammoth task indeed!

The judgment of North J in the New Zealand Supreme Court in *MacDonald v Pottinger* shows a clear application of the *res ipsa loquitur* doctrine in a way which can be followed by Namibian courts. In that case, a medical doctor was being sued for negligence in conducting an operation. As evidence of negligent conduct, the plaintiff pointed to the admitted fact that, after an abdominal operation, a forceps was found inside his body. According to the plaintiff, *res ipsa loquitur* (the facts spoke for themselves); therefore, negligence was to be inferred. North J was disposed to agree with that assertion, but he also said that the matter was not without doubt. In the event, the judge came to no definite conclusion about this, since in this part of the case, judgment was given against the plaintiff on another ground.⁷² In the case of Mr H, therefore, Dr S was to be proved negligent, for the facts speak for themselves. It is rather difficult to comprehend a situation in which the court exonerates a doctor – especially where simple common sense fails to answer questions like “How one can justify leaving a swab in a patient?”, and “What circumstance can make the court condone that?” The same questions have bearing on the present case: the existence of the swab can speak for itself that there was negligence on the part of Dr S.

Dr S can, however, deny liability. He could argue that he was not obliged to count the swabs. But did he act as a reasonable doctor in the circumstances? These questions are assessed below.

The rule in *Mahon v Osborne*: Analogies made, and case closed

As noted above, Namibian courts have never decided a case of this nature. Moreover, this case would have assessed the extent of medical negligence in Namibia and how it is visited by the law. Where the liability of the doctor is

⁷² There was also a claim for negligent treatment after the operation. On that claim, judgment was given for the plaintiff.

under consideration and the application of the *res ipsa loquitur* is contested, it is trite to go further and consider foreign cases. In this regard, we meet two contesting positions. These positions will now be considered in the light of what happened in the case of Mr H. But before foreign law is considered, it should be noted that, in delictual claims, three conditions for *res ipsa loquitur* are obliged to be satisfied:

- The accident has to be of a kind which ordinarily does not occur in the absence of someone's negligence
- It needs to have been caused by an agency or instrumentality within the exclusive control of the defendant, and
- It cannot have been due to any voluntary action or contribution on the part of the plaintiff.

In light of the above, *res ipsa loquitur* creates a presumption that the party accused of causing harm has to overcome such accusation with evidence. The presumption arises when the chief evidence is practically accessible to the accused party, but inaccessible to the injured person. Without the aid of the doctrine, a patient who has suffered permanent personal injury caused by the negligence of another would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability.

A case in point is *Mahon v Osborne*,⁷³ where a swab had been left in the plaintiff's body after an operation. In this case, the patient was brought to the Park Hospital at 03:40. The defendant surgeon was aroused from bed and made an immediate examination. He diagnosed a perforated duodenal ulcer, and decided that an immediate operation was essential. The staff attending him in the operating theatre were the anaesthetist and three nurses. There was no assistant surgeon, so the surgeon had to do the whole operation himself, i.e. he fulfilled every one of the many and varied surgical functions involved in the complicated operation which he had to carry out in the case concerned. In his evidence, he said that each of the nurses, following a carefully devised system of checks and counterchecks – with a blackboard and numbered hooks – in regular use at that hospital in order to count all swabs brought to the operating table; to make the count during an operation; and, at its conclusion, to tell the surgeon, in answer to his question, whether or not all swabs had been accounted for.

At the conclusion of the operation in question, when the surgeon thought that he had removed all packing swabs and was ready to sew up the peritoneum, he asked the usual question of one of the nurses as to whether the count of swabs was correct, and was informed by her that it was. He then sewed up the patient with the unsuspected swab still inside him. The count was wrong.

73 [1939] 2 KB 14.

JUDGMENT NOTES

Two months after the operation, a further operation became necessary. In the course of the second operation, a packing swab – the one left inside the patient during the first operation – was discovered lying just under the part of the liver which is close to the stomach. It had there caused an abscess, and, in spite of the second operation, caused the death of the patient two days later. It was common ground at the trial that the cause of death was the swab left in the abdomen at the first operation, and a case of negligence was laid against the surgeon.

One of the points discussed in the case was the application of *res ipsa loquitur*. Scott LJ was against its application because he thought the inferences to be drawn in a proper case depended on the “ordinary experiences of mankind”⁷⁴ or, rather, judges, whose duty it was to declare whether any presumption or inference of negligence was permissible. In this light, whether the expression *res ipsa loquitur* is applicable or not depends on whether, in the circumstances of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence.⁷⁵ He went on to say the following:⁷⁶

An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant’s negligence, or where the event charged as negligence ‘tells its own story’ of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maxim *res ipsa loquitur* applies.

According to his reasoning, “the ordinary experience of mankind” knows nothing of the nature of abdominal operations; nor does the ordinary judge have sufficient knowledge of surgery and its mysteries to enable a proper and natural inference of negligence to be drawn or rejected.⁷⁷ But the other members of the Court of Appeal took a different view. Interestingly, in *Mahon v Osborne*, the other members of the bench noted the South African ruling in the *Van Wyk* case – although they declined to follow it. The reasons they advanced for doing so, however, were not the same. Goddard LJ reasoned that inferences of negligence could be drawn even where the facts of the case involved some special skill, provided that the consequences complained of were not the ordinary consequences of the questions raised by the parties

74 (ibid.:540).

75 (ibid.:541 B).

76 (ibid.:541 E–F).

77 (ibid.:22–23). See also the Canadian case of *McFadyen v Harvie*, [1941] OR 90 [1942] 4 DLR 647 – where the plaintiff was burned in the course of an operation – and the Arkansas decision in *Routen v McGee*, (1945) 208 Ark 501 186 SW 2d 779, which are both in accord with this opinion.

before the court – as in this case, for example, where a swab remained inside a patient's body after a surgical operation.⁷⁸ Against this backdrop, Fridman said the following:⁷⁹

This [drawing inferences of negligence], it is submitted, is a fairer and more reasonable attitude to adopt. But it has nothing to do with *res ipsa loquitur*. It simply depends upon what a reasonable man would infer from the facts of the case. In some instances – even in skilled operations – an unskilled person may be expected to know something of what does or does not occur in the normal course of things. Thus, postoperative shock is a well-known phenomenon, and is not necessarily the result of negligent conduct by a surgeon. Hence the fact that the plaintiff suffered such shock will not of itself justify an inference of negligence. Nor apparently, if the Canadian decision of *Hughston v Jost*⁸⁰ is correct, will the escape of anaesthetic being given by an intra-venous injection, and causing injury to the plaintiff, entitle an inference of negligence to be made. But the presence inside a patient's body of swabs, or of forceps, or the sort of digital injury suffered by the plaintiff in *Cassidy v Ministry of Health*⁸¹ are not usual occurrences and therefore call for explanation. It is said ... that *res ipsa loquitur* applies if the injury was caused by failure to use 'common sense' rather than failure in technical skill.

