

Access to Justice: Human Rights Abuses Involving Corporations

SOUTH AFRICA



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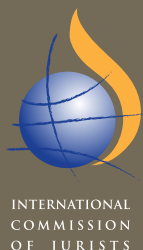
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Access to justice and effective legal remedies are crucial elements in the protection of human rights in the context of business activities. It is also relevant to the work of judges and lawyers who promote the rule of law and human rights. Despite its importance, access to justice is hindered by a number of obstacles unique to corporate human rights abuses. The study of state practices in providing access to justice reveals the potential of existing instruments to ensure this right. Scrutiny of state practices in this area will help the international community in its quest for new answers to the challenge of transnational corporate human rights abuse.

The South African legal system has considerable potential to ground liability and provide remedies for a wide range of possible violations of victims' rights. There is room for considerable development and re-interpretation, examples of which have been discussed. This potential is not wholly realised in practice. The key constraint is the very limited access to legal resources that victims have. The key factors affecting the extent to which the potential of the system is realised depend on responses to this constraint. The most notable factors are the interpretative approach of the courts, the current lack of clarity in certain substantive areas of the law, the extent to which victims are connected to competent representatives, and the extent to which a speedy and cheap remedial mechanism is available. There is good reason to think that reformers operating with these constraints in mind will be able to realise the considerable potential of the South Africa legal system to provide effective remedies to persons whose human rights are abused by corporations.



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South Africa

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Human Rights Abuses Involving Corporations

South Africa

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This study was drafted by Mr James Fowkes, Researcher at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) and reviewed by Prof David Bilchitz, Co-Director, SAIFAC and Associate Professor, University of Johannesburg, Prof Michelo Hansungule, Pretoria University and ICJ Commissioner, Charles Abrahams and Carlos Lopez. It is part of a larger ICJ project on Access to Justice and Legal Remedies for Human Rights Abuses involving Corporations, under the coordination of Carlos Lopez. Priyamvada Yarnell assisted in the production of the publication.

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TABLE OF CONTENTS

Introduction	1
1. Legal Liability for Corporations under National Law	3
1.1 International Human Rights Law	3
1.2 The Constitution	4
1.2.1 Application of the Constitution: Rights-Based Reform of the Law	4
1.2.2 Application of the Constitution: Extra-Territorial Liability	6
1.3 Company Law	8
1.3.1 Fiduciary Duties and Directors' Liability Under Company Law	9
1.3.2 Veil Piercing and Abuse of Corporate Personality	11
1.4 Criminal Liability	12
1.5 Civil Liability and Statutory Exclusions	14
1.6 Liability Under Other Bodies of Law	16
1.6.1 Competition Law	16
1.6.2 Environmental Law	17
1.6.3 Labour Law	18
1.6.4 Mining Law	19
2. Legal Remedies for Corporate Human Rights Abuses	21
2.1 The Constitution and Remedies	21
2.2 Specialised Remedies in Other Branches of the Law	23
2.2.1 Administrative Law	23
2.2.2 Company Law	24
2.2.3 Competition Law	27
2.2.4 Contract Law	28

2.2.5 Environmental Law	29
2.2.6 Extra-Territorial Remedies for Corporate Violations in Terms of the Constitution	30
2.2.7 Labour Law	30
2.2.8 Mining Law	30
3. Obstacles to Accessing Justice	32
3.1 Access to Courts and Legal Representation	32
3.1.1 Reform of the Legal System to Promote Access	32
3.1.2 Legal Aid	34
3.1.3 Equality of Arms	35
3.2 The Exercise of Jurisdiction	36
3.2.1 Service	37
3.2.2 <i>Forum Non Conveniens</i>	37
3.2.3 Rules Conferring Civil Jurisdiction	38
3.2.4 Two Important Exceptions	42
3.2.5 Extra-Territorial Jurisdiction in Terms of Statute	43
3.2.6 Impediments to Jurisdiction – Prescription/Statute of Limitations	44
3.2.7 Impediments to Jurisdiction – Amnesties, Pardons and Decisions Not to Prosecute	47
3.2.8 Impediments to Jurisdiction – State Secrets and National Security	48
3.3 Information-Gathering	49
3.3.1 Rules of Court	49
3.3.2 Promotion of Access to Information Act (PAIA)	50
3.3.3 Other Important Statutory Mechanisms for Obtaining Information	55

3.4 Obstacles During the Court Process	58
3.4.1 Standing	58
3.4.2 Delay and Length of Proceedings	59
3.4.3 Costs	60
3.4.4 Security for Costs	62
3.4.5 Delaying Tactics	62
3.5 Obstacles External to the Court Process	63
3.5.1 Enforcing Judgments	63
3.5.2 Enforcing Foreign Judgments	66
3.5.3 Reprisals	67
Conclusions and Recommendations	69
Bibliography	74

Introduction

This study addresses the question of access to justice, including legal remedies available for human rights abuses committed with the involvement of corporations in South Africa. It particularly focuses on access and barriers to justice encountered in the judicial context but it also deals with administrative and other non-judicial avenues of redress. It considers the potential, as well as the obstacles, of the South African legal system as a whole to offer remedies to persons ('victims') in these circumstances.

The study follows the definitions and methodology adopted by the broader ICJ Access to Justice Project, which involves other country studies (Brazil, Colombia, Democratic Republic of the Congo, People's Republic of China, India, Philippines, Netherlands, Nigeria and Poland) and questionnaires (in a number of additional countries). The present study is based on in-country research, consultation with a number of experts and academic and policy institutions. As part of this consultation process, a regional conference was held on 29-30 October 2009 in Johannesburg, with the participation of 40 judges, lawyers and human rights experts from the Southern Africa region. The study also draws from scholarly and policy publications in the area of corporate legal liability.

The task of elaborating this study has been complicated by the fact that South Africa is a state undergoing transition in a number of areas. During *apartheid*, the country had a functioning legal system, but the law was also an important vehicle for enforcing the *apartheid* system. The demise of *apartheid* and the advent of constitutional democracy saw the introduction of a Constitution with a Bill of Rights, which is now the founding source of legal authority in South Africa. At the heart of the South African Constitutional order lies an enterprise that has been characterized as 'transformative constitutionalism'.¹ This entails that the Constitution in South Africa was not designed simply to entrench the *status quo*: rather, it was enacted with the purpose of fundamentally transforming society. The Constitution must in due course have an impact on the entire legal system, but the process of re-shaping the system in line with its dictates is a work in progress.

There is in some ways still a sizeable gap between the promise of the Constitution and the existing broader body of statutory and common law, leading to the need for reform in many areas of law. The reform of company law is currently underway. A new Companies Act has recently been signed into law and will come into effect fully in 2010. A new code of corporate governance, contained in the King III Report, has also been released. The advent of the constitutional era has also brought about changes in the conduct of corporations. During *apartheid*, the state

1. One of the most influential contributions in the literature has been Klare, K 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146 – 188. Mureinik, E. 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 SAJHR 31-48 essentially saw the Constitution in similar terms.

showed little concern for the rights of those who were not white. As a result, many corporate abuses, particularly associated with mining-related diseases and environmental damage, arose during this era. With democracy has come a different pattern. Generally, the concern is no longer with mass abuses of rights. Instead, there are other issues. Companies are required to contribute actively to the realisation of rights and are required to manage compliance with an increasing array of statutes. There is a need to balance the conflicts that arise between the interests of corporations and local communities: for example, complexities now arise where the granting of mining licences conflict with the ongoing land claims process.

This study is divided into four main sections. It is important to note that the sections consider both the way in which the current stated legal position protects victims of corporate human rights abuses as well as the potential that exists for the future development of these protections. Sections 1 and 2 consider the ways in which the law can hold corporations and directors liable for human rights abuses and provide remedies to victims. Section 3, the largest section, considers a variety of obstacles victims may face in pursuing a remedy, including access to courts and legal representation; jurisdiction and obstacles to jurisdiction; standing; evidence-gathering and access to information; state security defences; and the enforcement by judges and the authority of the legal system. Section 4 discusses the broader lessons and reform proposals that this contribution suggests can be drawn from the South African case.

In order to begin to test the conclusions of the legal research process against the situation on the ground,, interviews were conducted and correspondence engaged with persons (including non-lawyers) in legal practice. In a number of cases, those approached were willing to contribute to this study only on condition that remarks would not be attributed directly to them. All undertakings to that effect have been respected. Information obtained in this way provided important insights, and the value of its inclusion was determined to outweigh the shortcoming that the reader will not be able to attribute some information to particular individuals.

A number of the questions raised by this study are novel in South African research, and where this has been the case this study presents original research to fill the gap. The positions adopted are intentionally less rather than more equivocal, in the hope that firm claims will be more useful in guiding victims and sparking further research.

The law stated is at time of writing in 2009.

1. Legal Liability for Corporations under National Law

1.1 International Human Rights Law

South Africa has ratified many of the major international human rights instruments, including the International Covenant on Civil and Political Rights (ratified 10 December 1998); International Convention on the Elimination of All Forms of Racial Discrimination (ratified 10 December 1998); Convention for the Elimination of Discrimination Against Women (ratified 15 December 1995); Convention on the Rights of the Child (16 June 1995) and Convention Against Torture (ratified 10 December 1998), and the Convention on the Rights of Persons with Disabilities (ratified in 2007).² Notable omissions are the International Covenant on Economic, Social and Cultural Rights; the Optional Protocol to the Convention Against Torture, the International Convention on the Protection of all Migrant Workers and Members of their Families and the International Convention for the Protection of All Persons from Enforced Disappearance. The former two have been signed.³ South Africa has a distinctly patchy record of submitting reports under these treaties.⁴ South Africa is also a party to major human rights treaties of the African Union, including the African Charter on Human and Peoples' Rights and African Charter on the Rights and Welfare of the Child. Customary international law is law in South Africa unless inconsistent with the Constitution.⁵ International agreements are domestically recognized as law in South Africa when enacted into domestic law, or, unless contrary to the Constitution or national legislation, if they are 'self-executing'.⁶ Direct reliance on international law is not critical because of the comprehensive nature of the Bill of Rights, but it is of important interpretative value.⁷ Courts must consider international law when interpreting the Bill of Rights and must prefer

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2. See updated ratification status online at www.ohchr.org
 3. South Africa signed the ICESCR on 3 October 1994 and OPCAT on 20 September 2006.
 4. See South African Human Rights Commission *Human Rights Development Report* (22 May 2008), Ch. 1, summary available at http://www.sahrc.org.za/sahrc_cms/downloads/HRDR_Summary.doc, last accessed 3 May 2009
 5. Constitution of the Republic of South Africa, 1996, s 232
 6. Constitution, s 231(4). On the difficulties of this term in the South African context, see John Dugard *International Law from a South African Perspective* 3 ed (Juta & Co, Cape Town, 2005) at 62 and sources there cited.
 7. Whilst it is recognized that there is a debate concerning whether corporations may be liable directly under customary international law for violations of rights, in South Africa, the Constitution clearly indicates that the Bill of Rights is applicable to corporations (see below). There is thus no need to ground remedies in customary international law which would in all likelihood only constitute a supporting source of law for such remedies. Given the controversy as to the existence of liability for corporations under international law, it is likely that the South African Constitution provides a more secure ground of liability for corporations. Hence, the international law debate is not canvassed more fully in this report.

an interpretation that is consistent with international law when interpreting any legislation.⁸

1.2 The Constitution

The South African Constitution contains one of the most extensive enumerations of rights in the world. It includes rights to life, equality and dignity; the traditional civil and political rights; rights to just administrative action, access to information, access to courts, and fair labour practices; fair trial rights; property rights; socio-economic rights including rights to housing, food, water, education, health services and social security; and environmental rights. All domestic law must be consistent with these rights and they are applicable to every action of the state.⁹ Importantly, the rights also bind private persons, including juristic (legal) persons, where they are applicable. Applicability is determined with reference to the nature of the right and the duties it imposes.¹⁰ Juristic persons are also beneficiaries of some of the rights,¹¹ and since most of the rights textually apply to ‘everyone’, non-citizens enjoy many rights as well.¹² Some rights contain internal limitation clauses, and all rights are subject to a general limitations clause.¹³

1.2.1 Application of the Constitution: Rights-Based Reform of the Law

The Constitution offers vast legal riches for victims, and the potential for change in various areas of the law that could be crucial for victims is examined below. But as this study will illustrate, a good part of this change has not yet happened. It is important at the outset to examine the application of the Constitution to private and juristic persons, as this underlies the broader question of corporate legal liability for human rights abuses under South African law.

The Bill of Rights can apply to law or conduct directly.¹⁴ Party A may require Party B to respect A’s right in its conduct, or, where B is the state, in its legislation.¹⁵ Direct application to statutes and state conduct is common: this entails that a

8. Constitution, ss 39(1), 233

9. Constitution, ss 7(1), 8(1)

10. Constitution, ss 8(2)-(4)

11. Constitution, ss 8(2), 8(4); see further Currie & De Waal *The Bill of Rights Handbook* 5 ed (Juta & Co, Cape Town, 2005) at 36-39; Woolman ‘Application’ in Woolman et al *Constitutional Law of South Africa* 2 ed [Original Service, 2006] (Juta & Co, Cape Town) at 31-39-31-42

12. Currie & De Waal, *ibid.*, at 35-36; Woolman ‘Application’ at 31-35-31-36 and cases there cited.

13. Constitution, s 7(2); the general limitations clause is s 36.

14. There are controversies on the interpretation of the text in this regard. These ‘three ways’ are intended as a way to think about application that is as neutral and simple as possible. For much more detailed accounts, see Stu Woolman ‘Application’ at 31-16-32, 31-42-82 and the other academic accounts referred to and discussed at 31-136-31-158.

15. Constitution, s 8(2).

litigant can commence litigation against a state alleging a direct breach of one of the rights in the Constitution. The Constitution also provides that natural persons and juristic persons are bound by the Bill of Rights to the extent that it is applicable to them. Despite this provision, however, the actions of private persons or corporations, are, generally speaking, regulated by the common law and legislation. The Constitution is applied to these parties by making changes in the common law (and statute) so as to give effect to particular rights and to the 'spirit, purport and objects' of the Bill of Rights.¹⁶ The Courts are also enjoined to give effect to the Bill of Rights in their interpretation of statutes and the common law. In practice, this means that it is unlikely that litigants against a corporation will ground their action in a direct violation of a fundamental right: rather, litigants will use the common law to vindicate their rights. If the common law is insufficient for this purpose, then it can be challenged by individuals as requiring revision in light of the Constitution to enable them to realise their rights. The application of the Constitution to individuals and corporations remains in some sense 'indirect' and operates through the common law and statutes.

Application is the subject of thorny technical questions. But the debates around direct and indirect application may not directly affect victims, because either way the Constitution will assist them. The issue can have implications for the way in which a case is formulated and in relation to remedies, which are discussed in the next section. Apart from that, the focus on indirect application in relations between private parties is only important to victims in the area of *stare decisis* (rules of precedent).¹⁷ Under the current rules, a High Court may only break with binding apartheid-era precedent when the claim is for the *direct* application of a right. In matters of more 'indirect' application, the High Courts are bound to follow precedent.¹⁸ The focus on indirect application therefore means that victims will invariably have to go to the expense of bringing cases to the appellate courts - the Supreme Court of Appeal and the Constitutional Court - in order to ensure that law is reformed in line with the Constitution. This may well be one reason why constitutional reform of the common law has been extremely slow in some areas. To ensure a greater impact of the Constitution on the common law, these rules of *stare decisis* should be revisited.

16. Constitution, ss 8(3) and s 39(2)

17. Stu Woolman identifies the problem posed by *stare decisis* in this context in his 'Application' at 31-55-31-56. The other problems he identifies with the courts' approach to direct application are of a textual or doctrinal nature and are not relevant here.

18. The relevant cases are discussed in Stu Woolman and Danie Brand 'Is there a constitution in this courtroom?: Constitutional jurisdiction after *Afrox* and *Walters*' (2003) 18 *South African Public Law* 37; Woolman 'Application' at 31-95-31-100. See resistance from a High Court in *Kate v Member of the Executive Council, Department of Welfare, Eastern Cape* 2005 (1) SA 141 (E) at paras 24-28.

A related issue is the tendency of the courts to apply the Constitution narrowly and cautiously.¹⁹ There is usually a preference to conduct constitutional reform by making small incremental changes to established bodies of law. (The reliance on indirect application, rather than the potentially much more far-reaching direct application, is a case in point.) While good reasons can underlie judicial minimalism, South African courts may not give enough weight to its costs. The costs are small where the pre-constitutional law already provided for the interest that is at stake and only small adjustments are generally needed – for example, the law of defamation. But sometimes, the Constitution envisages a paradigm shift in the law – for example, eviction law, which was slanted in favour of the landlord under apartheid, but now strongly incorporates the interests of the evictee. If this paradigm shift is given effect to by statute, the courts' slow incrementalism again does not matter much. In areas such as administrative law, labour law, environmental law, and indeed, eviction law, statutes have made large changes, and so judicial caution does not block substantial enjoyment of the new right. But where neither of these factors is present – where large developments are needed to bring existing law into line with the Constitution, and the legislature has not intervened – slow, cautious, incrementalism may inhibit the realisation of the right. Thus, the effect of the Constitution on established areas of law such as contract law, or the rules of jurisdiction, remains limited. The same has been true in company law, where it remains unclear which constitutional rights bind corporations and the nature of the obligations that this might entail. The fact that the 2008 Companies Act does not engage directly with a corporation's constitutional liability means that this state of affairs is likely to persist. As will be seen, this has potentially serious consequences for victims. For now, it means that many obligations corporations might have in law remain *latent* in the system, and have yet to be expressly developed through legislation or the common law.

1.2.2 Application of the Constitution: Extra-Territorial Liability

Extra-territoriality of the Constitution has been considered almost entirely from the perspective of *state* responsibility. The Constitutional Court has used its one mention of corporations in this area to indicate that the considerations that apply in the state context are different to those that apply to corporations.²⁰ Nonetheless, the state findings offer some guidance to extra-territoriality in the private context.