That *res ipsa loquitur* applies if the injury was caused by failure to use 'common sense' rather than failure in technical skill, it is submitted, supports what is said here. For it is precisely in failures in common sense that the ordinary person can be expected to draw his/her own inferences and reach his/her own conclusions. The differences of opinion expressed in *Van Wyk* and *Mahon* illustrate how different people can variously interpret evidence and can draw different inferences from the same facts to reach different conclusions. Mackinnon LJ thought that *res ipsa loquitur* should be applied in such cases because the plaintiff is not only unable to comprehend the technicalities involved, but has been rendered unconscious, cannot possibly know what went on. This, it will be remembered, was the general justification for the existence and use of *res ipsa loquitur* as a guiding rule. The application thereof was also justified by Wigmore:⁸²

78 (ibid.:50). Cf. *Garner v Morrel*, decided by the Court of Appeal on 30 October 1953. There, a dentist put a throat pack in the mouth of the plaintiff's husband, who died as a result of swallowing it. The defendant was called upon to disprove the negligence that was inferred.

79 (ibid.:48).

80 41 [1943] 1 DLR 402. In *Chrysler v Pearce*, [1943] 4 DLR 738. Alcohol which had been allowed to run on the plaintiff's skin was set alight by equipment in diathermy, and she was burnt. *Res ipsa loquitur* did not apply, for negligence was proved, not presumed.

81 43 [1995] 2 KB 343.

82 Best, A. 1940. *Wigmore on evidence* (Third edition). London: Aspen Publishers, IX,3834.

JUDGMENT NOTES

It may be added that the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.

And by Connor J in *Ross v Cotton Mills*:⁸³

The underlying reason for the rule is that usually the chief evidence of the true cause of procedure is practically accessible to the defendant, but inaccessible to the person injured.

The accessibility of evidence was the reason for the Californian decision in *Ybarra v Spangard*.⁸⁴ In this case, the plaintiff suffered injury to his arm and shoulder during an appendectomy. The appellate court thought that in such circumstances *res ipsa loquitur* applied, otherwise there would “rarely be any compensation for patients injured whilst unconscious”.⁸⁵ Once again, it is submitted, the law can very well be administered without the necessity of introducing *res ipsa loquitur*. Even if it is just to aid a plaintiff to prove his/her case in some circumstance, the basis of such aid is not, or ought not to be, the plaintiff’s of probability of negligence, i.e. to draw the inference that the defendant was negligent. In Mr H’s case, the facts permitted the inference of negligence, and they pleaded for such an inference.

It is the doctor’s duty to remove what he puts in the patient

The effects of the judgement of *James v Dunlop*⁸⁶ are that the doctor has the duty to count the swabs and make sure everything s/he has used in the operation process is taken out of the patient. In this case, the court laid down the rule in the following words:

Before there is any count, there is a duty on the doctor. His duty is to put in the necessary swabs, according to the ordinary course of the operation, to enable the operation to be safely carried out. He puts them in, and it is his duty to use reasonable care to put them in the proper places, and, having put in those comparatively few large swabs (because this question does not seem seriously to arise about small swabs, it is the large walling swabs which are the important matter, some three or four of them), it is his duty to take them out, and that is quite independent of any check or count. He puts them in, and he must take them out. He is the person who knows where he puts them in, and he is also the

83 (1905) 140 NC 155, 52 SE 121.

84 25 Cal. 2d 486, 154 P.2d 687 (Cal. 1944).

85 (ibid.:2a).

86 (1931) BMJ 730, at 731. See also *Ybarra v Spangard*, 25 Cal. 2d 486.

person who wants the amount of movement that can be reasonably expected – I cannot help thinking that it is comparatively slight – in the swabs that are put in.

Relying on the judgment of *Mahon v Osborne*, Goddard J, in *James v Dunlop*, reasoned that the dictum above was referring to the duty of the surgeon in general, and clearly not merely to the particular operation. Then Greer LJ, in *James v Dunlop*,⁸⁷ after saying that removal of the swabs was the duty of the doctor and that it was part of the operation, as it ought to be of any operation, to insert the swabs – which no one would doubt – says the following:

Therefore it is quite clear that all these gentlemen [surgeons] recognize what is only common sense – that, if it is a necessary part of the operation to insert the packs, it is also a necessary part of the operation to remove them. The removal of the packs involves a search after the operation is over by means of the finger of the operator, to ascertain whether the packs have or have not been removed. Surely it further follows that part of the operation is to be done with the same care and skill as every other part of the operation. The surgeon is not entitled to say: “I need not exercise any care and skill with regard to the removal of the packs, because I have a check ... am absolved from counting. I need not count how many I put in or how many I take out, because that count is being done by some other person.” But, assuming that to be, that does not absolve him from the duty to exercise reasonable care in the search he has to make with his finger before he puts any question to the nurse with regard to the count. The duty of the nurse to count cannot absolve the surgeon from his duty to exercise reasonable care.

In summation, the quote above means that Greer LJ was stating that the duty resting on the theatre sister in this respect did not relieve the surgeon; and Scrutton LJ laid down that, if a surgeon put swabs in a body, it was that surgeon’s duty to take them out, and not merely to rely on the count of another skilled person.⁸⁸ Similarly, in *Gold v Essex CC2*, Greene L said that a nurse employed as the servant of a hospital did not cease to be such when placed under a surgeon’s orders in the theatre; she was, therefore, not his servant, and he was not responsible as principal or employer for her negligence.⁸⁹

It should be borne in mind that, in *James v Dunlop*, the South African decision in *Van Wyk* was noted but rejected because it was deemed unfit to apply. The reasoning behind the foreign judgments cited above is that the nurse counted only what the doctor had removed from the patient, and did not take a count before the operation was performed. Similarly, in Mr H’s case, Nurse M counted only that which had been removed from Mr H and confirmed that

87 (1931) BMJ 730, at 731.