19. On minimalism in South Africa, see especially Iain Currie 'Judicious Avoidance' (1999) 15 *South African Journal of Human Rights* 138; Christopher Roederer 'Judicious Engagement: Theory, Attitude and Community' (1999) 15 *SAJHR* 486 and Theunis Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106

20. *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at para 45

The law on extra-territorial jurisdiction in the state context is set out in *Kaunda's* case.²¹ *Kaunda* concerned South African citizens arrested in Zimbabwe for alleged mercenary conduct in plotting a coup in Equatorial Guinea. They claimed that their rights were violated by the conditions of their detention in Zimbabwe, and by their pending extradition to Equatorial Guinea where they were at serious risk of not receiving a fair trial and could face the death penalty. Since the state is required by s 7(2) of the Constitution to uphold their rights, they sought an order that it come to their assistance. The Constitutional Court held that persons lose the Constitution's protection when they leave South Africa. *Foreign* corporations committing abuses against South Africans overseas will not, therefore, be liable in terms of the Constitution. (They may be liable under certain South African statutes, considered below).²²

The more difficult question is whether *South African* corporations can be liable under the Constitution, for abuses of human rights committed overseas. It is submitted that they can be, as a close reading of *Kaunda* reveals. On the face of it, *Kaunda* finds that neither foreigners nor South Africans are entitled to the protection of the Bill of Rights when they leave South Africa.²³ This would imply that the Constitution has no extra-territorial application. However, the judgment places an important hedge on this finding, stating that it may not necessarily apply 'if the application of the law does not interfere with the sovereignty of other states.'²⁴ *Kaunda's* result followed because the relief the applicants sought amounted to asking the South African government to oblige the Zimbabwean government to comply with the South African Constitution. That would clearly violate sovereignty, so the Constitution could not be interpreted to have this effect. But the implication

21. Three other decisions do not add to the law. *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) found the extradition of a Kenyan terrorist suspect from South Africa to the United States without seeking an assurance that he would not be sentenced to death to violate the Constitution, and ordered a copy of the judgment to be served on the US court hearing the case. This might be seen as extra-territorial application, but *Kaunda* refuted this, holding that the basis for the decision was the fact that the violation – the unlawful extradition – had occurred in South Africa: see *Kaunda, ibid.*, at paras 46-50, and Woolman 'Application' at 31-121. Two other decisions apply *Kaunda* without adding to it: *Von Abo v President of the Republic of South Africa* 2009 (2) SA 562 (T) (South Africa had failed to consider rationally a request for diplomatic protection in relation to Zimbabwean farm invasions; subsequent judgment of the Constitutional Court dealt only with a jurisdictional point and did not address the merits: see *Von Abo v President of the Republic of South Africa* [2009] ZACC 15, judgment handed down 5 June 2009, as yet unreported); and *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) (South African government not obliged, and not under international law entitled, to exercise diplomatic protection in respect of alleged mining claim expropriation in Lesotho).

22. An exception also exists in the case of labour contracts entered into in South Africa but performed overseas, which are governed by South African law under conflict of law rules: see Christa Roodt 'Jurisdiction of the South African Labour Court: Employer Identity and Party Autonomy' 15 *South African Mercantile Law Journal* 135 (2003)

23. *Kaunda, op. cit.*, note 20 at paras 36-37, 41-42

24. *Kaunda, ibid.*, at para 44

is that extra-territorial application could be acceptable where it does not violate sovereignty.²⁵

Kaunda in no way rules out this possibility and in fact explicitly allows for it in relation to corporations. Chaskalson CJ wrote the following:

‘During argument hypothetical questions were raised relating to South African officials abroad, to South African companies doing business beyond our borders, to the government itself engaging in commercial ventures through state owned companies with bases in foreign countries, and to what the state’s obligations might be in such circumstances. There is a difference between an extraterritorial infringement of a constitutional right by an organ of state bound under section 8(1) of the Constitution, or by persons bound under section 8(2) of the Constitution, in circumstances which do not infringe the sovereignty of a foreign state, and an obligation on our government to take action in a foreign state that interferes directly or indirectly with the sovereignty of that state. Claims that fall in the former category raise problems with which it is not necessary to deal now. They may, however, be justiciable in our courts, and nothing in this judgment should be construed as excluding that possibility.’²⁶

The Constitution thus can sometimes apply to persons overseas. The *enforcement* of the Constitution against South African corporations acting overseas will still be subject to sovereignty considerations. But international law accepts that a country’s courts may exercise jurisdiction over foreign cases in certain circumstances, provided that another court is not already exercising jurisdiction.²⁷ *Kaunda* thus does not rule out the real possibility of constitutional liability for South African companies for their actions overseas. The position in *Kaunda* though is confusing and, whilst not a hindrance to such liability, unfortunately there is no statute as clear as the Alien Tort Claims Act in the United States clearly imposing liability for abuses by South African companies overseas. Statutory reform in this regard should be considered.

1.3 Company Law

South African corporations have separate legal personality, with assets and liabilities distinct from those of their shareholders. Companies also have perpetual

25. See also Bilchitz ‘Corporate Law and the Constitution: Towards binding human rights responsibilities for corporations’ 125 *South African Law Journal* 784 (2009).

26. *Kaunda*, *op. cit.*, note 20 at para 45.

27. A country may legitimately exercise jurisdiction over an incident that begins or ends in its territory, as was recently confirmed in South Africa in *S v Dersely* 1997 (2) SACR 253 (CK). A country may also exercise jurisdiction over its own nationals in respect of an act committed by them overseas (although note that an additional link between South Africa and the victim will be needed in terms of *domestic* rules of jurisdiction, on which see below). See Dugard, *op. cit.*, note 6 at 152-54, Ian Brownlie *Principles of Public International Law* 5 ed (Oxford University Press, Oxford and New York, 1998) at 289

succession, existing beyond the natural lives of their members, and the liability of members (exceptional cases apart) is limited to the extent of their investment in the company.²⁸ As stated, South Africa is undergoing a transition in company legislation, with the Companies Act 61 of 1973 due to be replaced by the Companies Act 71 of 2008, which will be implemented some time after 9 April 2010.²⁹ The 2008 Act makes a number of important changes to the framework of corporate liability and to remedies, most of which are discussed in Section 2. But two important issues are discussed here.

1.3.1 Fiduciary Duties and Directors' Liability Under Company Law

The fiduciary duties that a director owes to a company are currently regulated by the common law, and a director may be held personally liable for breaching them.³⁰ The 2008 Act contains a 'partial codification', incorporating the common law position without attempting to spell it out exhaustively.³¹ As before, a director may be held liable in delict for a breach of fiduciary duties. The standard of conduct is therefore ostensibly the same: a duty to act with reasonable care and skill in the best interests of the company.³² However, the need to interpret the new section offers the courts an opportunity to revisit the scope of fiduciary duties, and the question of the persons to whom they are owed and the interests that must be considered.

One possibility is presented by the fact that s 76(3)(a) of the 2008 Act provides for a duty to exercise the powers of a director 'for a proper purpose'. This phrase currently holds a specialised meaning, referring to cases where directors use their power to issue shares in order to retain control of the company, rather than to raise capital.³³ However, given that companies (and therefore their servants) bear horizontal duties under the Constitution, it could be purposively interpreted to prohibit the use of directorial powers contrary to the Bill of Rights. This reading is reinforced by the fact that two of the 'purposes' of the Act, set out in s 7, are to 'promote compliance with the Bill of Rights...', and to encourage 'high standards of corporate governance as appropriate given the significant role of enterprises within the social and economic life of the nation.'³⁴

28. Cilliers & Benade *Corporate Law 3 ed* (LexisNexis Butterworths, Durban, 2000) at 5-6

29. Section 225 of the 2008 Companies Act provides that the Act will come into force on a date to be specified by the President, which may not be within one year of the date on which the President assented to the Act. The President assented to the Act on 9 April 2009.

30. Cilliers & Benade, *op. cit.*, note 28 at 139

31. 2008 Companies Act, s 77(2)(a); Michele Havenga 'Regulating Directors Duties and South African Company Law Reform' (2005) 26 *Obiter* 609 at 619-20 and sources there cited.

32. 2008 Companies Act, s 76(3). For the current common law standard, see Cilliers & Benade, *op. cit.*, note 28 at 139ff.

33. Cilliers & Benade, *ibid.*, at 146-47

34. 2008 Companies Act, ss 7(a) and (b)(iii)

Another possibility for re-interpretation is the phrase ‘best interests of the company’.³⁵ This has been understood as a duty to act in the best interests of shareholders.³⁶ But ‘company’ in the Act is not defined with reference to shareholders alone, but as a juristic person created under the Act or previous legislation, and, as just noted, the purposes of the Act recognise that companies have significance beyond their shareholders. So there is some reason to look for a different interpretation. One could interpret ‘the company’ as a reference to a social institution, creating a duty to act in the interests of all stakeholders instead of just shareholders alone. A diverse range of interests would then have to be considered as part of exercising one’s fiduciary duties. Alternatively, one could retain the idea that a director is there to serve the interests of shareholders, but recognise that what is *really* in the shareholder’s interests is an enlightened policy that takes a longer-term view and considers the impact of the company’s activities on other stakeholders. It is not in the company’s interest to drive off ethical talent, or pollute the environment in which it must operate tomorrow, or attract bad publicity by breaching rights. The King III report on corporate governance clearly favours this second approach,³⁷ and there is a strong possibility that the courts will adopt it.³⁸

Enthusiasm for these possibilities should remain cautious. First, the Act’s wording implies that the drafters intended to incorporate the existing common law position intact, and although constitutional imperatives outweigh the drafter’s intentions, courts may be reluctant to re-interpret the law in the face of this wording.³⁹ Secondly, all these re-interpretations *complicate* fiduciary duties, increasing the people or the interests the director must try and serve.⁴⁰ They may therefore do little to outweigh the key danger, which is not that directors will ignore rights concerns, but that they will, if forced to choose, come down in favour of shareholders and will not be blamed for deciding this way. More inclusive fiduciary duties do not respond to the danger that victim’s interests will be recognised, but outweighed.⁴¹ Responding to this means imposing specific legal duties to respect certain interests. Whilst such duties could be implicitly interpreted into

35. The discussion that follows is importantly influenced by I Eser & JJ Du Plessis ‘The Stakeholder Debate and Directors’ Fiduciary Duties’ (2007) 19 *South African Mercantile Law Journal* 346 at 356-60, although this study, as will be seen below, does not share the authors’ conclusions.

36. Cilliers & Benade, *op. cit.*, note 28 at 148-49

37. The general approach of King III is to argue that it is companies’ interests to comply with a range of moral, ethical and social obligations, so there is ultimately a convergence of the interests of shareholders with those of other stakeholders – see King Committee on Governance *Draft Code of Governance Principles for South Africa* (Institute of Directors of Southern Africa, 25 February 2009)

38. Havenga (2005), *op. cit.*, note 31 at 617-18

39. Author’s interview with Miranda Feinstein, Director at South African law firm Edward Nathan Sonnebergs and member of the King Commission on Corporate Governance, 15 June 2009

40. It is also worth noting that commentators have disagreed diametrically over the scope of fiduciary duties for more than seventy years: see Eser & Du Plessis, *op. cit.*, note 35 at 347-51. This strongly indicates that a simple understanding of more expansive directorial duties just does not exist.

41. Tsepho Mongalo *Corporate Law and Governance* (Juta & Co, Cape Town, 2003) at 212

the current fiduciary duties, it would have been better for the 2008 Act explicitly to have spelt this out.⁴²

1.3.2 Veil Piercing and Abuse of Corporate Personality

In principle, a juristic person is an entity that has assets and liabilities separate to those of the persons who own it.⁴³ In veil-piercing cases, the court ignores that separate liability of the corporation, and treats its assets and liabilities as those of its members.⁴⁴ It is therefore an important basis on which to hold those who use a company to violate rights personally liable for their actions. Veil-piercing is usually only seen as justified, when its aim is to impose liability, in cases where the company is being used to perpetrate fraud or improper or unlawful conduct.⁴⁵ This implies that it will be appropriate to pierce the veil if members are using a corporation to evade constitutional obligations, or if a corporation is using a subsidiary to do this.

The 2008 Act makes provision for relief from the ‘unconscionable abuse of the juristic personality of the company as a separate entity’. A court may grant a declaration that, in respect of any right, obligation or liability of a company, member or other person, the company is deemed not to be a juristic person.⁴⁶ It therefore appears that, as with a director’s fiduciary duties, the 2008 Act has incorporated the existing common law doctrine into statute. In interpreting the new statutory provision, the courts have an opportunity to use it to hold shareholders personally responsible for human rights violations committed by the company in which they have invested. The prospect of this liability gives shareholders a real incentive to police the human rights record of directors and to adopt reforms; and it also encourages acceptance of the notion that the ‘best interests’ of the shareholders involve respect for rights.⁴⁷

42. Bilchitz, *op. cit.*, note 25 (2009) at 781-783, referring to a provision of this nature in the English Companies Act (2007)

43. *Salomon v Salomon* [1897] AC 22; see *Dadoo v Krugersdorp Municipal Council* 1920 AD 530

44. Joubert et al *The Law of South Africa, 2 ed (LexisNexis Butterworths, Durban, 2003)* (LAWSA), Vol. 4(1) at 40-41

45. It is only in these cases that the courts consider the need to impose personal liability to outweigh the policy considerations inherent in treating a legal relationship as other than it is usually held out to be: a company that usually has separate legal personality, but in veil-piercing cases this is temporarily ignored: see LAWSA, Vol 4(1) at secs. 41-42; see also Bilchitz (2009), *op. cit.*, note 25 at 786. It should also be noted that the courts will more readily pierce the veil where the applicant is a third party injured by the corporation, rather than a ‘insider’ who made a choice to deal with a separate legal entity: see LAWSA, Vol. 4(1), sec. 42; see further Oxford Pro Bono Publico *Obstacles to Justice and Redress for Victims of Corporate Rights Abuses* (3 November 2009) (Oxford) at 239

46. 2008 Companies Act, s 163(4)

47. It also gives members an incentive to include specifications in the memorandum of incorporation that one of the purposes of the company is to uphold the Bill of Rights, a reform proposed in the final section. This is because any acts contrary to the Bill of Rights will then be ultra vires the company. If shareholders are held liable for this abuse of corporate personality, they will therefore be able to recover damages from directors who perform or authorise these acts: Cilliers & Benade, *op. cit.*, note 28 at 144-45.

Of course, a difficult problem arises in deciding when juristic personality is being ‘abused’ in this context – that is, when a company is being ‘used’ to violate rights – but this is discussed elsewhere.⁴⁸ It is also unlikely that the courts, which treat veil-piercing as an exceptional remedy, will extend the new doctrine of abuse of corporate personality very far. However, it is submitted that this is not necessarily problematic, since the criminal law doctrines of accomplice liability and common purpose, which will be discussed below, provide an alternative basis for liability.

1.4 Criminal Liability

South African corporate criminal law is ripe for reform. Currently, a corporation may be held liable only where a natural person has been shown to have committed a crime. This crime is then imputed to the corporate body either in terms of the doctrine of vicarious liability, or under the Criminal Procedure Act.⁴⁹ The approach of imputing liability is contrary to victim’s interests in two respects. It is *over*-inclusive: it may unfairly lead a corporation to be liable even where, for example, the corporation took reasonable steps to prevent the offence, and so provides no incentive to take those steps.⁵⁰ It is also *under*-inclusive: it does not ground corporate criminal responsibility where it cannot be shown that an individual is criminally responsible. With complex corporate decision-making structures (and possible wilful blurring of lines of instruction), it may not be possible to treat a toxic spill as the ‘act’ of any one individual. Various models have been proposed that correspond more closely to how corporations actually function, including approaches that judge an organisation on its policies and institutional practices.

48. See in this regard International Commission of Jurists *Report of the Expert Legal Panel on Corporate Complicity in International Crimes* (September 2008); Bilchitz (2009), *op. cit.*, note 25 at 56-57.

49. The difference between the two comes down to the incorporation of the crime in statute. If the statutory phrasing is such that the legislature can be deemed to have intended that a corporation be vicariously liable for incidences of it, the company will be held liable under the statute if the servant who committed the crime was acting in the course and scope of his duties at the time. See Jonathan Burchell *Principles of Criminal Law 3 ed* (Juta & Co., Cape Town, 2005) at 555-59; CR Snyman *Criminal Law 5 ed* (LexisNexis, Durban, 2008) at 250-51. The link to the ‘purposes’ of the employee is recognised under the law of vicarious liability as applied in delict: see *K v Minister of Safety and Security* 2005 (5) SA 419 (CC) at para 44 and Oxford Pro Bono Publico, *op. cit.*, note 45 at 246-47. If the crime has not been incorporated in statute in this manner, section 332(1) of the Criminal Procedure Act Criminal Procedure Act 51 of 1977 can apply. It is broader: it can apply to any crime, extends to acts outside the servant’s duties if the servant was ‘furthering or endeavouring to further the interests’ of the corporate body, and extends to acts or omissions done by third parties on the instructions of or with the permission of the servant. See Burchell at 565-66, Snyman at 254, Survey Response, Laws of South Africa (Charles Abrahams) *Commerce, Crime and Conflict: A Study of Sixteen Jurisdictions*, Fafo AIS (2006) (FAFO Report) at 14-15; Louise Jordaan ‘New perspectives on the criminal liability of corporate bodies’ (2003) *Acta Juridica (Criminal Justice in a New Society: Essays in Honour of Solly Leeman)* 48 at 49-53

50. Burchell, *ibid.*, at 556, 557; Snyman, *ibid.*, at 250-51; Jordaan, *ibid.*, at 53, 67, 69-70 and sources there cited. There seems to be an exception where the criminal acts consist in the defrauding of the company by the directors: see FAFO, *ibid.*, at 19.

It is submitted that any model that tightens the link to corporate wrongdoing is to be welcomed.⁵¹

Directors used to be liable under s 332(5) of the Criminal Procedure Act for any criminal act of the corporation – a criminal act, in other words, of another director or servant attributable to the corporation – but this has been declared unconstitutional for violation of the presumption of innocence.⁵² A director will be therefore liable only where individual criminal responsibility is established, as a perpetrator, or on one of three other grounds.⁵³ Under the form of the doctrine of ‘common purpose based on agreement’, all parties are guilty of a crime if they plan to commit it, regardless of whether there is a particular causal link between each member and the crime. Thus if a board plans to bribe an official, but only one director actually performs the act, the whole board might be criminally liable.⁵⁴ If the parties reach the agreement, but do not actually commit the crime, they may be found guilty of the statutory crime of conspiracy, which carries the same penalty as the offence concerned.⁵⁵

A party may also be guilty as an accomplice. This arises where a person does not agree to commit a crime or join in its commitment, but nonetheless ‘knowingly affords the perpetrator...the opportunity, the means or the information which furthers the commission of the crime’.⁵⁶ Following the invalidation of s 332(5), this will be the principal basis for holding one director liable for the acts of another.⁵⁷ Directors of a parent company (and thus the company) can also be held liable as accomplices for the practices of a subsidiary company or a supplier. Accomplice liability joins the doctrines of veil-piercing and misuse of corporate personality, which were discussed above, as the key ways in which a corporation may be held liable for complicity in the acts of a subsidiary or supplier. Should the doctrine of corporate criminal liability be reformed, as noted, to provide for corporate liability in its own right, accomplice liability will also be crucial. That a company as a whole, in virtue of its way of doing business, knowingly affords the opportunity for a subsidiary or supplier to commit a crime may well be easier to show than that an individual director did this.

51. Burchell, *ibid.*, at 562-65; Jordaan, *ibid.*, at 53-65, 70-71 and sources there cited.

52. *S v Coetzee* 1997 (3) SA 527 (CC)

53. See the discussion of *Coetzee* in Burchell, *op. cit.*, note 49 at 567-68, Snyman, *op. cit.*, note 49 at 254-55.

54. Burchell, *ibid.*, at 574-97; Snyman, *ibid.*, at 263-72

55. Burchell, *ibid.*, at 652-55; Snyman, *ibid.*, at 294-97. They point out that one could be charged with conspiracy where the crime is successfully committed, but our courts have indicated that this is inappropriate (at 653 and 295, respectively).

56. Quoting from the classic statement in *S v Williams* 1980 (1) SA 60 (A) at 63, as translated by Burchell, *ibid.*, at 599.

57. *Coetzee* also mentions compulsory disclosure and reporting duties as an alternative means of enforcing corporate compliance – see at para 49.

1.5 Civil Liability and Statutory Exclusions

The commission of a delict (roughly equivalent to the notion of tort in other jurisdictions) may give rise to a claim for the compensation of damage caused by A to B, due to A's fault, where what A did is considered to be wrongful according to the standards of the community. The Constitution is now the starting point for determining these standards: a breach of constitutional rights and norms is *prima facie* legally reprehensible and therefore *prima facie* wrongful.⁵⁸ Because there has been little application of constitutional rights directly between private parties, as already discussed, the use of the delictual action in this way has become the most important basis for liability for a breach of constitutional rights.⁵⁹

In litigation against the state, the courts have shown a willingness to develop traditional doctrines of wrongfulness so as to permit the use of delict to vindicate breaches of constitutional rights.⁶⁰ A line of cases beginning with *Carmichele* and *Van Duivenboden* has recognised that, in light of the duties that the Constitution imposes on the state, an omission to fulfil these duties is wrongful in delict.⁶¹

These set important precedents for expansion into the corporate sphere, and this expansion will be a natural one in the law of delict. Wrongfulness has always been treated as a standard that should develop in line with the changing norms of the community, and a development of the standard to respond to the increasing impact that corporations have on society is therefore a natural one.⁶² The more specific tests that form part of the doctrine apply naturally to the corporate context: the more a corporation acts in areas regulated by statute or in situations that involve placing others at risk, or exerts authority over or claims to be

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58. On wrongfulness, see J Neethling et al *Law of Delict 5 ed* (LexisNexis Butterworths, Durban, 2007) at 31 and sources there cited. On the link to constitutional rights, see Neethling at 36-37. Note, however, that an action is not delictually wrongful just because it breaches the Bill of Rights: policy considerations may lead courts to conclude that a breach of the Constitution should not be remedied by a damages claim: see *Steenkamp NO v Provincial Tender Board of the Eastern Cape 2007 (3) SA 121 (CC)*, esp. at para. 37.
59. See further Currie & De Waal, *op. cit.*, note 11 at 316-17; Neethling, *ibid.*, at 321-24. It is not a perfect replacement: a successful delictual claim would require it to be demonstrated that a right was infringed intentionally or negligently, and that this caused harm, whereas a direct constitutional action simply means showing that a right is infringed. See further Neethling at 19-20.
60. See the cases under wrongfulness of omissions below.
61. *Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)*; *Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)*; *Van Eeden v Minister of Safety and Security 2003 (1) SA 389 (SCA)*, *Minister of Safety and Security v Hamilton 2004 (2) SA 216 (SCA)*. This is significant given the traditional judicial reluctance in this area: Neethling, *op. cit.*, note 58 51-52, 68 and sources there cited.
62. The much-quoted statement on this point is that of former Chief Justice Michael Corbett delivering the Third Oliver Schreiner Memorial Lecture 'Aspects of the Role of Policy in the Evolution of our Common Law', reproduced in (1987) 104 *South African Law Journal* 52 at 59: "...[in judging whether conduct is wrongful] the law must keep step with the attitudes of society and consider whether on the particular facts society would require the imposition of liability." See also *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 (4) SA 376 (T)* at 377; Neethling, *op. cit.*, note 58 at 43-45 and sources there cited; and the recognition of the increasing blurring of 'public' and 'private' in *Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)* at para. 57.

looking after people, the more robust its legal duties will be.⁶³ This potential, however, remains largely unrealised, except in areas such as defamation actions by individuals against newspapers that were already well-developed before the Constitution.⁶⁴

One of the isolated exceptions to this trend occurs in the important doctrine of vicarious liability. In terms of this doctrine, a company may be held vicariously liable for the acts of those who act on its behalf, either as its employees or, as with directors, as its agents. The company will be liable if the act is committed by its employee or agent in the course and scope of her employment or authority.⁶⁵ Thus if an employee commits a wrong in the course of doing her job, the company will be liable even if the wrong had been specifically forbidden, because it is an incident of her doing the employer's work.⁶⁶ Vicarious liability, like corporate criminal liability, is strict liability: it is not necessary to show that the company had any intention (whether direct or through negligence) to commit a wrongful act.⁶⁷

Traditionally, the doctrine was based on the idea that the company, by carrying out its activities in the society through its servants, was introducing a risk for which it should bear the costs. Post-constitutionally, it is becoming a much more nuanced enquiry, in both the corporate and state contexts. It has been stated that courts will decide whether the case before it is of the kind in which in principle would render the employer liable bearing in mind the values the Constitution seeks to promote.⁶⁸ This development is welcome to victims. Vicarious liability is ceasing to be a rather arbitrary factual enquiry of whether the servant was doing the employer's tasks at the time.⁶⁹ It is developing into a principled enquiry, which means that if the employer takes reasonable steps to try and guard against infringements of rights caused by its employees to one another or to the public,

63. On the various sub-doctrines that are part of the wrongfulness enquiry, see Neethling, *ibid.*, at 45-70. These principles already, of course, ground a measure of corporate liability: see for example the seminal case of *Silva's Fishing Corporation (Pty) Ltd v Maweza* 1957 (2) SA 256 (A).

64. The explanations for this state of affairs are discussed below.

65. Neethling, *op. cit.*, note 58 at 338-41, 343

66. Neethling, *ibid.*, at 342-43

67. Neethling, *ibid.*, at 338

68. *K v Minister of Safety and Security* at para. 23; *Grobler v Naspers Bpk* 2004 (4) SA 220 (T) at 296F-297D. *Grobler* was upheld on appeal on other grounds without the finding of vicarious liability being considered: *Media 24 v Grobler* [2004] ZASCA 64, unreported judgment handed down 1 June 2004, see at para. 63

69. Neethling, *op. cit.*, note 58 at 330, 338-39; *Ess Kay Electronics Pte Ltd v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) at para 8-10, and authorities cited in those sources. The facts of *Ess Kay* illustrate the point (although the court did have mind to policy factors in its judgment – see at para. 18). A banker had stolen bank draft forms and therefore facilitated an international fraud. The South Africa bank was held not to be vicariously liable, however, in part because the victim of the fraud had been told he could rely on the drafts by his own banker. This implies that the outcome would have been different if the South African bank's employees been the one to tell the victim that the drafts were good, and therefore committed a wrong while acting in the scope of his authority. So fickle an enquiry does not guarantee to victims that corporations will be held liable where constitutional rights have been breached, nor will it necessarily reward efforts by corporations to protect rights.

that will impact upon its liability. This punishes companies with corporate cultures that are careless of rights, and gives employers an incentive to take steps to curb rights violations by its servants by training and other means in a way that the historical approach does not.

It should be noted that claims arising between an employer and an employee are usually dealt with in terms of specific worker's compensation legislation. The statutes provide for compensation for workplace injuries and diseases to be paid from a fund paid for by employer contributions.⁷⁰ This replaces the employee's delictual remedy, which is excluded.⁷¹ The constitutionality of the practice has been upheld, but the amount of the compensation under mining legislation can be very low.⁷²

1.6 Liability Under Other Bodies of Law

Corporations may also attract liability under several specialist bodies of the law. Here, labour law, environmental law, and mining law are considered.

1.6.1 Competition Law

As is discussed further in the next section, competition offences (such as price-fixing in the food and health industries) can have serious implications for rights. Under the current Competition Act, firms may be fined up to 10 per cent of their annual turnover for anti-competitive practices; it is also an offence not to comply with the orders of the Competition Commission or Tribunal or pervert an enquiry.⁷³ Under the 2008 Competition Amendment Bill, a director may be held personally liable for 'consenting or permitting' a firm to engage in practices prohibited under competition law. Offences may be punished with a fine of R500 000 and/or ten years in a prison, and the company concerned may not indirectly or directly cover or defray this penalty.⁷⁴ This creates a powerful incentive for directors to be wary of anti-competitive behaviour. The Bill awaits presidential approval and is not yet law.

70. See Compensation for Occupational Injuries and Diseases Act 30 of 1993; Occupational Diseases in Mines and Works Act 78 of 1973.

71. Compensation for Occupational Injuries and Diseases Act, s 35(1). There is no corresponding provision in the Occupational Diseases in Mines and Works Act, but in a potentially far-reaching decision, the courts have read it in: see *Thembekile v AngloGold Ashanti Ltd*, Southern Gauteng High Court, case number WLD 06/22312, 26 June 2008, unreported.

72. *Jooste v Score Supermarkets (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC). On compensation levels, see the comments of Richard Spoor, attorney for the plaintiff in the *Thembekile* case, reported in Christy van der Merwe 'Precedent-setting silicosis claim under way in Johannesburg' *Mining Weekly* 11 February 2008; Brindaveni Naidoo 'Human rights lawyer blasts compensation system for asbestos disease sufferers' *Mining Weekly* 31 October 2008.

73. Competition Act 89 of 1998, ss 61(2), 73(1) and (2)

74. Competition Amendment Bill [B31D – 2008], ss 12-13, inserting a new ss 73A and 74(a).

1.6.2 Environmental Law

The Constitution protects an environmental right in s 24. It provides for a right to “an environment” that is not harmful to “health of well-being”, and to have the environment protected “for the benefit of present and future generations”. There is an obligation, which by its nature is binding on the state only, to adopt reasonable legislative and other measures to prevent pollution, promote conservation, and “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.⁷⁵ Pursuant to these obligations, the National Environmental Management Act (NEMA),⁷⁶ together with a range of statutes focused at particular areas such as air and water pollution, have recently been enacted. NEMA also contains a set of ‘founding principles’, including versions of the core international environmental law principles,⁷⁷ as well as calls to provide for the involvement of the ‘vulnerable and disadvantaged’ in environmental governance,⁷⁸ to respect the right of workers to refuse work harmful to their health and to be informed in this regard,⁷⁹ and to recognise that the environment is held in public trust for all.⁸⁰ The principles bind organs of state only, but they apply indirectly to corporations since they guide the implementation and interpretation of all environmental law.⁸¹

Environmental liability, as a result, is often a complicated question to which more than one statute may apply. But the basic principle, set out in s 28(1) of NEMA, is that a person causing pollution has a duty to take reasonable measures to prevent it or, if it is statutorily permitted and cannot be reasonably avoided, to minimise and rectify the environmental damage. An amendment expressly provides that this obligation applies to environmental damage caused prior to the commencement of NEMA.⁸² NEMA also contains extensive obligations relating to the handling of environmental emergencies, which include obligations to report on and initiate clean-up procedures, and to contain and minimise the effects of the emergency.⁸³

This statutory liability is a matter for state enforcement, a fact with some implications for the remedies available to private individuals which are discussed in the

75. Constitution, s 24

76. National Environmental Management Act 107 of 1998

77. ‘Polluter pays’: NEMA, s 2(4)(p); Sustainable development: s 2(3)(a); the precautionary principle: s 2(4)(a)(vii); the preventative principle: s 2(4)(a)(ii). See the discussion in Jan Glazewski *Environmental Law in South Africa 2 ed* (LexisNexis Butterworths, Durban, 2005) at 12-20 and cases there cited, especially *Fuel Retailers Association v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (10) BCLR 1059 (CC)

78. NEMA, s 2(4)(f)

79. NEMA, s 2(4)(j)

80. NEMA, s 2(4)(o)

81. NEMA, s 2(1); esp. ss 2(1)(a) and (e)

82. NEMA, s 28(1A)

83. NEMA, s 30, esp. s 30(4)

next section. Environmental inspectors have the power to order compliance with environmental legislation where they find a breach, and it is an offence not to obey a compliance notice.⁸⁴ If a corporation does not act and an organ of state must remedy the damage, the costs of doing so may be recovered from the corporation concerned.⁸⁵ A director may be held liable together with the firm under NEMA where ‘the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence.’⁸⁶ Managers and employees whose failure to perform their tasks leads to breaches may also be held liable. A corporation is liable for such actions on the part of its servants where it fails to take ‘all reasonable steps’ to prevent the act in question.⁸⁷

1.6.3 Labour Law

South African labour law is a large body of law and has become increasingly sophisticated. Section 23 of the Constitution protects the right of ‘everyone’ to fair labour practices. Several statutes and numerous other instruments give effect to these rights.⁸⁸ Although individual labour contracts may alter some of the terms imposed by these instruments, the power of the employer is recognised in that the most important protections can only be altered by collective agreement, or cannot be varied at all.⁸⁹

Workplace safety is regulated by the Occupation Health and Safety Act 85 of 1993, except in the case of mining industries, which have their own statutes.⁹⁰ The employer has a basic duty to provide safe and healthy working conditions.⁹¹ (Note that mining has its own statutory regime, considered below.) Labour law protects the right to equality contained in s 9 of the Constitution by opposing workplace discrimination. In terms of the Labour Relations Act, a dismissal is automatically unfair (and therefore unlawful) if the reason for the dismissal relates to pregnancy, one of the grounds listed in s 9(3) of the Constitution, which include race and gender, or any other ground that impugns the dignity of the person concerned.⁹²

84. NEMA, s 31N(1)

85. NEMA, ss 34(1)-(2) read with Schedule 3

86. NEMA, s 34(7)

87. Which the Act provides for: NEMA, s 34(5)

88. There are regulations issued under these statutes, ministerial sectoral determinations relating to matters such as the minimum wage in various industries, collective agreements concluded in bargaining councils or more informally, and codes of good practice issued by the Minister, which tend to have something approaching statutory force in practice. John Grogan *Workplace Law 9 ed* (Juta & Co, Cape Town, 2007) at 11-13.

89. Grogan, *ibid.*, at 42-43

90. Minerals Act 50 of 1991; Mines and Works Act 27 of 1956

91. Grogan, *op. cit.*, note 88 at 63

92. Labour Relations Act 56 of 1995 (LRA), ss 187(1)(e)-(f); see also Du Toit et al *Labour Relations Law: A Comprehensive Guide 5 ed* (LexisNexis Butterworths, Durban, 2006) at LRA8-28 (6) – LRA8-28(11). The

Discrimination more generally is prohibited by the Employment Equity Act, which requires employers to ‘promote equal opportunity in the workplace’ and prohibits discrimination on the basis of the grounds listed in s 9(3), pregnancy, or HIV-status.⁹³

Labour law also protects children’s rights. Children have a right to be protected from exploitative labour practices.⁹⁴ The Basic Conditions of Employment Act 75 of 1997 makes it a criminal offence to employ a child under the age of 15 years.⁹⁵ A person between the age of 15 and 18 may not be employed in work that is inappropriate or that threatens their well-being, education or development, in accordance with a child’s constitutional right to this effect.⁹⁶ The limitation of working hours and annual, maternity and family responsibility leave are also regulated. These regulations protect children indirectly and serve the general public goal of good childcare.⁹⁷

1.6.4 Mining Law

There have been important recent amendments to the Mineral and Petroleum Resources Development Act.⁹⁸ Under the amended Act, any holder of a mining right or owner of mining works, whenever it existed and even if it has ceased to exist, remains liable for past and future environmental damage until the state issues a closure certificate in respect of that right or mine.⁹⁹ The effect is that mining companies are fully and retrospectively liable for the effects of mining pollution. In terms of mine safety legislation, mine operators also have an ongoing duty to take steps to guard against loss of life, injury or ill-health arising from a disused mine. Again, this persists until the state issues a clearance certificate.¹⁰⁰

reference to ‘any other arbitrary ground’ in s 187(1)(f) is interpreted according to the constitutional equality test, namely whether it impacts on the dignity of the person concerned – see *Harksen v Lane NO* 1998 (1) SA 300 (CC) at paras. 50-51 and Grogan, *op. cit.*, note 88 at 145-48. On dismissals related to pregnancy see further LRA, s 186(1)(c)(i) and Grogan at 113-14.

93. Employment Equity Act 55 of 1998, ss 5, 6(1); Du Toit et al *Labour Relations Law: A Comprehensive Guide 5 ed*; see further Grogan, *ibid.*, Ch 15
94. Constitution, s 28(1)(e)
95. Basic Conditions of Employment Act 75 of 1997 (BCEA), s 43(1)(a) read with s 43(3). The Act also provides – s 43(1)(b) – that a child under the compulsory schooling age may not be employed, but this is currently also 15 years: see South African Schools Act 84 of 1996, s 31(1).
96. Constitution, s 28(1)(f); BCEA 43(2). A ‘child’ is generally recognised to be a person under the age of 18 years – see Constitution, s 28(3) and *Geldenhuis v National Director of Public Prosecutions* 2009 (2) SA 310 (CC). Thus for example no person under the age of 18 years may work underground in a mine – Mine Health and Safety Act 29 of 1996, s 85(1) and (2).
97. *De Beer v SA Export Connection CC t/a Global Paws* [2008] 1 BLLR 36 (LC)
98. The Mineral and Petroleum Resources Development Amendment Act 49 of 2008 was promulgated in 17 April 2009.
99. Mineral and Petroleum Resources Development Act 28 of 2002, s 43
100. Mine Health and Safety Act, s 2(2)

Both duties are significant in a country where, in places, toxic mine waste remains on the surface.¹⁰¹

An employer is obligated to ensure safe working conditions in its mines.¹⁰² The person responsible for the overall business operations of the employer is obliged to ensure that reasonable steps are taken in this regard.¹⁰³ In a far-reaching development, employers, managers and the person responsible for the overall business operations may be held criminally liable for a failure to take all reasonable steps to comply with the Act that leads to the death or serious injury or illness of any person.¹⁰⁴

101. See for example John Pilger 'Apartheid's Legacy' *Mail & Guardian* 28 January 2009

102. Mine Health and Safety Act, s 2(1); see also ss 5-7

103. Mine Health and Safety Act, s 2A(1)

104. Mine Health and Safety Act, s 86A. The penalties for a breach of s 86A are withdrawal of permit, or a fine of R3-million and/or imprisonment for up to five years – see s 92(6).