88 See comments in Eurich, FW. 1943. “Non-fatal effects of exhaust-fume poisoning”. *British Medical Journal*, 326, 13 March.

89 (ibid).

JUDGMENT NOTES

the count was the same as before the operation was done; but Dr S did not verify the count to make sure that all the utensils he had used were indeed out of the patient. It follows from this that Dr H was negligent in not removing all the swabs. In collaboration, Nurse M was negligent in not picking up the discrepancy between the two counts, resulting in the swab being left in the complainant in this case. Both medical practitioners were negligent and, consequently, the hospital is vicariously liable. In this regard, we are informed as follows:⁹⁰

A specialist is required to employ a higher degree of care and skills concerning matters within the field of his specialty than a general practitioner. The objective “reasonable physician’s test” is subjectified to the particular branch of medicine to which the specialist belongs. This means that, what is expected from a specialist in the treatment of his patients is to act as a reasonable specialist would have done under similar circumstances.

In *The law of South Africa*, McQuoid-Mason and Strauss put it as follows:⁹¹

A medical practitioner is expected to exercise the degree of skill and care of a reasonably skilled practitioner in his field. This includes care during the procedure itself as well post-operative care. In deciding reasonableness the court will have regards [sic] to the general level of skills and diligence possessed and exercised by members of the branch of the profession the practitioner belongs. The test is how a reasonably competent practitioner in that branch of medicine would have foreseen the likelihood of harm and would have taken steps to guard against its occurrence. It is the ultimate which will decide whether in the circumstances the methods used were reasonable. In *Van Wyk vs Lewis*: 1924 AD at 438-444 it was held that negligence could not be inferred from [the] mere fact that the accident happened but that the onus of establishing negligence lies upon the Plaintiff. This finding is contrary to what Neethling in *Law of Delict* p311–315 said as quoted by Plaintiff’s counsel in his heads of argument that every factual infringement of the physical mental body is *per se contra bonos mores* or wrongful.

The quotation was applied with approval in the unreported case of *Geyer v Dekel*,⁹² a case of medical negligence, which maintained the paterfamilias did not have “prophetic foresight”.⁹³ The test is not how the occurrence could have been prevented, but whether the occurrence was reasonably foreseeable.⁹⁴

90 Clarison, NJB & T Verschoor. 1992. *Medical negligence in South Africa*. Pretoria: Digma Publications, p 15.

91 McQuoid-Mason, DJ & SA Strauss. 1999. “Medicine, dentistry, pharmacy and other health professions”. In Joubert, WA & JA Faris (Eds). *The law of South Africa*, Vol. 17 (First Re-issue). Durban: Butterworths, par 203.

92 (17818/02) [2005] ZAGPHC 41 (8 April 2005).

93 At par 32.

94 See *S v Bochrus Investments (Pty) Ltd & Another*, 1988 (1) SA 861 (A) at 866 J–876 B, in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)*, [1961] AC 388 (PC)1 ([1961] or All ER 404.

Thus, in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co. Ltd (The Wagon Mound)*,⁹⁵ Simonds says the following:⁹⁶

After the event, even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility.

It is unknown the case of Mr H whether Dr S searched for the swabs after assuming that everything was out. If he did, it is unclear again whether he did so only by way of a visual check or by a manual one as well. In *James v Dunlop*,⁹⁷ it was held that a search by touch was necessary: looking was not sufficient, for some swabs become camouflaged in the blood or organs on the site of the operation. The judgment in *Mahon v Osborne* supports this position:⁹⁸

The surgeon is in command of the operation. It is for him to decide what instruments, swabs and the likes [sic] are to be used, and it is he who uses them. The patient, or, if he dies, his representatives, can know nothing about the matter. There can be no possible question but that neither swabs nor instruments are ordinarily left in the patients [sic] body, and no one would venture to say it is proper, through particular circumstances it may be excusable, so to leave them. If, therefore, a swab is left in the patient's body, it seems to me clear that the surgeon is called upon for an explanation. That is, he is called upon to show, not necessarily why he missed it, but he exercised due care to prevent its being left there. It is no disparagement of the devoted and frequently gratuitous service which the profession of surgery renders to mankind to say that its members on occasion fall short of the standard of care which they themselves, no less than the law, requires [sic] and if a patient on whom had befallen such a misfortune as we are now considering were not entitled to call upon the surgeon for an explanation, I cannot but feel that an unwarranted protection would be given to carelessness, such as I do not believe the profession itself would neither expect nor desire.

The constitutional justification

Whereas one needs to remain sympathetic to these circumstances where the law is protective of an important profession, it is reasonable in the same circumstances to agree with suggestions that *res ipsa loquitur* should, at least where the prejudicial result is clearly in contrast with the acknowledged therapeutic objectives and techniques of the operation or treatment in question, find application in cases of alleged medical negligence.⁹⁹

95 (ibid.).

96 (ibid.:424 (AC), 414 G–H (in ER)).

97 (1931) BMJ 730, at 731.

98 [1939] 2 KB 14.

99 Clarison & Verschoor (1992:28); Hebblethwaite, L. 1991. "Mishap or malpractice? Liability in delict for medical negligence". *South African Law Journal*, 108:38, 38–9,

This is required not only by the constitutional guarantees of equality and a fair trial, but also by the values associated with Article 18, being the right to dignity. Unfortunately, the Namibian Constitution, unlike its South African counterpart, has no specific provisions for the right to health. The application of the *res ipsa loquitur* doctrine in such cases would significantly enhance the potential of the Namibian Constitution to address the imbalances in power inherent in the doctor–patient relationship, and to result in adequate compensation for those whose rights to receive care of an appropriate quality have been infringed.