2. Legal Remedies for Corporate Human Rights Abuses

2.1 The Constitution and Remedies

Under the Constitution, a court hearing a rights matter is obliged to declare any unconstitutional law or conduct invalid, and is empowered to grant ‘appropriate relief’ and to ‘make any order that is just and equitable’.¹⁰⁵ The Constitutional Court has held that courts bear an obligation to exercise the remedial power creatively where necessary to ensure that rights are vindicated and the Constitution is upheld.¹⁰⁶ This principle underpins the discussion of the whole section on remedies.

The possibilities offered by specialised areas of the law are considered below. But in general constitutional practice, a wide range of remedies are used, including declaratory orders, severance from an offending statute, mandatory and structural interdicts, supervisory jurisdiction and an obligation for parties to negotiate relief themselves under court auspices.¹⁰⁷

There are some general concerns for victims and their representatives in the area of remedies. The first is that a case framed as a public interest matter may lead the court to grant the remedy in which the public has an interest – and the public’s interest is not necessarily aligned with that of the victim. It may be felt that the public interest is not served by sizeable money damages,¹⁰⁸ or that it is better served by a lengthy consultative litigation that results in better law rather than one that achieves speedy relief for victims.¹⁰⁹ If so, victims may not get effective relief.

105. Constitution, ss 38 and 172(1)

106. *Fose* at para. 38

107. See Michael Bishop ‘Remedies’ in Woolman et al *Constitutional Law of South Africa* [2 Ed Original Service 06-08] at 9-85 – 9-199; Currie & De Waal, Ch. 8. The consultation remedy was utilised in the recent case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC), and also in the ultimately withdrawn application in *Mamba v Minister of Social Development, CCT 65/08*.

108. Compare *Fose* (constitutional damages inappropriate where other remedies, including delict, existed) and *Steenkamp* (delictual damages inappropriate for losses due to administrative irregularities that led to a tender award being overturned; better relief in contract or by correcting the administrative action) with *President of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) (damages awarded where no other way to vindicate the breach of rights; facts of the case are discussed). *Steenkamp* is discussed further below.

109. A good illustration is *Fraser v Children’s Court, Pretoria North* 1997 (2) SA 261 (CC). Mr Fraser sought to prevent his natural child being adopted without his consent, and successfully challenged the statute that permitted this. However, the court held that it was for the legislature to devise a new regulatory regime. So in the interests of upholding the system of governance, the court suspended its order of invalidity to allow the legislature time to do so. The old law therefore remained temporarily in force and Mr Fraser’s child was adopted, without his consent, in the meantime. See the discussion of this and other related cases in Michael Bishop ‘Remedies’ at 9-11-9-15.

These dangers can be alleviated if lawyers and judges are sensitive to them. In many cases where the interests of the public and the victim diverge, both can be accommodated. If the effect of an order must be suspended in order to permit a legislature to rectify a problem, interim relief can be ordered to safeguard the victim's rights while this process occurs. In several cases, the court has issued temporary guidance for the application of invalidated legislation by officials, or read words in, to mitigate unconstitutional effects before the legislature acts.¹¹⁰ In *Bhe*, the Court had invalidated certain apartheid legislative provisions and customary law rules regulating the administration of the estates of black South Africans, and declined to leave these rules in place by suspending the order.¹¹¹ It recognised that the resultant gap in the law could have serious implications for the rights of vulnerable surviving spouses and children.¹¹² The court therefore ruled that another statute, which had governed white succession under apartheid, would apply pending new legislation, with appropriate alterations to provide for issues such as polygamous marriages.¹¹³ This very extensive order indicates a willingness to order effective interim relief.

Another aspect of this problem is that a claim framed in the 'private law' may not be adequately vindicated by traditional 'private law' remedies. For example, it is accepted that constitutional claims against the state can be vindicated by structural and supervisory interdicts, and similarly creative relief. But, as has been noted, litigation against corporations or between private individuals is likely to draw on the Constitution *indirectly*, via areas of the 'private' law such as of delict. Remedies here are traditionally much more limited than those of public law. These remedies may not always provide effective relief. Thus, a payment of damages to individuals who can prove serious harm from a chemical spill does not clean up the effects of the spill.

It could be possible for litigants to bring claims in terms of both kinds of law: proving a delict to obtain individual relief, and a direct constitutional violation to obtain public relief. But this expands the complexities and costs of litigation, and is also dependent on the courts changing tack and being more willing to apply the Constitution directly in cases between non-state actors. It is submitted that the better approach is to expand the remedies awarded in traditional branches of law. If a breach of any branch of law is found that has implications for constitutional rights, the Constitution clearly demands that the court make the order that is appropriate, just and equitable. Therefore, non-traditional remedies should be

110. Bishop, *ibid.*, at 9-123-9-126

111. *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) at paras 73, 97, 108; point 5 of the order made in para 136.

112. *Bhe* at paras 107-08

113. *Bhe* at paras 113-25

ordered, in ‘private’ law cases where the Constitution is applied indirectly, if that is what is necessary to vindicate the right in question effectively.

However, there is limited evidence that this expansion is occurring. This study found no examples in the law of delict. A recent decision in contract law, *Mpange v Sithole*, concerned an application by tenants to have a landlord improve the unhygienic condition of their shelter.¹¹⁴ The usual approach is for tenants to carry out the repairs themselves and then claim the cost back from the tenant. But here the tenants did not have the funds to do this. The High Court ultimately awarded a reduction in rent to remedy the situation, and held that it would also have been acceptable to order a landlord to improve the condition of rooms in a context such as this, as an instance of the remedy of specific performance. This focus on the kind of relief that will actually remedy the situation is an important precedent. Analogously, for example, delictual damages might be payable into a fund for remedying environmental damage, or a company might be ordered to rehabilitate the site as part of its duty to compensate for harm.

2.2 Specialised Remedies in Other Branches of the Law

2.2.1 Administrative Law

Corporations may be subject to administrative law if the power they exercise is a public one.¹¹⁵ This happens most typically when a state function or state-owned company is privatised. It is not fully clear when a body or function will be treated as ‘public’. However, the extent to which a private entity is controlled by the state or determines regulations or makes policy decisions that bind the public has been treated as important to the determination.¹¹⁶ This approach has tended to mean that juristic persons established by the state for regulatory purposes are treated as ‘public’ entities; on the other hand, private companies that merely perform important public functions, such as the provision of healthcare, do not appear to be ‘public’ in terms of this definition. Where ‘public’ functions like these are privatised or already conducted by private companies, remedies will currently have to be sought in other bodies of law (often in specific legislation). To the extent that a corporation is treated as ‘public’ in this way, its decisions will be subject to review for administrative fairness and can be invalidated if fair procedure has not been followed. Remedies can also include the court substituting its decision

114. *Mpange v Sithole* 2007 (6) SA 578 (W), referred to by Bishop, *op. cit.*, note 109 at 9-175-9-176

115. An ‘organ of state’ is bound by the Bill of Rights - s 8(1) - which includes the right to just administrative action - s 33. An ‘organ of state’ includes ‘private’ entities that exercise powers or functions under the Constitution, or public powers or functions in terms of legislation - s 239.

116. See further the discussion in Cora Hoexter *Administrative Law in South Africa* (Juta & Co, Cape Town, 2007) at 147-59 and sources there cited.

for that of the decision-maker and awards of compensation, but these are very exceptional orders.¹¹⁷

Administrative law is also important where the state approves a corporate project or grants a corporation a licence to carry out certain activities. The Promotion of Administrative Justice Act requires the state to grant a reasonable opportunity to make representations to an individual whose rights are affected by a decision, or to the public, if the rights of the public as a whole are affected.¹¹⁸ This offers a ‘pre-emptive remedy’ by permitting persons potentially affected by corporate activity an opportunity to raise concerns and require that their interests be properly considered.¹¹⁹

2.2.2 Company Law

The 2008 Companies Act will substantially re-design and expand the state mechanisms for regulating companies. It will create a Companies Commission, which has, *inter alia*, information-gathering, educational, and enforcement tasks;¹²⁰ and a Companies Tribunal for the resolution of disputes arising under the Act.¹²¹ Unlike the present structures, the independence of both bodies is strongly emphasized.¹²² Most importantly, the Commission is permitted, at its discretion, to commence court proceedings on behalf of any person in respect of a complaint filed with it, if the complainant so requests.¹²³ If used appropriately, this will permit enforcement of provisions of the Act (such as the director’s duties), and use of

117. The Promotion of Administrative Justice Act 3 of 2000 confirms the reviewing court’s constitutional power to make ‘any order that is just and equitable’ – s 8(1) – but confines substitution and compensation to ‘exceptional cases’ – s 8(1)(c)(ii). See further *Steenkamp* at paras 29-30 and sources there cited.

118. PAJA, ss 3 and 4. The same applies, according to s 3, if the decision affects a person’s legitimate expectations, at odds with the definitions section of the Act which defines a decision as something affecting only ‘rights’, but this is a side issue for present purposes. See further Hoexter at 358-59

119. The debate on just how far this obligation extends continues, given the competing danger of imposing ‘obligations upon government which will inhibit its ability to make and implement policy effectively’ – per *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) at para 101; *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para 41. Compare *Earthlife Africa (Cape Town) v Director-General, Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C), esp. at para 48 (providing for continuing and extensive public participation in a decision to build a new nuclear power station) and *Muckleneuk/Lukasrand Property Owners and Residents Association v The Member of the Executive Council: Department of Agriculture, Conservation and Environment, Gauteng Provincial Government* [2007] 1 All SA 1265 (T), esp. at paras 39-42 (providing for a more restricted opportunity to make representations concerning a decision as to the route of a new high-speed train).

120. 2008 Companies Act, ss 185(1), 186(1), 187(2)

121. 2008 Companies Act, s 195(1)

122. 2008 Companies Act, ss 185(2)(b) and (c), 185(3) (Commission); ss 193(1)(b) and (d), 193(2) (Tribunal). The relationship to government envisaged appears to be similar to that of the Electoral Commission and other Chapter 9 bodies – compare ss 181(2) and (3) and the judgment of Langa DP in *New National Party of South Africa v Government of the Republic of South Africa* 1999 (2) SA 191 (CC) – save, of course, that it is not constitutionally entrenched.

123. 2008 Companies Act, s 157(2); see also s 165(16) respecting derivative actions, discussed below. This is consistent with the broad approach to standing in rights matters, discussed below.

the derivative action and delinquency action (discussed below), even where complainants lack resources.

Perhaps the most important of the developments contained in the 2008 Companies Act is the changes to the derivative action.¹²⁴ The derivative action permits persons to compel a company to take legal action in respect of a legal wrong done to it, where the people who have done the legal wrong control the company. Here, it is chiefly important because the obligations of a director, including fiduciary duties, are often owed to the company. If a director breaches these obligations – which breach, as discussed above, can involve harm to victims – but the other directors and/or majority shareholders choose not to bring a case against that director, then the duty is not enforced. The derivative action permits others to step in and enforce the duty.

Under the current 1973 Act, this protection remains theoretical. The common law derivative action based on *Foss v Harbottle* may never have been used,¹²⁵ while that contained in the 1973 Act is of narrow application.¹²⁶ The most plausible explanations for this disuse are three: the narrow scope of the actions, the fact that the applicant has to obtain the evidence on which to launch the action from the company (i.e. from those in control of the company against whom it is bringing the action); and the fact that the litigant bringing the action must assume the risk. If the action is successful, the damages or other benefit will accrue to the company, and the litigant may not even recover all her costs. If it fails, the litigant is usually responsible for all the costs.¹²⁷ The 2008 Companies Act will replace these actions with a new one that is sensitive to these concerns. First, while only shareholders can bring the current actions, the 2008 Act will permit a derivative action to be brought by a shareholder, a director, a trade union or other representative of employees, or by any other person where a court rules that it is ‘necessary or expedient to do so to protect a legal right of that other person’.¹²⁸ Second, there are regulated steps a company must take in response to an application to bring a derivative action, including appointing an independent person to investigate the claim.¹²⁹ And third, the court now has the discretion to order that any of the

124. The discussion that follows is influenced in a number of respects by the author’s interview with Miranda Feinstein

125. The seven authors of Cilliers & Benade, *op. cit.*, . note 28 at 305 state: ‘We are not aware of any instances where a derivative action connected with the rule in *Foss v Harbottle* was brought, though cognisance has frequently been taken of the existence of such a rule.’

126. 1973 Companies Act, s 266; see Cilliers & Benade, *ibid.*, at 307

127. Under the common law action, the applicant bears all the risk: see Cilliers & Benade, *ibid.*, at 305-06. Under the statutory action, the applicant will only have to provide the resources upfront if it appears to the Court that there is reason to believe the applicant will not be able to bear the costs if unsuccessful, in which case security may be required – 1973 Companies Act, s 268. But, as this implies, the applicant will still ultimately be liable for the costs if the action is unsuccessful.

128. 2008 Companies Act, s 165(2)

129. 2008 Companies Act, ss 3 and 4

parties or the company shall bear the costs of the litigation, so those bringing a derivative action to defend rights may well not carry the risk.¹³⁰

If the derivative action will indeed be opened up, what is the significance for victims? The action is not primarily aimed at protecting human rights. It exists to protect the legal interests of the *company*, and the 2008 Act implies that the action is chiefly aimed at liability between the company and its directors in cases of bad faith or a similar breach by directors.¹³¹ However, there is scope for its use to protect rights; and the comments made about the use of a director's fiduciary duties to act in the best interests of the company for this purpose apply here too. If the company has clear, enforceable duties to respect victims' rights, then it will clearly not be in the interests of the company to violate those rights. It is only if this is so that a derivative action to protect the *company's* interests will become a tool to protect *victim's* interests as well. If this development occurs, the derivative action can be of great importance.

Analogous changes have been made to the provision for disqualification of a director, a mechanism permitting a court to order that a person is temporarily or permanently unfit to be a director. The current disqualification remedy is available only to members, creditors and certain commercial authorities;¹³² the clear intention is that a director may only be disqualified for offences that serve to show she will not be a reliable custodian of shareholders' investments;¹³³ and the remedy is little or never used.¹³⁴ Under the 2008 Act, the application to declare a director 'delinquent' may be brought (depending on the circumstances) by a company, shareholder, director, a trade union or other representative of the company's employees, by the Commission or the Panel, or by an organ of state.¹³⁵ The offences which may ground disqualification are greatly expanded, and now include repeated failure to comply with legislative obligations or statutory compliance notices¹³⁶ and actions "in a manner materially inconsistent with the duties of a director".¹³⁷ (The application of this latter section to protect human rights once again requires the recognition that the duties of the director include duties

130. 2008 Companies Act, ss 9-11. The issue of cost is key to the current under-use of the remedy: interview with Miranda Feinstein; comments of attorney Robert Wilson quoted in Sancia Temkin 'Directors who fail in fiduciary duties "face damages risk"' *Business Day* 3 April 2009.

131. The derivative action exists 'to protect the legal interests of the Company' – s 165(2); may only be brought in the company's name if it is a matter of 'material importance' to the company which it is in the best interests of the company to be brought – s 165(5)(b); and there are rebuttable presumptions that an action is *not* in the best interests of the company if, *inter alia*, the action is between the company and an outsider, and if the company's directors have acted in good faith – s 165(7) read with s 165(8).

132. 1973 Companies Act, s 219(2)(a)

133. 1973 Companies Act, s 219(1)(a) – (d); the offences listed all relate to fraud and specialised offences in the company law context.

134. Cilliers & Benade, *op. cit.*, note 28 record at 126 that there is no reported use of the section.

135. 2008 Companies Act, s 162(2)-(4).

136. 2008 Companies Act, s 162(5)(d)-(f)

137. 2008 Companies Act, s 162(7)(a)(ii)

to protect rights). Like the derivative action, the delinquency remedy is a potentially powerful tool to combat failures to respect rights. The penalties are severe: delinquency on any of these grounds prohibits a person from being a director for seven years, or longer if the court sees fit.¹³⁸

2.2.3 Competition Law

The Competition Commission and Tribunal have the potential to serve as a vital check against structural rights violations by corporations. Findings of anti-competitive behaviour in the bread and the milk industries have direct implications for the costs of basic foodstuffs and hence the rights of all, especially the poor.¹³⁹ The same is true of penalties imposed on pharmaceutical companies for price collusion that led the cash-strapped state system to pay 10%-15% more for IV fluids.¹⁴⁰ There are ongoing investigations into several parts of the food industry which has been identified as a priority area, as well as supporting industries such as fuel and transport that affect food and other costs and so may impact on socio-economic rights.¹⁴¹ It has also been suggested that the Commission could review the rights implications of proposed mergers (which it already evaluates),¹⁴² although interview research for this report suggested this may exceed the Commission's mandate. The Commission also has wide powers to interdict or undo anti-competitive behaviour, and may issue interim relief in certain circumstances to prevent 'serious, irreparable harm'.¹⁴³ Competition law may also provide a basis for backward-looking relief: finding of anti-competitive behaviour can ground a delictual claim for damages.¹⁴⁴ Any person may lodge a complaint with the Commission,

138. 2008 Companies Act, s 162(6)(b). Sections 162(11) and (12) permit a court the discretion to lift the declaration of delinquency on application after three years.

139. See esp. 'Tiger Brands admits to participation in bread and milling cartels and settles with Competition Commission', 12 November 2007, available at [www.compcom.co.za/resources/Media Releases/Media Releases 2007/PR08 2007.pdf](http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202007/PR08%202007.pdf); 'Competition Commission settles with Foodcorp', 5 January 2009, available at [www.compcom.co.za/resources/Media Releases/Media Releases 2009/PR01 2009.pdf](http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202009/PR01%202009.pdf); 'Competition Commission settles with milk cartel participant', 16 January 2009, available at [www.compcom.co.za/resources/Media Releases/Media Releases 2009/PR03 2009.pdf](http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202009/PR03%202009.pdf).

140. 'Adcock Ingram Critical Care admits involvement in cartel and agrees to penalty representing 8% of turnover', 9 May 2008, [www.compcom.co.za/resources/Media Releases/Media Releases 2008/PR07 2008.pdf](http://www.compcom.co.za/resources/Media%20Releases/Media%20Releases%202008/PR07%202008.pdf); Simon Roberts 'Report on Key Priorities of the Commission', presentation at Competition Commission Public Sector Consultative Forum, Pretoria, 13 February 2009.

141. Oupa Bodibe 'Presentation on Priority Sectors: Food', presentation at Competition Commission Public Sector Consultative Forum, Pretoria, 13 February 2009; Roberts presentation; Address by Dr Rob Davies, Deputy Minister of Trade and Industry, Competition Commission Public Sector Consultative Forum, Pretoria, 13 February 2009. It should be noted that, if signed into law, the 2008 Competition Amendment Bill will expand the Commission's powers in relation to monopolistic practices – see ss 4 and 6, relating to complex monopoly conduct and inquiries into entire markets.

142. Competition Act, Ch. 3

143. Competition Act, Ch. 6, esp. ss 59(1), 60, 61(2). All fines levied are paid to the state: s 61(4)

144. Competition Act, ss 49D(4); 65(6) and (9)

which is obliged to investigate; the Commission may also initiate investigations of its own accord.¹⁴⁵

2.2.4 Contract Law

Contract law is important. One effect of increased liability in other branches of law, and increased public interest in this, is that corporations may well be inclined to determine their relationships with stakeholders in advance. A good example is agreements with local communities in new mining operations. The vast role of corporations in all aspects of life also means that areas with potentially serious implications for rights, like insurance policies and home mortgages, are governed by standard-form contracts. Contract is also an area, however, where all the factors conducive to judicial minimalism are present, and so reform of the law has been slow.

An emerging remedy is provided by the development of notions of public policy. While parties are generally free to contract on the terms they wish,¹⁴⁶ the courts will refuse to enforce terms contrary to public policy.¹⁴⁷ Public policy, since the advent of the Constitution, is determined with reference to rights and considerations of fairness, justice, equity and ubuntu.¹⁴⁸ The relative bargaining position of the parties will be relevant to this determination.¹⁴⁹ In short, a party will be able to escape a contractual provision if she can demonstrate that enforcing it would be contrary to basic constitutional values. This, together with the existing remedies for overturning contracts where one party materially misled or coerced the other, means that a remedy exists where corporations attempt to get parties to ‘contract out’ of their rights. However, it is a remedy victims may have trouble accessing. The onus to show that a clause is contrary to public policy rests on the victim, and under-resourced persons may have trouble discharging it. The current approach also means that harsh terms stand unless judicially challenged, something many victims will be unable to do. This is particularly important where the effect the contract purports to ‘waive’ constitutional rights.¹⁵⁰ Suggestions for reform in this regard are made below.

145. Competition Act 89 of 1998, ss 44, 45(1)

146. *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at para 94; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at para 12; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 57.

147. *Barkhuizen v Napier* (CC) at paras 23-36; *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) at para 10.

148. *Napier v Barkhuizen* (SCA) at para 12; *Barkhuizen v Napier* (CC) at paras 51, 73. That the decision implies that fairness is a generally applicable value, rather than something confined to s 34 and time limitations clause is borne out by the subsequent application by the Constitutional Court of a broad value of fairness to arbitration agreements – *Lufuno Mphaphuli Associates (Pty) Ltd v Andrews* [2009] ZACC 6, handed down 20 March 2009, as yet unreported.

149. *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at para 12; *Napier v Barkhuizen* (SCA) at paras 14-15; *Barkhuizen v Napier* (CC) at paras 56, 59, 64-65

150. There is an important debate about the use of the language of waiver in the rights context: see Stu Woolman ‘Application’ in *Constitutional Law of South Africa* at 31-122 - 31-130 for a critique and references

2.2.5 Environmental Law

In terms of NEMA, it is the state that has the power to take remedial steps against corporations that pollute. If a corporation does not comply with its statutory responsibilities, the state may, in terms of s 28(4), order a number of initial remedial steps, including requiring the defaulter to assess the impact of their activities so that harm can be prevented in future or remedied.¹⁵¹ If that is not done, the state may ‘take reasonable measures to remedy the situation’ and, as noted above, recover the costs from the polluter. A private individual’s remedy is not against the corporation, but the state: if the state does not take the remedial steps in s 28(4), ‘any person’ may apply to court for an order compelling it to do so. The Act may also be read as permitting any person to compel compliance with other provisions in this way.¹⁵² This is appropriate: if the state fails to act against a defaulting corporation, it is failing to comply with its duties under the environmental right, and so its compliance should be enforceable.

The state-focused model in NEMA may be questioned. It is submitted that parts of the environmental right – to have an environment not harmful to health or well-being,¹⁵³ for example – are pre-eminently suited for horizontal application.¹⁵⁴ Yet the law as articulated in statute operates only vertically: the public’s right is against the state, not the polluter, which is in turn liable to the state. Private parties may rely on the environmental right indirectly, in bringing claims in delict, or in the property law of nuisance, against companies that damage the environment. But this is a clear example of the problem noted earlier: remedies in these spheres may not be suitable to the task of actually cleaning up the pollution, and so rights may not be adequately vindicated.

to the other contributions in the literature. The merits of the viewpoints cannot be considered here, but it should be noted that the courts have used the language of waiver and limitation. Much of the applicable case-law has concerned clauses requiring litigation in terms of a contract to occur within some limited period, constituting a limitation of the s 34 right of access to courts. It has been held that such clauses are generally acceptable: see e.g. *Napier v Barkhuizen* (SCA) at para 10; *Barkhuizen v Napier* (CC) at paras 45-49, and sources there cited. It has also been accepted that derogations from other important rights are possible – see *President of the Republic of South Africa v Mohamed* 2001 (3) SA 893 (CC) at paras 61-64; *Afrox Healthcare* at paras 13, 23-24 – though they may be unconstitutional if the ambit of the derogation is too extensive – see *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) at para 12 – or if parties act freely and with adequate knowledge – see *Currie & De Waal, op. cit.*, note 11 at 41-43 and cases there cited.

151. NEMA, s 28(4)

152. NEMA, ss 28(12) read with ss 28(1), 28(4), 32(1). The breadth of the right is uncertain, because it is not clear whether the s 32(1) standing right includes the right to seek relief other than that referred to in s 28(12) – see on this point *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism* 1996 (3) SA 1095 (Tk) at 1104H-1106I; *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 (6) SA 66 (T) at para 36 and *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Produce* 2004 (2) SA 393 (E) from 407B.

153. Constitution, s 24(1)

154. Glazewski, *op. cit.*, note 77 at 74

2.2.6 Extra-Territorial Remedies for Corporate Violations in Terms of the Constitution

Kaunda, discussed above, dealt with the relief that citizens may seek from the South African government in respect of wrong done to them by another *state*. It held that citizens have a right to request diplomatic protection from the state and to have that right properly considered.¹⁵⁵ The relief there does not extend to the case of a corporate wrong: *Kaunda* concerned diplomatic protection, which presupposes an international wrong by a state.¹⁵⁶ But its logic may be extended. If citizens have a right, in terms of their s 3 citizenship rights, to request a state to exercise diplomatic protection on their behalf, they presumably also have the right to request other protections. Thus a citizen who is the victim of a corporate rights violation in a foreign country likely has the right to request the South African state to enlist the help of the foreign government concerned, and to have that request properly considered.¹⁵⁷ As has already been discussed, *Kaunda* did not close the door on the possibility of remedies for violations of fundamental rights by South African companies abroad though an explicit piece of legislation governing this area would be welcome.

2.2.7 Labour Law

Labour law offers a variety of special remedies in and outside the courts. The Constitution protects the rights to strike, to form, join and participate in the activities of a trade union; and (through a union) to engage in collective bargaining.¹⁵⁸ The judicial remedies for an unfair dismissal are reinstatement, re-employment, or compensation.¹⁵⁹ In certain circumstances, the court may also issue other relief, such as interdicting discriminatory behaviour.¹⁶⁰

2.2.8 Mining Law

As noted, environmental legislation provides that a polluter is obliged to clean up pollution or, failing that, to reimburse the state for doing so. In the mining context, this is buttressed by the provision that no environmental authorisation to engage in mining activity may be granted unless security (in a prescribed amount) has been provided in respect of environmental damage that may occur. This amount

155. *Kaunda* at paras 58-63

156. *Kaunda* at paras 29-24 and sources there cited; *Van Zyl* at para 64 and sources there cited in n 38.

157. *Kaunda* at paras 63-81

158. Constitution, ss 23(2)(a)-(c), 23(4)(b), 23(5)

159. Labour Relations Act, s 193(1). Reinstatement means deeming that the employee was never dismissed; re-employment is to dismiss and then re-hire. There is a preference for these remedies over compensation – see s 193(2) – and compensation is subject to upper limits – see s 194.

160. Labour Relations Act, s 193(3)

is used for future rehabilitation costs in the event that the company is unable to pay them.¹⁶¹ Another provision permits the Minister, when granting a mining right, to impose conditions necessary to promote the rights of a community occupying the land.¹⁶²

161. Mineral and Petroleum Resources Development Act, s 43(6), read with NEMA, ss 24P(1)-(2), 24R(1)

162. Mineral and Petroleum Resources Development Act, s 23(2A)

3. Obstacles to Accessing Justice

Different obstacles to receiving remedies for violations of rights by corporations arise at different stages of the legal process. This study considers problems of access to courts; obstacles to the courts exercising jurisdiction when approached; mechanisms for information-gathering when building a case; obstacles arising in the law and the legal process when a court hears a case; and difficulties when the case ends, either in settlement or in a judgment.

3.1 Access to Courts and Legal Representation

Many South Africans live in desperate conditions: 25% are unemployed, and 34,6% of those between the ages of 7 and 24 are not in an educational institution due to lack of funds.¹⁶³ Poverty is widespread – 34,1% of the population live under \$2 a day – but perhaps more tellingly for present purposes, the top 10% of South Africans, who drive the cost of legal services, are 33,1 times richer than the bottom 10%.¹⁶⁴ These conditions are exacerbated by the fact that many South Africans are legally and generally illiterate, geographically separated from the legal services clustered in the urban centres, and will not always be comfortable speaking in Afrikaans or English, still the languages of the courts and the legal profession.¹⁶⁵ As will be discussed in the concluding section, the fact that so many legal developments important to victims remain nascent reflects the fact that victims' issues are not getting to court.

3.1.1 Reform of the Legal System to Promote Access

Slow steps are being taken to reform the legal system to respond to the needs and circumstances of the citizenry. Nine courts expanded their facilities in 2008/09, including the new Polokwane High Court, which serves a province that has hitherto lacked a High Court.¹⁶⁶ The boundaries of court districts are being adjusted to serve areas of larger (and poorer) populations.¹⁶⁷ Some indication of the speed of progress may be gathered from the fact that 2009 saw the Kimberley Magistrate's Court conduct its first ever case in an African language.¹⁶⁸ An important new development is the Jurisdiction of Regional Courts Amendment Act 31 of

163. Data from Statistics South Africa 2007 *General Household Survey*, available at www.statsa.gov.za/keyindicators/keyindicators.asp, last accessed 2 May 2009.

164. Data from United Nations *Human Development Report*, available at www.hdrstats.undp.org/en/indicators, last accessed 2 May 2009.

165. The Constitutional Court took judicial notice of these factors in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at para 14.

166. Department of Justice and Constitutional Development *Annual Report 2007/08* at 9

167. *Annual Report 2007/08* at (ii)

168. 'Mense nou ook in Tswana verhoor' *Volksblad* 27 March 2009

2008, which provides for the civil jurisdiction of the regional magistrates courts.¹⁶⁹ Previously a victim would either have had to pursue civil action in the expensive, distant High Courts, or in the District Magistrates' Courts, which could not award damages above a low threshold. The Act should help to increase access to the legal resources needed to resolve the kinds of claims victims will usually have against corporations.

Non-state legal actors are also important here. Law clinics, state-paid public defenders in rural areas, and public interest legal services bodies all play an important supporting role.¹⁷⁰ However, their resources remain limited. Recent research suggests that South African public interest litigation bodies suffer from loss of staff to the private sector, reduced community mobilisation, and a shortage of funds.¹⁷¹

Corporations predictably have access to excellent legal representation. The ability of victims to match this varies. In cases potentially involving large settlements, such as those relating to apartheid-era mining claims, professional firms are often involved. But, as will be discussed further in the final section of this report, interviews conducted for this report suggest that the majority of contemporary disputes between corporations and individuals are about resolving legal problems – negotiating relocations with mining companies or balancing land claims with mining rights – which is vital work, but seldom lucrative and seldom arises in urban areas. Here, the only representatives of victims' interests are likely to be NGOs or local officials, who it appears display variable levels of legal acumen, resources, and commitment.

Changes in the legal profession have been slow. On the latest available figures, a single hour's consultation with an attorney would cost between 8% and 21% of the average South African monthly wage.¹⁷² Most South Africans can only therefore access legal representation if special arrangements are made. South African lawyers may enter into contingency fee agreements, subject to limits to protect

169. The Act was promulgated on 5 November 2008

170. See generally Douglas McQuoid-Mason 'Lesson from South Africa for the delivery of legal aid in small and developing Commonwealth countries' *Obiter* (2005) at 207; a number of NGOs are heavily engaged in building awareness of rights: comments of Dr Bhutelezi (National African Farmers Union) and Mr Moses Cloete (Benchmarks Foundation) at African Institute for Corporate Citizenship Human Rights and Business Project South Africa Roundtable, Johannesburg, 9 June 2009

171. Gilbert Marcus & Steven Budlender *A Strategic Evaluation of Public Interest Litigation in South Africa* (Atlantic Philanthropies, June 2008) at 15-17, 22-23, 126

172. These approximate figures are based on the current government quarterly employment figures, available at www.statssa.gov.za/keyindicators/keyindicators.asp (giving an average salary of R5775 per month), and the current median rates charged by attorneys according to the September 2008 National Survey of the Attorney's Profession prepared for the Law Society of South Africa, available at www.lssa.questweb.co.za/Uploads/files/National_Survey_of_the_Attorneys_Profession_2008.pdf, at 19, giving median hourly consultation fees of between R450 and R1200 per hour.

the client.¹⁷³ The other possibility is to access legal services provided on a *pro bono* basis. A Legal Services Charter was concluded between government and the legal profession, in which the profession undertakes to take steps to increase *pro bono* work, support law clinics and similar bodies, and enhance access in rural areas.¹⁷⁴ The government has yet to publish officially the Charter or the scorecards for measuring compliance,¹⁷⁵ so it effectively remains a voluntary document. Some legal professional bodies and firms require *pro bono* work.¹⁷⁶ Drafts of legal practice legislation were prepared in 2002, but there appears to have been little progress since then. The drafts refer, among other things, to the increased use of paralegals to enhance access to justice, but do not appear to contemplate specific obligations to engage in *pro bono* or similar work.¹⁷⁷

3.1.2 Legal Aid

The Legal Aid Board is widely regarded as one of the success stories of the last ten years. Effectively bankrupt in 1998,¹⁷⁸ it resolved 399,738 matters in 2007/08 and estimates that it provides representation in 80-95% of all High Court cases.¹⁷⁹

These successes notwithstanding, an evaluation of the contribution of legal aid to litigation against corporations for human rights violations must add three important reservations. First, the legal aid system is heavily committed to representing criminal defendants and detained persons. Only 10% of Board's resources are allocated to civil matters,¹⁸⁰ and the focus here is on family law issues and matters affecting the landless.¹⁸¹ This focus is not unreasonable – although the s 34 right to have civil disputes resolved in court is arguably not adequately reflected in the 90% allocation to criminal matters – but it means that corporate victims

173. Contingency Fees Act 66 of 1997, s 2(1) and (2). See also a written opinion by Advocate EC Labuschagne dated 30 May 2002, available at <http://www.northernlaw.co.za/content/view/51/84/>

174. See the Legal Services Charter, adopted by government and representatives of the legal profession in December 2007, available at www.justice.gov.za/LSC/legal_charter.htm, esp. at 8-11

175. According to the Law Society of South Africa's website, www.lssa.questweb.co.za, last accessed 28 June 2009; the Bill is not listed among the 'current bills' of the Department of Justice and Constitutional Development, available at <http://www.justice.gov.za/legislation/bills/bills.htm>.

176. The Cape Law Society requires *pro bono* work of all its members; the requirement is for 24 hours per year – see Rule 21 of the Society's Rules, available at www.capelawsoc.law.za/Files_for_New-Website/Clrules2003.doc

177. The 2002 drafts may be found at www.lssa.questweb.co.za; the report of the chairman of the 2002 drafting process, Geoff Budlender, is available at www.lssa.questweb.co.za/Uploads/files/Task_Team_Chairman's_Report.pdf, at paras 26, 37. Reports of 2008 engagement on the legislation, revealing continued deep disagreements, may be found at <http://www.northernlaw.co.za/index.php>.