A further, and arguably more pernicious, impediment to the effectiveness of the relevant common law principles in securing tangible relief for patients whose right to receive care of an adequate quality have been infringed is that the principles are increasingly excluded from application in the majority of doctor–patient relationships, especially in the private health care sector. The great majority of private health care institutions indemnify themselves against damages resulting from standard or negligent care administered by their personnel, by insisting that patients waive their remedies in this regard upon entering into a contract of admission to the institution. So prevalent is this practice that virtually no patient of a private health care institution can nowadays successfully hold that institution liable for rendering negligent or substandard care.¹⁰⁰

Thus, it is possible to sue all three parties in this case, being X Hospital, Dr S and Nurse M: the hospital could have been held vicariously liable for the actions of its employees at the time. *Mtetwa v Minister of Health*¹⁰¹ summed up South African law in this regard as follows:

Just as, these days, the Minister of Law and Order can be held accountable for the peccadilloes of a policeman even when the latter exercised a discretion of his own (cf. *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A)), indeed, even when he was not on duty (cf. *Minister of Police v Rabie* 1986 (1) SA 117 (A)), so too, it might be argued by analogy, the Minister of Health is at risk if a member of the staff of a hospital under his command is negligent in the exercise of any of his duties, be they professional and not subject to dictation from others.

The court further held that –¹⁰²

43; see also the authorities cited there. For examples of cases calling for application of *res ipsa loquitur*, see Carstens, PA. 1999. “Die toepassing van *res ipsa loquitur* in gevalle van mediese nalaatigheid”, *De Jure*, 32:19, 214.

100 Brand, D. 2002. “Disclaimers in hospital admission contracts and constitutional health rights”. *ESR Review: Economic and Social Rights in South Africa*, 3(2):17, 18.

101 1989 (3) SA 600.

102 See e.g. *Gold v Essex County Council*, [1942] 2 KB 293; *Collins v Hertfordshire County Council*, [1947] KB 598; *Cassidy v Ministry of Health*, [1951] 2 KB 343 (CA); *Roe v Ministry of Health*, [1954] 2 QB 66.

Melancholic medical law

... to the extent that the judgment in the Lower Umfolosi case purported to enunciate a universal principle of law, namely that a hospital assumes no responsibility for the negligence of any member of its staff engaged in professional work, it has thus been overtaken by more recent authority English ones as well.

Therefore, in cases of hospital medical malpractice, the plaintiff, in addition to proving the requirements for a contractual or delictual claim as set out above, will have to prove –

- that the person who committed the delict was an employee of the hospital
- that he or she performed the act in the course and scope of his/her employment, and
- what that employee's duties were or with what work s/he was entrusted at the relevant time.

Conclusions

It is sad that the case of Mr H did not reach the court because of his lack of funds. However, it highlights the intricacies the courts needed to deal with. There is a mire of persuasive but unjust laws on the one hand, but on the other there are favourable cases – albeit too far removed from Namibia. Nonetheless, the point remains that there is always a duty of care on the part of the medical practitioner to treat a patient as a reasonable doctor would. Furthermore, the essence of the objective test of negligence is that a doctor will be assessed against the standard of a reasonable doctor in those circumstances. To talk of a variable standard of care misses the point, and opens the way for the 'slippery slide' approach whereby practitioners could argue that, in the absence of adequate facilities, there is no duty of care at all. There is always a duty of care: but whether that duty of care has been satisfied will always be judged in the light of the prevailing circumstances.

What happened in this case cannot be classified as a simple mishap that warrants the exoneration of Dr S and Nurse M. The law as it stands is very much in protection of Dr S rather than Mr H, but this position ought to be jettisoned. The fact that the law is generally in favour of practitioners in Namibia – taken in the context of Mr H's case – has invited a lot of criticism of the same position in South Africa, especially considering the *Van Wyk* case.

There is no statute which directly deals with the imbalance between medical practitioners' rights and patients' rights. The case of Mr H would have broken new ground, but it never reached the court for a decision. This was an opportunity missed for the Namibian court to decide the medico-legal position of the case and lay down a rule on this part of the law.

Should we leave the population dying in the face of a rigid medical law? Should the court condone the actions of doctors which could reasonably be

JUDGMENT NOTES

avoided and promote the well-being and health of the people? Should the courts stick to 1924 principles if those who came up with the principle have already departed from it? Is it not justifiable for the court in the circumstances to follow the precedent of more liberal courts who have struck a balance between the unbalanced positions of doctor and patient? The answer to all these questions should be a resounding “Yes”. To this end, it is reasonable to believe that, whatever principle the court deems applicable, Mr H should have been in a position to recover the damages sought. This is a time that demands change in law or at least a variation in regime direction, as an independent and impartial court will always ensure under the current democratic and constitutional trends.

Determining reasonable possibility of compliance with the '48 hours rule': An analysis of *Minister of Safety and Security v Kabotana*

Ndjodi ML Ndeunyema*

Introduction

The legal power vested with the law enforcement agencies of Namibia to effect arrests and detain persons suspected of crime is a legally recognised curtailment of the right to personal liberty.¹ However, this authority to curtail liberty is not and cannot be exercised with *carte blanche*, but should occur within strict and recognised procedures permitted by the Namibian Constitution and other laws.² One such procedure relates to the arrest and detention of persons pending their appearance before a magistrate or other judicial officers. Article 11(3) of the Namibian Constitution requires that –

[a]ll persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer *within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter*, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer. [Emphasis added]

Article 11(3) is known colloquially as the '48 hours rule'. Crucially, in the computation of the 48-hour period, Article 11(3) needs to be read together with section 50 of the Criminal Procedure Act, 1977,³ which provides for the expiry of the 48 hours in instances which include, among others, when the period expires after 16:00, on a weekend, or on a day when the court does not sit.

This paper exclusively considers the proper approach to be adopted in determining reasonable possibility of compliance with Article 11(3). Although this issue had already come under the judicial microscope of the High Court,⁴

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1 Article 7, Namibian Constitution.

2 See e.g. section 50, Criminal Procedure Act, 1977 (No. 51 of 1977).

3 No. 51 of 1977.

4 *S v Mbahapa* 1991 NR 274 (HC).

JUDGMENT NOTES

the case of *Minister of Safety and Security v Kabotana*⁵ offered the Supreme Court its first opportunity⁶ to express itself on the matter within a judicial decision.