178. Douglas McQuoid-Mason, *op. cit.*, note 170 at 219-20

179. Legal Aid Board Annual Report 2007/08, <http://www.legal-aid.co.za/images/publications/annual-reports/2008.pdf>, at 2-3

180. *Ibid.*, at 4

181. Van As, Hennie 'Taking Legal Aid to the People: Unleashing legal aid in South Africa' (2005) 26 *Obiter* p. 187 at 207; see the letter from the Legal Aid Board indicating that it did not support personal injury claims submitted to the English Courts in *Lubbe v Cape plc* [2000] 4 All ER (HL) 268 at 278

are usually some way from the front of a long queue. Secondly, the Board only provides services to the poorest, but most who fail its means test nonetheless cannot afford to litigate. Indeed, in a distinctly tragic irony, if corporations violate the rights of their workers or communities established around their industries, the wages they pay will likely make their employees and their families too rich for legal aid, without being rich enough to engage in litigation. (The provision of subsidised government housing can have a similar effect.¹⁸²) Thirdly, the Legal Aid Board remains over-stretched, in need of assistance from other areas including local government and the profession.¹⁸³ It is not designed to construct and litigate complex corporate liability cases, and it lacks the resources to do so. However, it should be added here that the Board has recently established a Strategic Impact Unit, designed to fund litigation with a wider public interest. The Unit, with partners, has engaged in a sizeable litigation relevant to this study, involving a series of test cases on behalf of ex-miners suffering from silicosis. The parties are currently in talks pursuing a settlement.¹⁸⁴

3.1.3 Equality of Arms

Given the severe limitations and inequalities in access to legal resources, notions of equality of arms could play an important role in South Africa. However, the current usage of the doctrine is narrow. The Constitutional Court has noted the concept in the context of a civil case where one side was significantly under-represented relative to the other. The court there declined to make definite findings on the link between the principle and the s 34 right of access to courts. However, it did hold that a 6:1 ratio of counsel was a basis on which to grant a postponement to allow the under-represented side to obtain somewhat more equal representation.¹⁸⁵ It has also held that s 34 protects the *fair* resolution of social conflict, and that an inequality of arms will be a key factor in determining whether s 34 requires a hearing by a court (as opposed to another body with a less rigorous procedure).¹⁸⁶ The salutary implication is that s 34 imposes a duty on the courts to ensure a fair contest where parties are of unequal strength. However, there is limited evidence of this in practice. What resources exist are heavily channelled

182. Van As, *ibid.*, at 205

183. McQuoid-Mason, *op. cit.*, note 170 at 220-30; Van As, *ibid.*, at 199-205; Arthur Chaskalson 'Legal Interns could solve legal aid problems' 1997 *De Rebus* 782, Editorial 'Legal Aid Again: The profession should not be side-lined' 1998 *De Rebus* 5; Legal Aid Board Report at 3

184. Richard Meeran 'Open Letter to the Special Representative of the UN Secretary-General on Business and Human Rights: The genesis and development of MNC litigation in South Africa and a possible model for the future', available at <http://edit.business-humanrights.org/Links/Repository/353808/jump>; author's personal communication with Bongumusa Sibiyi of the Legal Resources Centre, 5 June 2009.

185. *Shilubana v Nwamitwa* (1) 2007 (5) SA 620 (CC) at paras 20-23

186. *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at paras 61-63

into providing representation to accused in serious criminal matters.¹⁸⁷ Important as this is, it does mean that the ability of the system to ‘equalise’ arms is likely to remain limited. The focus should accordingly be on reducing the effects of ‘unequal arms’. An unqualified adherence to adversarial procedure, for example, is likely to lead to unfairness that a more inquisitorial approach could avoid.

3.2 The Exercise of Jurisdiction

Jurisdiction is a constitutional matter. Section 34 of the Constitution gives everyone the right to have disputes that can be resolved by law decided in a fair public hearing before a court or similar body.¹⁸⁸ Any restriction on the ability of the courts to decide legal matters is therefore a limitation of the right, and will only be justifiable if it passes the limitations test contained in section 36 of the Constitution.¹⁸⁹ Restrictions on jurisdiction will therefore be uncommon, and will need a strong justification. The question, for victims, is whether the current rules of jurisdiction match up to this constitutional promise.

Rules of jurisdiction are determined first by the Constitution, which allocates powers to specific courts¹⁹⁰ and then, within this scheme,¹⁹¹ by Parliament.¹⁹² To the extent that these two sources do not decide a jurisdictional question, the courts have the power to interpret or develop the rules as the interests of justice require.¹⁹³ Since the courts are there to defend rights, this inherent power should

187. Constitution, s 35(2)(c) provides for free legal representation in criminal matters ‘if substantial injustice would otherwise result’, the only constitutional guarantee of legal representation. The Constitutional Court has rejected applications by an amicus to participate in a criminal matter before it, bolstering the state’s side, on the grounds that it was undesirable to stack the case against the accused in criminal matters: *S v Basson: In re: Institute for Security Studies* 2006 (6) SA 195 (CC)

188. Section 34 applies to all legal disputes other than criminal matters, which are not seen as ‘disputes’ and are regulated by section 35: see *S v Pennington* 1997 (4) SA 1076 (CC) at para 46

189. See *Hintsho v Minister of Public Service and Administration* 1996 (2) SA 828 (TK) at 842A (a clause ousting judicial jurisdiction is contrary to the right of access to courts); *Beseergelik v Minister of Trade, Industry and Tourism (Minister of Justice Intervening)* 1996 (4) SA 331 (CC) at para 10 (implying that, were a court barred from considering a matter, the right of access to courts would be violated); *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) at para 13 (the purpose of s 34 is to ‘guarantee the protection of the judicial process’ to persons with disputes that can be resolved by law; and *Dormehl v Minister of Justice* 2000 (2) SA 987 (CC) at para 4 (“As long as there is a right to approach a court of competent jurisdiction for the relief claimed, the requirements of [s 34] are met”); see also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at paras 31-34. On ‘applicable law’ in the context of s 34, see *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) at paras 19-24).

190. Constitution, ss 165-69.

191. Of particular relevance: the Constitution provides that certain matters may only be heard or finally decided by the Constitutional Court – ss 167(4), 167(5), 172(2)(a) – and that a magistrates’ court does not have jurisdiction to decide many kinds of constitutional matters – ss 170, 172(2)(a).

192. Constitution, s 171 read with ss 166(e), 167(6), 168(3)(c), 169(a)(i), 169(b) and 170.

193. Constitution, s 173

ensure that any ‘gaps’ in jurisdictional rules will not pose an obstacle to victims’ claims.¹⁹⁴

3.2.1 Service

Valid civil proceedings always require that the defendant be served with notice of them.¹⁹⁵ However, a court has the power to effect service whenever it has jurisdiction, so service is not an independent obstacle to victims.¹⁹⁶ It suffices to state the following. Service may be effected on any person or any company operating in South Africa, by the court sheriff.¹⁹⁷ If a person’s whereabouts are unknown, a court may order substituted service.¹⁹⁸ If a person is outside South Africa or believed to be, a court may order service or substituted service under the rules of edictal citation.¹⁹⁹

3.2.2 *Forum Non Conveniens*

The Supreme Court of Appeals has recently confirmed the existence of this doctrine in South Africa, closing a troubled chapter in its history in this country. In *Bid Industrial Holdings*, the court recognised the right of a defendant to object to an exercise of jurisdiction on the grounds of *forum non conveniens*.²⁰⁰ This is a key (though tacit) rejection of the principle hitherto in force in South Africa that a court with jurisdiction may not refuse to exercise it on grounds of convenience.²⁰¹

The doctrine remains to be developed. A substantial body of foreign law exists to guide South African courts here.²⁰² There are also many domestic precedents for the resolution of choice-of-court problems in cases that essentially invoke

194. See Constitution, ss 38 and 172(1). See on the duty to adapt the law as needed to enforce rights *Fose* at para 69 and *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2002 (3) SA 363 (CC) at paras 19-32. Indeed, this inherent power to develop procedural law has always been part of the common law: see *Carmel Trading Co Ltd v Commissioner, South African Revenue Service* 2008 (2) SA 433 (SCA) at para 18.

195. LTC Harms *Civil Procedure in the Superior Courts* (LexisNexis Butterworths, Durban, June 2008) at B 4.1

196. Uniform Rules 4(1), 4(2), 4(10)

197. Uniform Rule 4(1)(a) read with 1973 Companies Act, s 70 (2008 Companies Act, s 23(3)); see further Harms, *op. cit.*, note 195 B 4.16

198. Uniform Rule 4.10; see further Harms B 4.30

199. Uniform Rules 4(3)-(5) read with Rule 5; see further Harms B 4.33

200. *Bid Industrial Holdings(Pty) Ltd v Strang* 2008 (3) SA 355 (SCA) at para 55

201. See especially *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 914E-F (A court has no discretion to hear a case once a prima facie cause of action is established; it will ‘not inquire...whether it is the convenient forum in which to bring action’.) The court in *Bid Holdings* makes no mention of this or other decisions, but must be seen to overrule them.

202. For discussions of foreign precedents in the local context, see Erwin Spiro ‘Forum non conveniens’ (1980) 13 *Comparative and International Law of South Africa* 333; H Christian AW Schulze ‘Forum non Conveniens in Comparative International Private Law’ (2001) 118 *South African Law Journal* 812; JP Van Niekerk ‘Local Asbestosis Claims in English Courts: Not Coming Home to Roost (In)conveniently’ (2001) 13 *South African Mercantile Law Journal* 133.

forum non conveniens albeit not explicitly.²⁰³ This development will not be free from trouble: the way *Bid Holdings* introduces the doctrine blurs it with the rules determining whether a court has jurisdiction. This is considered in the discussion of *Bid Holdings* below.

The introduction of the doctrine is crucial to the development of jurisdiction rules in South Africa. It is a necessity for dealing with modern transnational litigation, where the parties to a case may have links to several countries. In these circumstances, the doctrine is a mechanism to ensure that the most suitable court hears the case. The basic principle of *forum non conveniens* is that a court having jurisdiction can choose not to exercise it where it is confident that another court has jurisdiction and that justice can better be done in that court. This determination is based on factors such as the location of the evidence and the witnesses, the applicable law, and the nature of the alternative forum: in short, where the other court offers a more appropriate forum. But there is another reason that is more important to victims. It will no longer be necessary to draw the rules conferring jurisdiction restrictively in order to exclude inappropriate cases, as has sometimes been the case. The rules can now err on the side of openness, because the doctrine can be used to exclude problem cases as it has in other jurisdictions. This will be borne in mind in the discussion that follows.

Interestingly, the doctrine formed the reason that the English courts decided to hear a claim for compensation as a result of asbestos mining in the case of *Cape plc*. Here the English Courts expressed concerns about issues in South Africa relating to the provision of legal aid in civil cases and the experience of local lawyers to handle such complex and specialised litigation. These concerns were the basis for a finding that the case should be heard in England despite its links to South Africa. Some of the concerns were and are real. But the real concern, it is submitted, was not that the system was wholly unsuitable for the hearing of this kind of litigation, but that the English Courts felt its ability adequately to grant a remedy in such cases was uncertain and untried.²⁰⁴

3.2.3 Rules Conferring Civil Jurisdiction

For a South African court to exercise jurisdiction, there must be some sort of link between it and the parties; between it and the legal matter at hand; or both. The link must be between the party and a specific South African court: it is not the case that any South African court will have jurisdiction over any South African person or

203. On the application of the doctrine in choosing between South African courts, see Jerrold Taitz 'Jurisdiction and Forum Conveniens – A New Approach?' (1980) 43 *Tydskrif vir die Hedendaagse Romeinse-Hollandse Reg* 187, AC Beck 'The Convenience of Jurisdiction' (1980) 15 *Comparative and International Law of South Africa* 344. On the application of importantly similar doctrines, see David Pistorius *Pollak on Jurisdiction 2 ed* (Juta & Co, Cape Town, 1993) at 25-26 and cases there cited; Van Loggerenberg, DE & Farlam P *Erasmus: Superior Court Practice* [Service 2009] (Juta & Co, Cape Town) at A1-32K and cases there cited.

204. *Lubbe* (HL) at 277-80; *Cape plc v Lubbe* [2000] Lloyd's Rep 139 (CA) at 162-64.

act. It is also necessary to establish a jurisdictional link in respect of each party: a court will not exercise jurisdiction over a parent company just because it is doing so in respect of a subsidiary.²⁰⁵ It will be important whether the parties are resident in the area of jurisdiction of the court, or at least resident in South Africa, and whether the legal matter arises in the area of jurisdiction of the court. Quite what links suffice in a particular case can be a matter of considerable complexity. For this reason, the discussion here is limited. It focuses on civil claims sounding in money in the High Court (the sort victims will typically bring) and provides only a brief summary of rules that pose no obstacle to victims.²⁰⁶ More attention is given to problem cases.

The courts will always have jurisdiction over companies incorporated in South Africa in respect of acts in South Africa. Corporations incorporated in South Africa are treated as resident where they have their registered office,²⁰⁷ and all such corporations must have a registered office.²⁰⁸ Since courts will always exercise jurisdiction in respect of any resident defendant, South African companies will definitely be subject to the jurisdiction of at least one South African court. They will also be subject to the jurisdiction of the court where their principal place of business is located,²⁰⁹ and to that of the court in whose jurisdiction the cause of action arose, if these are different to that in which their registered office falls.²¹⁰ If more than one court has jurisdiction, the choice is the plaintiff's, which may allow victims to sue closer to home.²¹¹

The courts will also exercise jurisdiction in respect of all natural persons who are residents in their area of jurisdiction. Residence is a matter of ordinary habitation,²¹² so it includes both foreigners and citizens who are in South Africa

205. The *causa continentia* rule permits a court to exercise jurisdiction over the whole of a matter on grounds of convenience if no court has jurisdiction over more than part of it. The rule has only been applied domestically and even there is subject to strict limitations: *Pollak, op. cit.*, note 203 at 25-26. The extension to foreign parties in the absence of a link sufficient to establish jurisdiction in its own right is unlikely.

206. Different rules apply in the Magistrate's Court and to the Supreme Court of Appeal and Constitutional Court; different rules also apply in the High Court in respect of certain other types of matters, such as those relating to divorce actions or fixed property.

207. *Erasmus, op. cit.*, note 203 at A1-25; Cilliers, AC et al *Herbstein & Van Winsen: The Civil Practice of the High Court and Supreme Court of Appeal of South Africa 5 ed* (Juta & Co, Cape Town, 2009) at 69; *Pollak, op. cit.*, note 203 at 73-75

208. 1973 Companies Act, ss 170(1)(b), 322(1)(a); 2008 Companies Act, s 23(3)

209. *Erasmus, op. cit.*, note 203 at A1-25; *Harms, op. cit.*, note 195 at A-20; *Herbstein & Van Winsen, op. cit.*, note 207 at 68-69; *Pollak, op. cit.*, note 203 at 74-75.

210. *Erasmus, ibid.*, at 1-28A-1-30, 1-32-1-32B; *Herbstein & Van Winsen, ibid.*, at 57

211. For the combination of jurisdictional rules yielding this result see *Erasmus, ibid.*, at A1-32 and n 3; *Harms, op. cit.*, note 195 at A-23. The same conclusion is reached by *Herbstein & Van Winsen, ibid.*, at 69.

212. *Erasmus, ibid.*, at A1-23-1-24; *Herbstein & Van Winsen, ibid.*, at 59. There is High Court authority to the effect that mere domicile does not suffice for residence: *Geysers v Nedbank Ltd: In re: Nedbank Ltd v Geysers 2006 (4) SA 544 (W)* at 546D-E. It may be doubted whether this is correct. See on the point *Erasmus, ibid.*, at A1-24; *Harms* at A4.12; *Herbstein & Van Winsen, ibid.*, at 58-59; *Pollak, op. cit.*, note 203 at 42-43, 47-48, 53; Forsyth 'The Impact of the Domestic on the International: Some Crucial Deficiencies

for long periods on business.²¹³ Residents will also be subject to the jurisdiction of the South African court in whose area of jurisdiction the matter arose.²¹⁴ Again, if this means that two courts have jurisdiction, the plaintiff can choose the one more accessible to her.

Citizens or foreigners who are not residents, but are only temporarily present in South Africa,²¹⁵ used to have to be arrested for courts to exercise jurisdiction over them.²¹⁶ *Bid Holdings* declared this practice unconstitutional, and introduced an alternative. If there is an ‘adequate connection’ between a South African court and a legal matter, mere service on the defendant while temporarily present in South Africa will ground jurisdiction.²¹⁷ The judgment is therefore, at least, authority for the proposition that mere service can sometimes be a basis for jurisdiction over non-resident natural persons where the legal wrong in question arises in South Africa. This amounts to a small revolution in the law, and it sets an important trend towards a more liberal trend to jurisdiction rules that will be important to the discussion below. However, a difficulty will arise from the fact that the existence of an ‘adequate connection’ is held by *Bid Holdings* to depend on questions of ‘appropriateness and convenience’. This places the factors from the *forum non conveniens* enquiry – whether a court should choose to exercise jurisdiction – at the heart of a test as to whether it has jurisdiction in the first place. This conceptual confusion would not matter to victims, were it not for the fact that the plaintiff bears the burden of proving that the court has jurisdiction, while the defendant bears the burden under the *forum non conveniens* enquiry. Thus shifting factors from the *forum non conveniens* enquiry to the jurisdiction enquiry increases the burden on the plaintiff.²¹⁸ It is submitted that *Bid Holdings* can and should be interpreted to avoid this result.²¹⁹

in the South African Law of Jurisdiction with their Regional and International Consequences’ (2006) 18 *South African Mercantile Law Journal* 1 at 7-11. It would serve victims if domicile does suffice, given the complications of establishing jurisdiction over non-residents (see below), and this is arguably defensible. A domicile may not be present in a country (the usual reason for rejecting it as a ground), but domicile does establish a link between person and court.

213. *Mayne v Main* 2001 (2) SA 1239 (SCA) esp. at paras 24-26
214. *Erasmus, op. cit.*, note 203 at A 1-26, 1-28; *Harms, op. cit.*, note 195 at A-22; *Herbstein & Van Winsen, op. cit.*, note 203 at 69, *Pollak, op. cit.*, note 203 at 60-62
215. On the inadequacy of mere temporary presence, see *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) at 492B-C, most recently approved in *Bid Industrial Holdings* at para 53; see further *Erasmus, ibid.*, at A1-24 and cases there cited. On the inadequacy of mere citizenship, see *Mayne v Main* at paras 4-9
216. *Bid Industrial Holdings* at paras 32-59
217. *Bid Industrial Holdings* at para 56
218. See the discussion of foreign case law in Schulze (2001)
219. The judgment in *Bid Holdings* can be interpreted in a way that is sensitive to these considerations (of which the judgment reveals awareness: see at paras 48, 55). Its findings in relation to appropriateness and convenience can be read as applying to the *general* question of when a court will hear a case – to the whole enquiry into both rules conferring jurisdiction and *forum non conveniens*. If so, the judgment does not rule out the bulk of the convenience and appropriateness factors being treated under the *forum non conveniens* test. It is significant in this regard that the conclusion comes at the end of a discussion

The rules already stated relate to South African companies, and to South African and foreign natural persons. The rules relating to companies incorporated in foreign countries are rather more complex and uncertain. The position is as follows. A court will exercise jurisdiction over a foreign corporation, on the basis of residence alone, where it has its 'principal place of business' in the court's jurisdiction. Thus a company with its 'principal place of business' in South Africa may be sued in the court in whose jurisdiction that place of business falls, in respect of a wrong committed anywhere in South Africa.²²⁰ If a foreign company does not have its 'principal place of business' in South Africa, but merely 'carries on business' here, then a court will exercise jurisdiction if it 'carries on business' in its area of jurisdiction *and* if a further condition is met. According to some authorities, the condition is that the cause of action must arise in the area of jurisdiction of the court;²²¹ according to others, it must arise particularly from its local business activities.²²² It should be added that the precise meanings of the phrases 'principal place of business' and 'carries on business' remain unclear.²²³

If a corporation fulfils neither of these requirements, then it is a non-resident. It should be noted that a corporation will be treated as a resident or a non-resident in respect of a particular act. So a foreign corporation will be a resident in respect of acts meeting the above tests and a non-resident in respect of other acts.²²⁴ The courts will have jurisdiction over such a non-resident corporation if the cause of action arises in the court's area of jurisdiction, or if the plaintiff is resident in the court's area of jurisdiction. In both cases, there is a further requirement: the court will not exercise jurisdiction unless property of the defendant is attached.²²⁵ Under s 26(1) of the Supreme Court Act, the property to be attached must be in the area of jurisdiction of the court.²²⁶ Property elsewhere in South Africa does not suffice.

encompassing both considerations, and is stated as being a finding about when a court can 'take cognisance of the suit', rather than, say, 'exercise jurisdiction over it' – see at para 56. Admittedly, a contrary indication may appear from para 52, but it should not prevent courts from adopting the interpretation suggested.