Before proceeding to discuss the above landmark case, it is imperative to preface this analysis by offering the *raison d'être* behind Article 11(3). In *Sheehama v Minister of Safety and Security*,⁷ Parker J aptly points out that Article 11(3) is one of the Constitution's most important and reassuring avenues for practically realising the protection and promotion of the basic human right to freedom of movement guaranteed to individuals. This is especially true if regard is had to Namibia's history of ubiquitous detentions without trial, human rights abuses which occurred in detention, and other related injustices. Remarking on the protection afforded by Article 11(3), Hannah J in *Garces v Fouche & Others*⁸ opined that it sets out rights conferred on, and enjoyed by, every person who is subject to arrest and "is solely for the benefit of such persons and not for the benefit of the State".⁹ Other prominent reasons for the existence of Article 11(3) are as follows:

- To ensure the timely protection of a detainee's right to due process of law by preventing indefinite languishing in custody for a period determined at the whim of a detaining authority
- To allow a court to determine whether initial detention was justified, and promptly decide whether the detainee be remanded in custody pending trial, and
- To prevent or uncover violations of the detainee's fundamental rights and guard against unlawful or arbitrary detention, enforced disappearance, torture, and other forms of ill-treatment (which is particularly more likely to occur in the initial stages of a deprivation of liberty),¹⁰ and even ensure that a detainee is, in fact, alive.

5 Case No. SA 35/2012, unreported judgement of the Supreme Court of Namibia delivered 26 March 2014 per Shivute CJ (Mtambanengwe AJA and O'Regan AJA concurring).

6 This is as far as can be established from post-1990 reported case law.

7 2011 (1) NR 294 (HC) at par 5.

8 1997 NR 278 (HC) at 282.

9 Without detracting from the generality of this *obiter dictum* by Hannah J, one should pause to appreciate that detainees are not the sole beneficiaries of Article 11(3). This is so if one is to consider that the protection and promotion of the individual human rights of individuals are not merely and exclusively in the interest of an individual directly affected by a violation, but also in the interests of the state and its citizenry to horizontally and vertically fulfil its protective and promotional mandates, respectively, as provided for in Article 5 of the Constitution. This is if one is to fully appreciate the existence of a collective (state) obligation that achieves collective (societal) rewards.

10 Amnesty International. 2012. *The Human Rights Committee's New General Comment on the Right to Liberty and Security of Person: Amnesty International's preliminary observations*. London: Amnesty International Publications, p 16.

The facts of *Minister of Safety and Security v Kabotana*

As will become clearer below, in order to comprehensively understand the Supreme Court decision in *Minister of Safety and Security v Kabotana*, one needs to trace this appeal to the decision of the court *a quo* in *Lubilo & Others v Minister of Safety and Security*.¹¹ The facts in *Lubilo* were that three plaintiffs – the second of which was John Genese Kabotana, the respondent in *Minister of Safety and Security v Kabotana* – had brought a consolidated action for damages against the Minister of Safety and Security. Kabotana was arrested as allegedly being part of a group that attempted the secession of the then Caprivi (now Zambezi) Region from Namibia on 2 August 1999. For the purposes of this paper, the relevant facts and issues for the High Court to determine involved the lawfulness of the arrest and detention of the second plaintiff by the police officers concerned.

Evidence led on behalf of Kabotana indicated that he had been arrested at his home on Wednesday, 1 September 1999, between 10:00 and 11:00.¹² The 48-hour period within which he was to be brought before court expired on Friday, 3 September 1999, at 16:00 – without his appearance in court, however.¹³ The Minister of Safety and Security adduced evidence that the reason why Kabotana had not been brought to court before the 48-hour period had expired was due to prior arrangements of the unavailability of the magistrate and public prosecutor, preventing the court from convening. Moreover, the Minister of Safety and Security contended that, in the aftermath of the secession attacks, the police had been overstretched and, therefore, could not bring the accused to court within the required 48-hour period.¹⁴ Kabotana was subsequently transported to Grootfontein to appear before a magistrate there on 6 September 1999. Therefore, the court had to determine whether or not it had been reasonably possible for Kabotana to be brought before court prior to the expiry of the 48-hour period.

The High Court's approach in determining the reasonable possibility of complying with the 48 hours rule

Damaseb JP outlined the approach to be applied in determining the lawfulness of detention after the expiry of the 48-hour period for purposes of compliance

11 I 1347/2001 [2012] NAHC 144, unreported judgement of the High Court of Namibia, 8 June 2012, per Damaseb JP.

12 *Lubilo*, par 30.

13 This computation is based on a dual reading of Article 11(3) of the Constitution and section 50(1) of the Criminal Procedure Act.

14 *Lubilo*, par 88.

with Article 11(3), which can be paraphrased as follows:¹⁵

- (a) Was it established that the plaintiff was not brought to court within 48 hours after arrest?
- (b) Was it possible for the police to have complied with the requirement of the law that the plaintiff be brought to court within 48 hours after arrest?
- (c) Is the reason the plaintiff was not brought to court within 48 hours after arrest because it was not reasonably possible to do so, and, assuming that to be the case, was he indeed brought to court as soon as possible?

In applying the above three-step test to the facts of the case, the court found that –

- in respect of part (a) of the test, the evidence established that Kabotana had not been brought before court within the 48-hour period
- in respect of part (b) and (c) of the test, the Minister of Safety and Security failed to adduce any evidence showing why no arrangement had been made for a magistrate to be available on 3 September 1999, which is the date on which Kabotana ought to have been brought before a magistrate to comply with the 48 hours rule
- Kabotana had been unlawfully detained beyond the 48-hour period after his arrest – which is from the afternoon of 3 September 1999 until the morning of 6 September 1999, when he appeared before a magistrate in Grootfontein.

Damaseb JP, therefore, held that Article 11(3) had been violated; he awarded damages in the amount of N\$12,000.

The Supreme Court's approach in determining the reasonable possibility of complying with the 48 hours rule

In *Kabotana*, the Minister of Safety and Security (who was the defendant in the High Court) appealed against the finding of Damaseb JP in *Lubilo* and the approach adopted to determine the reasonable possibility of complying with Article 11(3). Thus, the Supreme Court was charged with establishing the proper approach to be adopted in determining the reasonable possibility of complying with the 48-hour rule as contemplated by Article 11(3).