220. *Herbstein & Van Winsen, op. cit.*, 207 at 69; *Pollak, op. cit.*, note 203 at 77-78; Forsyth, Christopher *Private International Law: The Modern Roman-Dutch Law including the Jurisdiction of the High Courts 4 Ed* (Juta & Co., Cape Town, 2003) at 196.

221. *Erasmus, op. cit.*, note 203 at A1-25 – 1-26; *Herbstein & Van Winsen, ibid.*, at 69; *Pollak, ibid.*, at 78

222. The condition is applied in this way in the case of *Joseph v Air Tanzania Corporation 1997 (3) SA 34 (W)*, where a court refused to treat a foreign company as a resident of its jurisdiction in respect *Forsyth* at 196 and authorities there cited.

223. *Erasmus, op. cit.*, note 203 at A1-25 – 1-26; *Herbstein & Van Winsen, op. cit.*, note 207 at 69-70

224. *Forsyth, op. cit.*, note 220 at 196, citing *Joseph v Air Tanzania Corporation 1997 (3) SA 34 (W)* where the property of a foreign company that could, in other circumstances, have counted as a resident, was attached in circumstances where the residency requirements were not met.

225. *Erasmus, op. cit.*, note 203 at A1-32-A1-32A

226. Following the decisions in *Estate Agents Board v Lek 1979 (3) SA 1048 (A)* and *Ewing McDonald Co Ltd v M & M Products Co 1991 (1) SA 252 (A)*; see further *Forsyth, op. cit.*, note 220 at 187-88.

These rules, in theory, leave open a gap. If a corporation commits a wrong in an area of South Africa in which it does not do business and does not have property, and if it also does not have property in the area of South Africa in which the victim is a resident, no South African court will have jurisdiction. The court in whose area the wrong occurs will not exercise jurisdiction if there is no property in its own jurisdiction to attach. The court of whose area the victim is resident will also not exercise jurisdiction if there is no property in its area to attach. And even if there is property in the area of some other court, *that* court will not exercise jurisdiction on the basis of attachment alone.²²⁷ The courts are most likely to evade this problem by simply not requiring attachment in the circumstances, but this remains uncertain.²²⁸

The nature of these rules is problematic. Victims, as plaintiffs, will bear the onus of establishing that a court has jurisdiction, and so they will bear the costs of confronting and resolving the difficulties raised in the preceding paragraphs. They will also bear the costs of attaching property where that is required. Attachment can require quick action – a ship may only be in the country for a brief period; assets may be moved to another jurisdiction. There is a possibility of recovering these costs, but unless victims are represented by a firm operating on a contingency basis, upfront costs pose a considerable barrier. The result is that many victims will struggle to hold foreign corporations liable in South African courts for breaches of rights committed in South Africa. That is plainly undesirable and contrary to the intentions of the s 34 right. Proposals to simplify rules of jurisdiction are accordingly made in the final section.

3.2.4 Two Important Exceptions

The courts will not grant an order that requires performance of an act in a foreign country, even if the rules of jurisdiction just set out are met.²²⁹ This is because the court is not in a position to render its judgment effective. The converse is also true: the courts *will* grant an order that does not require action to be taken, such as a declaration of rights, even if the rules of jurisdiction are *not* met.²³⁰

Mohamed's case illustrates both principles. The South African government had extradited Mohamed, a terrorist suspect, to the United States without securing a guarantee that he would not be executed. This violated the rights Mohamed had

227. These results follow from rules already discussed, but readers are referred to the convenient summary table given by Forsyth, *ibid.*, at 206.

228. See *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1987 (4) SA 883 (A), esp. at 890D-E. Where a South African resident is sued in a court other than that in which they are resident, attachment used to be required. However, s 28(1) of the Supreme Court Act then prohibited the attachment of the property of any South African resident. *Veneta* held that attachment would no longer be required, thus preserving the courts' jurisdiction. See also Forsyth, *ibid.*, at 214 and cases there discussed in note 431.

229. *Ex parte Hay Management Consultants (Pty) Ltd* 2000 (3) SA 501 (W) at 507D-508E

230. See cases cited by Taitz, *op. cit.*, note 203 at 193.

enjoyed in terms of the South African Constitution while present in South Africa. However, the Constitutional Court could not order mandatory relief, because it could not order entities in the United States, where Mohamed now was, to act. However, the Court could and did award declaratory relief, which it ordered served on the US court hearing Mohamed's case.²³¹ Declaratory relief, which may generate negative publicity or impel another government to act, can be important relief to victims.

3.2.5 Extra-Territorial Jurisdiction in Terms of Statute

Three of the statutes providing for extra-territorial jurisdiction are of particular relevance to victims.²³² The first is the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, which applies to genocide, crimes against humanity, and war crimes. In addition to the persons over whom the courts have jurisdiction on the basis of the rules above, the Act provides for jurisdiction over an alleged perpetrator of these crimes who is merely present in South Africa, or in respect of these crimes if committed (anywhere in the world) against a citizen or resident of South Africa.²³³ Secondly, under the Prevention and Combating of Corrupt Activities Act 12 of 2004, South Africa courts will have jurisdiction in respect of any offence under the Act where there is some link to South Africa.²³⁴ The Act covers the giving and receiving of bribes and various other misuses of power and influence.

A complication with both of these Acts is that they apply only to natural persons, and not to corporations.²³⁵ This does not in itself prevent a corporation being held liable, since the liability of the natural person may be imputed to the juristic person. But, as mentioned, a court must establish jurisdiction separately over each party before it. So a corporation can only be held liable by South African

231. *Mohamed* at paras 69-71

232. Other statutes providing for extended jurisdiction in a similar manner are the Preventing of Counterfeiting of Currency Act 16 of 1965, the Admiralty Jurisdiction Regulation Act 105 of 1983, the Financial Intelligence Centre Act 38 of 2001, the Private Security Industry Regulation Act 56 of 2001, and the Defence Act 42 of 2002. See further FAFO, *op. cit.*, note 49 at 29-35.

233. Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002, s 4(3) read with definition of 'crime' in s 1

234. The Act provides for jurisdiction, in addition to that under the ordinary rules, in respect of any offence committed under the Act over any person (i) arrested in the Republic; (ii) found in the Republic, if the conduct contrary to the Act they are alleged to have committed affected or was intended to affect any person, business or public body in South Africa, unless that person is to be extradited; (iii) who conspires to or assists in the commission of any offence in South Africa, even if the offence itself is not committed in South Africa; and (iv) who, although committing no act in South Africa, had an obligation under the Act to take certain steps in South Africa and failed to take them.

235. "Person", in the Corruption Act, includes "persons in the private sector" – s 2(5). "Private sector" includes any non-public juristic person – definition in s 1. Reading the two definitions together, it can be seen that it would make nonsense of s 2(5) to include juristic persons in the definition of "persons": the section would then purport to include "persons in juristic persons". The Act therefore embodies the view that a company never acts itself, but only through its servants, and does not apply directly to corporations.

courts, for acts by a natural person over whom the courts have extra-territorial jurisdiction in respect of either statute, if the courts have jurisdiction over the company *in terms of the ordinary rules*. Statutory amendment will be needed to address this gap. The third piece of legislation considered shows how this problem can be avoided. The Foreign Military Assistance Act 15 of 1998 applies to natural persons and to ‘juristic persons incorporated or registered’ in South Africa.²³⁶ The Act prohibits the rendering or involvement in the rendering of military services for gain,²³⁷ as well as the provision of military services not for private gain unless there is compliance with the authorisation requirements of the Act.²³⁸ South African courts have jurisdiction over breaches of the Act unless committed by a foreign citizen wholly outside South African territory.²³⁹

3.2.6 Impediments to Jurisdiction – Prescription/Statute of Limitations

Civil claims are subject to being barred if not pursued within the time periods provided for in the Prescription Act 68 of 1969. The period for claims important to this study will almost always be three years.²⁴⁰ The Act applies to all claims arising in South Africa.²⁴¹ Prescription therefore operates as a limitation on the s 34 right of access to court, and will need to be justified as such.

In this regard, some existing exceptions to the three-year rule must be noted. If unlawful conduct is ongoing, it is treated as a ‘continuing wrong’, and prescription begins to run only from the time of the last unlawfulness.²⁴² Prescription also does not run against claimants as long as there are obstacles to the claim. Obstacles that interrupt prescription in this way include an administrative decision that the claim is not due, until the decision is set aside by a court;²⁴³ a statutory obstacle to the claim;²⁴⁴ action by the debtor which ‘wilfully prevents the [claimant] from coming to know of’ the claim;²⁴⁵ the fact that the debtor is outside South Africa,

236. Foreign Military Assistance Act, definition of ‘person’ in s 1

237. Foreign Military Assistance Act, s 2 read with definition of ‘mercenary activity’ in s 1.

238. *Ibid.*, s 3 read with ss 4-5 and definition of ‘foreign military assistance’ in s 1

239. *Ibid.*, s 9 read with s 8

240. Prescription Act 68 of 1969, s 11(d). A similar restriction is contained in the 2008 Companies Act, s 219, and the Competition Act, s 67(1), in respect of claims arising out of those two Acts.

241. According to South African choice of law rules, prescription is a substantive matter and so the rules of the forum where the wrong occurred apply: *Kuhne & Nagel AG Zurich v APA Distributors (Pty) Ltd* 1981 (3) SA 536 (W) at 583A-G, 539E. For further discussion see John Saner *Prescription in South African Law* [Service Issue 14, July 2008] (LexisNexis Butterworths, Durban) at 6-4-6-12

242. See the discussion of the doctrine in *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA) at paras 20-22 and Saner, *ibid.*, at 3-47-3-48.

243. *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at para 55-56

244. Prescription Act, s 13(1)(a)

245. Prescription Act, s 12(2)

unless the debtor is foreign company which has a registered office in South Africa;²⁴⁶ the fact that the claim is that of a company against one of its directors, until one year after the time the director ceases to hold her position;²⁴⁷ and the fact that the claimant lacks knowledge ‘of the identity of the debtor and the facts from which the debt arises.’²⁴⁸

The last-mentioned ground is of special relevance here, because of its potential to ensure that prescription does not operate unjustly towards under-resourced victims. According to the Act, the claimant’s ignorance must be ‘reasonable’.²⁴⁹ In *Farocean Marine*, it was held that a claimant will not have ‘the necessary knowledge’ if she is merely aware of the broad situation: knowledge of the specific facts that ground the claim is required.²⁵⁰ In *Minister of Finance v Gore NO*, it was held that a claimant does not have the ‘necessary knowledge’ if she is personally convinced of the legal wrong but lacks evidence. In that case, prescription did not run during the time it took to use a statutory mechanism to obtain evidence confirming the applicant’s suspicions.²⁵¹

The claimant’s personal circumstances are also relevant.²⁵² In *Van Zijl v Hoogenhout* it was held that prescription in respect of a rape victim’s claim will not run during the time that the effects of the rape prevent the victim from instituting a claim.²⁵³ There is some evidence that judges are beginning to consider the effects of education and vulnerability.²⁵⁴ Access to legal advice may also be a factor. The current authority is *Truter v Deysel*, in which a patient suffered blindness following eye surgeries, but only received an expert opinion that his surgeons had been negligent (on the strength of which he then launched proceedings)

246. Saner, *op. cit.*, note 241 at 3-54 citing *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd* 1985 (4) SA 615 (T).

247. Prescription Act, s 13(1)(e) read with s 13(1)(i)

248. Prescription Act, s 12(3)

249. Prescription Act, s 12(3) The recognition that the s 34 right is in play in prescription cases will be important in ameliorating the harsh results that can follow: see for example *Munnikhuis v Melamed NO* 1998 (3) SA 873 (W) at 889G-891D, 893D-893I, which recognises a harsh result but does not consider whether rights require the court to adopt a different interpretation of the Act to ameliorate it. However, as in the *Truter* case discussed below, both parties in *Munnikhuis* were legally represented throughout.

250. *Farocean Marine (Pty) Ltd v Minister of Trade and Industry* 2007 (2) SA 334 (SCA) at para 18

251. *Minister of Finance v Gore NO* 2007 (1) SA 113 (SCA) at paras 17-19, 25 and cases there cited; see also *Farocean Marine* at paras 13, 26

252. *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 209F-G

253. *Van Zijl v Hoogenhout* 2005 (2) SA 93 (SCA). This rule, in sexual offence cases, is now enshrined in the Prescription Act, s 12(4). See further Andre Mukheibir ‘Sexual Abuse, Post-Traumatic Stress Syndrome and Prescription: A comparison between the South African and Dutch Positions’ (2005) 26 *Obiter* 140

254. See *Gore* at paras 20-24; *Ditedu v Tayob* 2006 (2) SA 176 (W), esp. at para 12; and, more speculatively, *Njongi* at paras 24, 48. See also on the considerations applicable to condonation of a delay in a case where prescription was not raised *Ntame v Member of the Executive Council for Social Development, Eastern Cape, and Two Similar Cases* 2005 (6) SA 248 (E) at paras 13-29. Reservations apply to *Njongi*’s finding at para 24 since a partial offer may serve as an acknowledgement of debt, interrupting prescription in respect of the whole: Saner, *op. cit.*, note 241 at 3-58-3-61

more than three years later. His claim was held to have prescribed.²⁵⁵ However, the earlier case of *Ditedu v Tayob* described as ‘absurd’ the proposition that prescription operates against a person whose attorney makes an error, which is only discovered after the three-year period elapses.²⁵⁶ *Truter* is a higher court case, and certainly adopts a more restrictive line than *Ditedu*, which it would trump to the extent that the two are in conflict. But *Truter* concerned an educated plaintiff who had access to some legal representation at all stages.²⁵⁷ The more generous approach of *Ditedu* may well therefore still be good law in a case where a plaintiff is less educated, or lacks access to legal representation at important stages. Such flexibility in light of the plaintiff’s circumstances is in line with s 34.

Various other statutes affect the operation of prescription in specific circumstances.²⁵⁸ These can work for and against victims. For example, there is a statutory mechanism, funded by employer contributions, to compensate workers for certain workplace harms.²⁵⁹ A claim against the statutory fund lapses if the worker does not report the accident or death from illness to the employer within 12 months.²⁶⁰ But once reported, prescription cannot operate against the claim, as where, for example, an employer fails to act on the report.²⁶¹ To the extent that such variations on prescription operate to limit rights, they will also have to pass the limitations test to be constitutional.

Finally, it may well be that prescription does not run at all in respect of a claim based on a constitutional obligation. The Constitutional Court has expressed ‘doubts’ over whether prescription can run in respect of a claim for an unpaid social grant, the grant being due in line with the fundamental right to social assistance.²⁶² *Van Zijl* similarly reflects the idea that the importance of rights claims may override prescription.²⁶³ This is of crucial importance for victims.

A form of prescription also applies to criminal matters. There is an absolute bar on prosecutions more than twenty years after the offence was committed, except for crimes such as murder and rape.²⁶⁴ Lesser delays may be a ground for applying to a court for a permanent stay of prosecution, in terms of the constitutional right

255. *Truter v Deysel* 2006 (4) SA 168 (SCA)

256. *Ditedu v Tayob*

257. *Truter v Deysel* at paras 8, 24

258. A summary is given in Saner, *op. cit.*, note 241 Chapter 1.5

259. Compensation of Occupational Injuries and Diseases Act, ss 15, 16(1), 22

260. Act, s 43(1)(a)

261. Act, s 43(1)(b) read with s 38

262. *Njongi* at paras 41-42. The Court did not decide the point.

263. See also *Minister of Finance v Gore NO* at para 16; *Farocean Marine* at para 13, *Unilever Bestfoods Robertsons (Pty) Ltd v Soomar* 2007 (2) SA 347 (SCA) at para 30 for support of this proposition

264. Criminal Procedure Act, s 18(1)

of accused persons to ‘have their trial begin and conclude without unreasonable delay’.²⁶⁵ This is an exceptional remedy, especially in the case of serious crime.²⁶⁶

3.2.7 Impediments to Jurisdiction – Amnesties, Pardons and Decisions Not to Prosecute

South Africa conducted an amnesty process as part of its transition to democracy, in respect of all civil and criminal liability for political acts committed during apartheid.²⁶⁷ The precedent sets a formidable legal threshold for constitutionally acceptable amnesties. The apartheid amnesty formed part of the negotiated settlement, was enshrined in the Epilogue to the Interim Constitution, and was given further content in a statute.²⁶⁸ It was challenged at the time as being unconstitutional. The Constitutional Court, upholding the amnesty, emphasised the fact that it was part of the consolidation of a new democracy in South Africa. For reason of this exceptional purpose, it was not contrary to applicable international law. Moreover, it was the only plausible way to obtain disclosure about the atrocities of the past, and although it represented a clear limitation of rights, it was a limitation mandated by the constitutional text itself.²⁶⁹ None of these factors is likely to be true of an amnesty for corporate violations of human rights.

That said, the legislature clearly retains the power to enact amnesties, and the President has clear authority to issue pardons.²⁷⁰ Both powers are subject to the Constitution, and the Court’s judgment on the apartheid amnesty would seem to require exceptional justification.²⁷¹ But recent litigation over presidential pardons for some apartheid-era offenders still behind bars shows that a less than rigorous procedure for granting pardons is currently followed by the President.²⁷²

265. Constitution, s 35(3)(d)

266. *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), esp. at paras 27-39; *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (11) BCLR 1327 (SCA) at paras 10-22. Unless the delay will impact on the fairness of the trial itself, the courts have held that it is in the interests of all, including the accused, if a trial is held and guilt or innocence fairly determined.