The Minister of Safety and Security contended that, in *Lubilo*, the High Court had erred in the approach it had adopted, and that the correct approach should have been one akin to a standard of negligence utilising the reasonable

15 (ibid.:par 10).

person test¹⁶ which, when applied to the facts of *Kabotana*, was formulated as follows:¹⁷

Was it reasonable or not – under these extreme circumstances – for the police officers to assume that they could still bring [Kabotana] before court on the Friday afternoon [3 September 1999]?

The Minister of Safety and Security contended that, in order for liability to arise, the evidence should establish that the police officers acted negligently and unreasonably in their failure to comply with the 48 hours rule. The Minister of Safety and Security further argued that an approach different from that which he proposed “would place too heavy a burden on the police than is warranted”.¹⁸

Shivute CJ, writing for the Supreme Court, considered the approach proposed by the Minister of Safety and Security, but was unable to agree that “the delictual standard of negligence should be employed”¹⁹ in the determination of *reasonable possibility* in the context of Article 11(3). The Supreme Court endorsed the High Court’s approach in *Lubilo*, emphasising the importance of complying with Article 11(3) as an aspect of the right to liberty.²⁰ The Supreme Court proceeded to unpack the meaning of *reasonably possible* within the context of Article 11(3). The court cited with approval a passage in *S v Mbahapa*,²¹ where Hannah AJ stated the following:

[W]hat is possible or reasonably possible *must be judged in the light of all the prevailing circumstances in any particular case*. Account must be taken of such factors as the availability of a magistrate, police manpower, transport, distances and so on. *But convenience is certainly not one such factor*. [Emphases added]

Self-evidently, the above standard of diligence and compliance is much higher than the approach proposed by the Minister of Safety and Security. In that context, the Supreme Court paused to reflect on and appreciate the context within which the test was to be applied, i.e. fundamental human rights infringements contained in the Namibian Constitution, as opposed to a delictual matter within the realm of private law.²²

16 See Neethling, J, JM Potgieter, PJ Visser & JC Knobel (Eds). 2010. *Law of delict*. Durban: LexisNexis, p 131.

17 *Kabotana*, par 10.

18 (ibid.:par 12). Counsel for the Minister of Safety and Security rejected the contention that the approach would not be one of considering the convenience of the police officers as described in *S v Mbahapa*, 1991 NR 274 (HC).

19 *Kabotana*, par 15.

20 (ibid.:par 16).

21 1991 NR 274 (HC), at 280.

22 On this point, Shivute CJ cited *Dendy v University of the Witwatersrand*, 2005 (5) SA 357 (W) at par 23, where Boruchowitz J cautioned as follows:

JUDGMENT NOTES

The Supreme Court sympathised with the fact that only six police officers had been processing approximately 22 arrested persons²³ and deciding on whom to charge and whom to release; however, it effectively found that there had been a duty of proper coordination and planning placed upon the law enforcement and other officials (such as the magistrate and prosecutor) to combine the state's resources so as to ensure that there was mutual cooperation in the enforcement of constitutional rights and freedoms.²⁴ In the practical application of the approach adopted by the High Court in *Lubilo* as to the reasonable possibility of complying with the 48 hours rule, the Supreme Court in *Kabotana* pointed out that the police officers were aware that prior arrangements could easily have been made with court officials by a "simple phone call or sending an officer to court to make arrangements" to ensure that there was a presiding officer available to postpone the cases in the late afternoon when they took the suspects, including Kabotana, to court.²⁵ It was found, therefore, that the police officers had not observed a high level of diligence for compliance. The Supreme Court cautioned that one had to –²⁶

... guard against laxity and aspire to setting very high standards for compliance with constitutional rights, especially those having a bearing on the liberty of individuals.

Elsewhere the Supreme Court emphasised that –²⁷

... the 48-hour requirement must act as a flashing red light in the minds of the officers processing suspects for onward transmission to court. This is the vigilance with which we must guard this fundamental right to appear in court within 48 hours after being arrested unless it is not reasonably practical to do so.

The Supreme Court dismissed the Minister of Safety and Security's appeal, therefore, finding that the respondent's rights under Article 11(3) had been violated and thereby confirmed the High Court's award of N\$12,000 in damages.

"Conceptual difficulties are bound to arise if one were to equate all infringements of fundamental rights with an ordinary delict. There is the problem of overlapping and possible conflict between fundamental rights entrenched in the [South African] Constitution and private subjective rights protected by, or legal duties imposed by, the law of delict. Where the infringement of a fundamental right overlaps with generally recognised areas of delictual liability, an ordinary delictual claim will lie at the instance of an aggrieved person. The problem lies with those infringements of fundamental rights that extend beyond the recognised ambit of the law of delict and which do not meet the requirements of delictual liability."

23 *Kabotana*, par 27.

24 (ibid.).

25 (ibid.:par 28).

26 (ibid.).

27 (ibid.:par 31).

Analysis and concluding observations

As noted above, the significance of *Kabotana* is that it was the first opportunity for the Supreme Court since its establishment in 1990 to express itself on the proper interpretation of Article 11(3). Firstly, the *Kabotana* decision affirms that the right to be brought to court is circumscribed by a general standard that it must be done within a 48-hour period after arrest.²⁸ Secondly, when exceptional circumstances exist that depend on the facts of an individual case, there is an outer limit for bringing a detainee to court "as soon as reasonably possible".²⁹ In the determination of what is or is not "reasonably possible", a court needs to apply the following three-pronged test:

- Was it established that a detainee was not brought before court with 48 hours after arrest?
- Was it possible for the detaining authority to bring a detainee before court within 48 hours after arrest?
- If it is established that it was not possible to bring a detainee to court within 48 hours, was s/he brought to court as soon as possible?

This approach places an exclusive onus upon the detaining authority to adduce evidence proving that it was not possible under the particular factual circumstances to bring a detainee before court within 48 hours after arrest. Here, consideration should be placed upon the unique context of each case and the facts should reflect a high standard of diligence on the part of the detaining authority in its pursuit of compliance with the 48-hour period. But the *Kabotana* approach does not purport to prescribe an unrealistic, utopian or unpragmatic standard diligence nearing Herculean compliance with the 48 hours rule.

The first prong of the test involves a commutation of when the 48-hour period expires, as informed by section 50(1) of the Criminal Procedure Act. If the evidence establishes that it was not possible to bring the detainee to court before the 48-hour period expired, the detaining authority has to proceed to adduce evidence proving that a detainee was in fact brought to court as soon as possible. In the final analysis, the approach adopted by both the High Court in *Lubilo* and the Supreme Court in *Kabotana* in determining *reasonable possibility* sets a commendable standard of diligence in the respect of the detainees' rights to liberty and their presumption to be innocent under the law until due process declaring otherwise is accorded. Moreover, *Kabotana* generally suggests that the invocation of delictual standards in the interpretation

28 This computation of the 48 hours should, of course, take into account the method contained in section 50 of the Criminal Procedure Act, 1977.

29 Compare the South African approach outlined in Steytler, N. 1998. *Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa*. Durban: Butterworths, p 126.

JUDGMENT NOTES

of constitutional rights is inappropriate and should be discouraged. This approach equally aligns with the United Nations Human Rights Committee³⁰ principle that pre-trial detention be invoked only as a measure of last resort. This is especially true in a country where physical conditions of pre-trial detention are horrendous, overcrowded and undignified.³¹ The prescribed three-pronged approach, therefore, ensures that sowing the seeds for unduly extended, arbitrary or excessive periods of detention without bringing a detainee to court is jealously guarded against.

30 United Nations Minimum Rules of Non-Custodial Measures, Principle 6.1.

31 Office of the Ombudsman. 2013. *Human Rights Baseline Study Report in Namibia*. Windhoek: University of Namibia, Human Rights and Documentation Centre, p 102.

BOOK REVIEW

***Beyond the law: Multi-disciplinary perspectives on human rights.* Frans Viljoen, assisted by Jehoshaphat Njau (Eds); Pretoria: Pretoria University Law Press, 2012, 295 pages**
Johannes DK Kariseb*

When, in 1980, Anthony Allott¹ wrote *The limits of law*, a consciousness had long existed that law, as a discipline, was not a lone cell but rather an aftermath of pluralistic variables meeting at an intersection. His generic idea was that law functions as an inter- and intra-discipline which is strongly interwoven into social systems. Allott, at least from his writings, did not see law as drawing its legitimacy from social anthropology or the social sciences; instead, he believed the law to be a multi-disciplinary discipline with roots traceable in other subjects. Therefore, he laments that the –²

[L]aw is only one normative system among many which compete for the attention and the allegiance of those to whom they are addressed. [Emphasis added]

Recently, *Beyond the law: Multi-disciplinary perspectives on human rights*, the book under review in this paper, cemented Allott's sentiments – albeit in a different context. Here, the law, and human rights in particular, are analysed from a multi-disciplinary discourse. That is, a variety of human rights issues are discussed and analysed not only from a legalistic point of view, but also from various disciplinary perspectives. Such an approach to human rights demonstrates, as is also visible in the numerous chapters of the book, that various sciences – i.e. the law, anthropology, the social sciences, the humanities – can all operate in a way that are mutually inclusive and still simultaneously promote human rights. A purely legalistic approach will not suffice. Put differently, a legal approach, together with inter- and intra-disciplinary models, can mould a system of law that will amplify human rights.

The term *multi-disciplinary* in respect of an approach has championed diverse meanings and interpretations. However, one particular understanding remains triumphant, namely that a multi-disciplinary approach to human rights reproaches a strictly legal approach based on authorities in favour of one that is inclusive of ideas, sensibilities and values from different systems.

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1 Allott, A. 1980. *The limits of law*. London: Butterworth.

2 Allott (1980:121).

BOOK REVIEW

The book is edited by Prof. Frans Viljoen of the University of Pretoria with the assistance of Research Associate Jehoshaphat Njau of the Centre for Human Rights at the same institute. The publication is sectioned as follows:

- An Introduction, which gives a synopsis on the multi-disciplinary nature of law as a discipline, as well as the advantages of human rights as a field of law.
- Part I (Human Rights and Social Sciences) discusses human rights issues such as the right to development, the right to health, the right to education and children's rights from social-scientific and anthropological perspectives. Part I, comprising Chapters 1 to 8, is predominantly substantive and theoretical.
- Part II (Human Rights, Narratives and Representation) ranges from Chapter 9 to Chapter 12. Here, the focus is on practical matters such as the Rwandan genocide and the Egyptian Spring revolution, and
- Part III (Human Rights and Medicine) looks at the relatively supplementary relationship between medicine and law.

In sum, the publication features an introduction and 13 chapters. That the book battles with questions of law so eminently requiring socio-legal insight is not doubtable, for it eloquently demonstrates the antinomies between law and other disciplines as well as the harmony and consensus between law and these other disciplines.

I have restricted myself to reviewing only part of the publication in an effort to entice potential readers to tackle its full content rather than have it all presented to them on a platter. Also for this reason, I will review only selected text that relates strongly to our contemporary context. I do not intend qualifying the works of some authors over the work of others. To do that, in my view, would be unfair and consequential, as all the chapters show fine scholarship. The selected chapters reviewed here are as follows:

- "On the interactions between law and social science in the understanding and implementation of human rights", by Michael Freeman
- "Political cultures in conflict: Analysing constitutional litigation in South Africa", by Richard Maiman
- "How sociology enriches human rights: The case study of Malawi's first openly gay couple", by Joseph Mlenga (?spelling differs below), and
- "The role of personal narratives in Egypt's 2011 Spring revolution", by Rebecca Wright.

The selection of these articles will not deter me from making overall observations and reflections, for which all credit (and, where criticised, all blame) is due to all the authors that have made a contribution to the book.

Michael Freeman contributes a discussion entitled "On the interactions between law and social science in the understanding and implementation of human rights." In its din, Freeman's contribution seeks to extend the purely

legal understanding of human rights into a multi-disciplinary context by demonstrating both the contributions and limitations of (comparative) political science, international relations and anthropology on law generally. The paper strongly suggests that a systematic integration of law with other disciplines will broaden our understanding, practice and implementation of human rights.

Richard Maiman's chapter entitled "Political cultures in conflict: Analysing constitutional litigation in South Africa" raises a thought-provoking question: Why would the African National Congress (ANC) Government in South Africa be attributable to an individualistic political culture? In his response, Maiman measures the ANC's kilometric existence as the ruling party to date as a plausible contribution to the individualistic political model. On the other hand, Maiman vests the moralistic political culture predominantly in the domain of South African civil society. This assessment is a logical one because, generally speaking, civil societies the world over are always concerned with public policy issues.

Joseph Mlenga's contribution entitled "How sociology enriches human rights: The case study of Malawi's first openly gay couple" sheds light on the ties between sociology and the law. Aided by the case of Steven Monjeza and Tiwonge Chimbalanga, Malawi's first openly gay couple, who have stirred international uproar because of the prosecution they had to endure, Mlenga shows how the social constructs of resistance from Malawian authorities and religious communities violate human rights by denying gays their right to sexual orientation. In gist, in an attempt to link sociology with law, Mlenga avers that the social construction of human rights should involve a balancing of power and political interests.³

Rebecca Wright, in her chapter on "The role of personal narratives in Egypt's 2011 Spring Revolution", reflects on how the narration of ordinary personal experiences and stories of Egyptian civilians can be used to trigger an impulse that can give birth to a human rights revolution. She stresses that societal events such as the '18-Day Revolution' that took place at Tahrir Square, Cairo, in early 2011, reflect the need for a deviance from purely legal procedure for the effective realisation of human rights. In answering a question regarding the extent to which the observation of personal narrative through modern media and personal stories in the revolutionary events in Egypt contributes to human rights and human rights law, Wright opines as follows:⁴

A legalistic perspective on human rights may be too restrictive. Certainly, in Egypt, the promotion of human rights was better achieved by branching out from a purely legal perspective and by engaging with multiple approaches to the concept of human rights and to the quest to achieve justice and equality. In

3 Mlenga (2012:114).

4 Wright (2012:191–192).

addition to emphasising the benefits of a multi-faceted approach to human rights, an analysis of the ways in which personal narratives have been constructed and disseminated in Egypt over the last year is also a reminder of the fluid nature of personal narrative. As a human rights lawyer, it is easy to become convinced that the legal representation of a victim's experiences is pure fact, with little distortion from reality. However, when we consider that the act of remembering and crafting a person's narrative always involves a degree of distortion and manipulation, we are reminded of the ethical complexities of human rights work. Lawyers should always keep in mind that they are speaking on behalf of someone else and should be sensitive to the power dynamics generated by that act. By acknowledging that one person's, or one community's, story can be told from multiple perspectives, human rights lawyers can consider practical ways to avoid the potentially limiting effect of legal interpretations of victims' lives. If victims wish their stories to be told and to gain publicity for abuses, lawyers should ideally develop litigation strategies that extend beyond the act of legal representation. They can link up with bloggers, artists, film makers and poets so that different aspects of victims' lives and identities are captured. Such collaboration has multiple benefits, including the fact that victims' stories are not 'trapped' into linear, legalistic narratives constructed solely around international human rights principles. In addition, by tapping into the personal narratives that are being circulated within a society, and by remaining aware of the perspectives and sympathies generated by those narratives, human rights lawyers can become more effective advocates for their clients. They can better gauge the public mood and therefore make a more informed decision about whether and when a case should be brought. If lawyers simply remain in their offices, guided only by the principles contained in human rights treaties, and if they fail to submerge themselves in the narratives circulating online and in other public spaces, they are less likely to achieve the type of societal reform that might otherwise be possible.

A cursory reading of its contents reveals its strong reliance on comparative and international law, particularly from some authors who are known the world over in these fields. Indeed, publications with a firm base on comparisons have been hailed as doing greater justice than those which do not. As Kriegler J (as he then was) said in *Bernstein & Others v Bester & Others NNO*,⁵ –

[C]omparative study is always useful, particularly where the courts in exemplary jurisdictions have grappled with universal issues confronting us.

Equally, the diverse topics covered in the book married with the fact that it is available electronically mean it has not been made to collect dust on some shelf but should instead reach a wide targeted and/or untargeted network of audiences. I, for one, have gained a broader understanding of the terse yet kilometeric ties and differences between law and other disciplines.

5 1996 (2) SA 751 (CC), at 811I–812A; also approved in *S v Malumo & 112 Others*, 2011 (1) NR 168 at 182 per Hoff J.

Although not reviewed here, other interesting and challenging articles form part of the book.⁶

As is the case with all publications, *Beyond the law: Multi-disciplinary perspectives on human rights* holds within it some material weaknesses. For example, on a substantive note, some of the articles make subjective submissions that lack proper evidence. Secondly, the book holds very little value for advocacy. Hence, practising lawyers may find the book of little, if any, value for court practice. This may be a limitation on the audience that can be reached through this publication. In addition, a few errors and misspellings have been observed. Despite these and perhaps other weaknesses not mentioned here, these shortcomings do not necessarily override the inherent value of the book.⁷

Overall, *Beyond the law: Multi-disciplinary perspectives on human rights* remarks on a deep sense of sensitivity for human rights by analysing it from a wide range of disciplinary perspectives. The editorial care and gigantic degree of intelligence visible in the book are highly commendable. The book makes sound reading for all scholars – especially those who bear a soft spot for constitutional, humanities, and human rights issues.

6 “Beyond juridical approaches: What role can the gender perspective play in interrogating the right to health in Africa?” (Ben Kiromba Twinomugisha); “Reasons for rights: A **qualitative** approach to rights use among HIV advocacy groups” (Kristi Kenyon); “Demystifying human rights: A socio-legal approach to the political framing of migrant workers’ rights in Africa” (Aishah Namukasa); “Theorising children’s rights as a multi- and inter-disciplinary field of study (Rushiella Songca); “The right to education as a basis for human rights education: An interface between human rights and education” (Chongo Chitupila); “Policed perceptions, masked realities: Human rights and law enforcement in Kenyan popular art” (Humphrey Sipalla & Karest Lewela); “Justice ‘beyond’ the law in *The secret in their eyes*: Rights of victims and offenders in the post-sentencing phase” (Annette van der Merwe); “Narrative research and human rights law: A case study of Rwanda” (Cori Wielenga); and “Steve Biko’s death: The role of the medicine, law and their organised professions” (Servaas H Rossouw & Nico Buidendag).

7 Mlenga (2012:114).