267. Catherine Jenkins ‘“They have built a legal system without punishment’: Reflections on the use of amnesty in the South African transition’ (2007) 64 *Transformation* 27, esp. at 44

268. Promotion of National Unity and Reconciliation Act 34 of 1995

269. See generally *Azanian People’s Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 672 (CC)

270. Constitution, s 82(2)(j)

271. President prerogative powers are subject to review for rationality and for compliance with the Bill of Rights: *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC) at para 116; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at paras 10-28, 65; *President of the Republic of South Africa v South African Rugby Football Union (SARFU)* 2000 (1) SA 1 (CC) at para 148. However, it may be hard to review pardons of individuals – see *Hugo* at para 24 and Currie & De Waal, *op. cit.*, note 11 at 243-45

272. Author’s personal communication with Marjorie Jobson of Khulumani Support Group. See the most recent statement of civil society coalition opposing the current pardons process available at <http://www.khulumani.net/in-the-media/media-statements/statements-2009/339-civil-society-coalition-calls-upon>

The National Director of Public Prosecutions may review a decision to prosecute or not to prosecute, after taking representations from the accused person, the complainant and any others she considers relevant.²⁷³ This power could be good for victims by ensuring that prosecuting procedures are properly adhered to. However, a concern in this area is that the prosecuting authority is potentially subject to political control and there is potential for political considerations to interfere with decisions.²⁷⁴

Courts have limited powers in this area. A court generally has no power to interfere with a decision not to prosecute.²⁷⁵ However, a court may overturn a decision to prosecute or not to prosecute if it is made for an improper purpose.²⁷⁶

3.2.8 Impediments to Jurisdiction – State Secrets and National Security

There is apartheid-era precedent to the effect that a statute may oust the jurisdiction of the courts on grounds of national security.²⁷⁷ However, it is now of doubtful authority. There are no restrictions on the judiciary’s constitutional duty to hear allegations of rights violations and remedy breaches. The Constitution makes it clear that the jurisdiction of the courts is not ousted by a declaration of emergency. Indeed, the courts have jurisdiction to pronounce on the validity of a declaration of emergency and of any emergency measures.²⁷⁸ It is therefore unlikely that the apartheid-era precedents on this point will be followed, though the issue has yet to arise in the constitutional era. The closest indication relates to

-president-zuma-to-abandon-defective-pardons-process.html; see also the earlier ‘Rights Body wary of political pardons’ *Business Day* 22 January 2009.

273. Constitution, s 179(5)(d)

274. There is no constitutional provision for the independence of the national prosecuting authority, unlike Ch 9 bodies – Constitution, s 181(2)-(4) – and the judiciary – 165(2)-(4). The National Director is appointed by the President – s 179(1)(a) – and the cabinet member responsible for justice ‘must exercise final responsibility over the prosecuting authority’ – s 179(6). Prosecuting decisions must be made ‘without fear, favour or prejudice’ – s 179(4). See further *Zuma v National Director of Public Prosecutions* 2009 (2) SA 277 (SCA), esp. at paras 28-34.

275. *Zanner v Director of Public Prosecutions*.

276. There is currently a disagreement between the courts and the Prosecuting Authority as to what constitutes ‘an improper purpose’. The judicial view appears to be that it would be unlawful to withdraw a prosecution in circumstance where reasonable grounds for prosecution are present. This position would protect the rights of victims and the societal interests that the truth or falsity of charges is determined in a fair trial. The Prosecuting Authority’s view is that it may be lawful to withdraw a prosecution on the basis of irregularities in the prosecution process even if reasonable grounds to prosecute are present and the irregularities do not affect the subsequent fairness of the trial. It contemplates the termination of prosecutions, and thus a failure to vindicate victim’s rights, even if though the fair trial rights of the accused are not infringed upon, which may go too far.

277. Important examples include *Roussouw v Sachs* 1964 (2) SA 551 (A); *Scherbrucker v Klindt NO* 1965 (4) SA 606 (A) and *Katofa v Administrator-General, South West Africa* 1987 (1) SA 695 (A).

278. Constitution, s 37(3). See also ss 37(5)-(8).

national security objections raised in the context of allegedly classified evidence, which the courts firmly rejected.²⁷⁹

3.3 Information-Gathering

Section 32(1) of the Constitution provides for a right of access to state information, and to information in private hands where it is required for the exercise and protection of rights. If the Rules of Court provide for access, they apply; in all other cases, the right is given effect to by the Promotion of Access to Information Act 2 of 2000.²⁸⁰

It is important to note that the ban on self-incrimination in s 35 of the Constitution means that a director or other company official cannot be obliged to reveal information that would serve to incriminate her. If a person *is* obliged by the access to information right to disclose information, it will not be admissible against her in subsequent proceedings.²⁸¹ Victims relying on the mechanisms here discussed may therefore face a choice between finding out what happened and holding directors accountable for it. This important dilemma remains largely unexplored.

3.3.1 Rules of Court

The Rules of Court are to be applied so as to give effect to affected constitutional rights, favouring openness and procedures that resolve disputes quicker.²⁸²

279. The Constitutional Court in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re: Masethla v President of the Republic of South Africa* 2008 (5) SA 31 at paras 48-51 specifically rejected the propositions that a court may not enquire into a decision by the executive to classify information, and that a court has no power to order the release of this information to the public.

280. See the approach of the Supreme Court of Appeal in *MEC for Roads and Public Works, Eastern Cape v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA), which seems to adopt the interpretation of s 7 advocated by Currie & Klaaren *The Process of Access to Information Act Commentary* (Siberlnk, Claremont, 2002) at 52-54. Should both mechanisms prove inadequate, a party will be able to rely on s 32 directly, but a person seeking to exercise the s 32 right must usually proceed in terms of the provisions of PAIA: *Institute for Democracy in South Africa (IDASA) v African National Congress* 2005 (5) SA 39 (C) at paras 14-19, or in terms of the Rules of Court. The Constitutional Court has yet to rule definitively on the point, but this interpretation is inevitable given its approach to such questions. See in particular the obligation to bring administrative challenges in terms of the Promotion of Administrative Justice Act – legislation similarly giving effect to a constitutional right – set out in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) (CC) at paras 25-27. On direct reliance on s 32, see Currie & De Waal (2005), *op. cit.*, note 11 at 688-89.

281. See the summary by JJ Henning and S Du Toit 'The Constitution and the Companies Act: a challenge for the coming millenium' (2000) 21 *The Company Lawyer* 103 at 103-105, and especially *Ferreira v Levin; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); see also 2008 Companies Act, s 176(5).

282. Discovery procedures affect the s 32 right to access to information, as well as the constitutional commitment to openness in the public and private sphere; the s 34 right to have legal disputes 'decided in a fair public hearing', and the s 35 right to a fair trial: see esp. *Independent Newspapers* at para 26, *De Beer NO v North-Central Local Council and South-Central Council (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) at para 11; *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) 297 (SCA) at para 9; *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003 (6) SA 190 (SE) at paras 8, 13.

Rule 35 provides for the discovery procedure, which obliges parties to set out under oath the documents they have or have had that are relevant to the case.²⁸³ All parties then have a right to inspect the documents. Courts have the power to order discovery, and ultimately to dismiss a party's claim or defence, if a party fails to discover.²⁸⁴ The tendency appears to be towards openness: a party does not have to prove that a document is relevant to obtain sight of it.²⁸⁵ If a party refuses to permit inspection on the grounds of privilege, the court may itself examine the document to determine the validity of the claim.²⁸⁶ The threat of discovery alone has proven an effective tactic to obtain a settlement against pharmaceutical companies, who did not wish to disclose pricing schedules and elected to settle before discovery.²⁸⁷

Rule 38 provides a mechanism for obtaining the attendance of any person at trial to give evidence. Evidence may also be taken on commission outside South Africa. A person's attendance under Rule 38 may be secured by arrest, and they may be compelled to give evidence (subject to the ban on self-incrimination) by imprisonment for renewable eight-day periods.²⁸⁸ Rule 53 permits a party to obtain the details of a decision and the reasons for it from a state body for the purposes of an administrative law challenge.²⁸⁹

3.3.2 Promotion of Access to Information Act (PAIA)

PAIA provides one of the most extensive mechanisms for obtaining information in existence anywhere in the world. It regulates 'requests' for 'records' held by 'public' and 'private' bodies. A 'record' is any recorded information, including information recorded pre-PAIA.²⁹⁰ Although PAIA makes it an offence to destroy,

283. See generally Harms, *op. cit.*, note 195 at B35. Discovery includes the obligation to disclose documents that may damage a party's own case: South African courts apply the rule as stated in the English case of *Compagnie Financiere et Commerciale du Pacific v Peruvian Guano Co* (1882) 11 QBD 55; see *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 316D-H and cases there cited.

284. See Uniform Rules 35(6) and (7)

285. See *Greenberg v Pearson* 1994 (3) SA 264 (W), esp. at 268-69; *Rellams (Pty) Ltd v James Brown & Hamer* 1983 (1) SA 556 (N) at 557. This is qualified by the need to protect confidential information, but in holding this, it is been stressed 'that care must be taken not to place undue or unnecessary limitations on a litigant's right to a fair [civil] trial' – *Crown Cork & Seal Co Inc v Rheem South Africa (Pty) Ltd* 1980 (3) SA 1093 (W) at 1100A, quoted with approval in *Masetlha* at para 27.

286. *Independent Newspapers* esp. at para 53. For an example under PAIA, see *CCII Systems (Pty) Ltd v Fakie and Others NNO* 2003 (2) SA 325 (T), esp. at para 20.

287. Remarks by Adilla Hassim, then of the Centre for Applied Legal Studies, presentation at University of Witwatersrand, Johannesburg, 3 April 2006.

288. Supreme Court Act 59 of 1959, ss 30-31

289. It likely does not apply to the record of deliberations (which may be the most important factor if the concern is that the state is acting in bad faith): *Johannesburg City Council v The Administrator, Transvaal (1)* 1970 (2) SA 89 (T) at 91G-92A. The SCA recently referred to this view without deciding the point: *Intertrade Two* at para 15. Parties seeking this information will have to rely on PAIA.

290. PAIA, s 3; see further Currie & Klaaren, *op. cit.*, note 280 at 43.

conceal or falsify records,²⁹¹ it does not oblige parties to keep records.²⁹² Since entities must keep records to function, however, this is not necessarily problematic, and other statutes that do require records to be kept play a valuable complementary role here.²⁹³

In terms of PAIA, a public body is obliged to disclose information, subject to certain defined exceptions. A private body is obliged to disclose information where it is necessary to protect ‘rights’, again subject to certain defined exceptions. It has recently been held that ‘rights’ includes ordinary legal rights as well as fundamental rights.²⁹⁴ The exceptions may be overridden where this is shown to be in the public interest. Anyone (including foreigners, persons outside South Africa territory, and those seeking to represent the rights of others) may request records.²⁹⁵ Records obtained may be used for litigation, in the political sphere and in the media.²⁹⁶

Similarly to the position with public functions performed by private bodies in administrative law, the classification of a body as ‘public’ or ‘private’ for the purposes of a particular request ‘is dependent on the function performed by the body in relation to the record requested’.²⁹⁷ A private company performing a public function is therefore subject to the same extensive disclosure duties as the state in respect of records relating to that function.²⁹⁸ As in administrative law, the courts have been cautious to treat ‘private’ bodies as ‘public’.²⁹⁹ This may not adequately reflect the aims of PAIA and the s 32 right, which is to ‘foster a culture of transparency and accountability’,³⁰⁰ and which the Preamble to PAIA recognises

291. PAIA, s 90.

292. Benita Roberts ‘Scope of the Promotion of Access to Administrative Justice Act 2 of 2000: A Comparative Perspective’ (2006) 25 *Politeia* 117 at 119-20.

293. Natania Locke ‘The Application of the Protection of Access to Information Act 2 of 2000 in consumer protection’ (2007) 19 *South African Mercantile Law Journal* 461 at 465.

294. *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) at paras 7-8. Most academics had previously held that it should apply to fundamental rights only: See Currie & Klaaren, *op. cit.*, note 280 at 69-71; Fanie Cloete and Christelle Auriacombe ‘Counter-productive impact of freedom of access to information-related legislation on good governance outcomes in South Africa’ (2008) 71 *Tydskrif vir die Hedendaagse Romeinse-Hollandse Reg* 449; Natania Locke ‘Access to a company’s accounting records by means of the Promotion of Access to Information Act 2 of 2000’ (2005) 17 *South African Mercantile Law Journal* 221. The exception is Jonathan Klaaren and Glenn Penfold ‘Access to Information’ in Woolman et al *Constitutional Law of South Africa 2 ed* (Juta & Co, Original Service 2002) at 62-14 (should include all constitutional, statutory and common law rights).

295. See the definition of ‘requester’, PAIA, s 1; Currie & Klaaren, *ibid.*, at 65; Roberts, *op. cit.*, note 292 at 125-26

296. Currie & Klaaren, *ibid.*, at 70-71; Klaaren & Penfold, *op. cit.*, note 294 at 62-15 and cases there cited.

297. Currie & Klaaren, *ibid.*, at 51 (emphasis in original); see PAIA, s 8 and definition of ‘public body’, s 1.

298. See the discussion of case law in *Mittalsteel v Hlatswayo* [2007] 1 All SA 1 (SCA) at paras 10-22.

299. See for example *IDASA* at para 30-32 (the raising of funds by a political party is a method of generating income and an exercise of rights open to all, and so is not a public function). See also *Unitas Hospital v Van Wyk and Another* 2006 (4) SA 436 (SCA); [2006] 4 All SA 231 (SCA), below.

300. PAIA, Preamble. These and related values find repeated constitutional expression.

can apply to corporations as much as the state.³⁰¹ The SCA recently failed to decide this point in a case concerning a request from a large private hospital, a good example of “quite a public private body”.³⁰² It is submitted that the correct view is that PAIA requires more openness the more ‘public’ the corporation and its functions are. This view accords with the purposes of the s 32 right.³⁰³

A public or private body may refuse a request, giving ‘adequate reasons’. Refusals by public bodies³⁰⁴ may be internally appealed, and all refusals may be reviewed in the High Court.³⁰⁵ A reviewing court may itself examine any disputed record, which cannot be withheld from the court for any reason.³⁰⁶ On review, the applicant must at a minimum³⁰⁷ identify which right is threatened, which records are sought, and how they will assist in protecting the right.³⁰⁸ The applicant must then show that the records are ‘reasonably required’ for the protection of the right. The test – at this early stage of its development – is flexible enough to be sensitive to the needs of victims, but some critical points of interpretation lie ahead.

The emerging view requires an applicant, to show that a record is ‘reasonably required’, and so must demonstrate some ‘substantial advantage or an element of need’.³⁰⁹ A ‘substantial advantage’ includes at least the situation where disclosure of the record will assist decisively in resolving a dispute, in the interest of

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301. The Preamble recognises that ‘the system of government in South Africa before 27 April 1994...resulted in a secretive and unresponsive culture in *public and private bodies which often led to an abuse of power and human rights violations*’ (emphasis added). One of its aims is ‘to foster a culture of transparency and accountability in *public and private bodies* by giving effect to the right of access to information’ (emphasis added). See also s 9(e).
302. *Unitas Hospital*. The view advocated here, and the phrase ‘a rather public private body’ appear from the judgment of Cameron JA (paras 40-42). Cameron JA’s view is rejected in the judgment of Cloete JA, Harms JA concurring (see at para 51). The remaining two judges do not consider the question, and so there is no majority view. The Constitutional Court did not consider the issue for procedural reasons: see *Van Wyk v Unitas Hospital* 2008 (4) BCLR 442 (CC).
303. See further Shannon Bosch ‘IDASA v ANC – An opportunity lost for truly promoting access to information’ (2006) 123 *South African Law Journal* 615 at 618-21.
304. This does not apply to private bodies performing a public function (see below); see *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources* [2005] ZAGPHC 135, unreported judgment handed down on 23 February 2005, at para 32.
305. PAIA, ss 74-78. Rules are to be promulgated for the procedure for High Court review, but despite a considerable extension of the statutory time limit, this had not happened as at December 2008. Until the rule is promulgated, the Act provides its own cause of action in s 79(2).
306. PAIA, s 80(1)
307. These obligations constitute a ‘threshold requirement’: see *Unitas* at para 17.
308. *Cape Metropolitan Council v Metro Inspection Services* CC 2001 (3) SA 1013 (SCA) at para 28. See also *Mpaphela v First National Bank of South Africa* 1999 (3) BCLR 253 (CC) at para 16 (rejecting request where ‘even if the applicant were to be given the reasons he seeks, he would not be able to claim any consequent right’); *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T) (rejecting requests that simply listed documents without any link to rights.)
309. *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA); [2005] 2 All SA 225 (SCA) at para 13; followed in *Unitas* at para 17 and *Claase* at para 9

convenience and cost-saving.³¹⁰ A frequent concern of the courts in this area is the so-called ‘fishing expedition’, the speculative request for information in the hopes of finding something which the requester can use to her advantage.³¹¹ The threshold obligation of an applicant to show the link between a right and a record should assist here. Most significantly, the effect of the recent *Claase* judgment is that an applicant does not need to prove that she has a right and that it has been violated to gain access to the record. In other words, a record may be ‘reasonably required’ to protect rights where the record will reveal *whether* a right has been violated. This will be vital to victims.

The most crucial concern going forward is how far this right to convenient disclosure, or disclosure to determine whether a right has been violated, extends. The courts have shown reluctance to permit ‘pre-action discovery’: the use of PAIA, prior to the commencement of proceedings, to obtain all the information that would usually be obtained by discovery. It is submitted that pre-action discovery should be permitted when, in the words of s 50, it is ‘necessary to protect rights’. In other words, it should apply to situations where there is a danger that rights will not be vindicated if applicants are forced to wait until discovery, or are forced to undertake the expense of initiating proceedings in order to obtain discovery.³¹² The point remains to be decided, but the interpretation offered is in line with previous decisions.³¹³

Once the applicant establishes that the information is needed to protect rights, the respondent bears the onus to show that one of the exceptions apply.³¹⁴ The key exceptions protect personal information, trade secrets and other commercial information, and information subject to confidentiality agreements.³¹⁵ Judicial interpretation of the exceptions remains limited. But they are unlikely to pose obstacles to legitimate claims provided that they are seen for what they

310. Thus in *Claase v South African Airways*, an applicant was granted access to a record which would reveal whether or not a corporation had reneged on a contractual obligation. *Claase* at para 9, interpreting *Unitas* at para 54; see also *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T); [1997] 1 All SA 305 (T) at para 103.

311. See the discussion of the earlier case-law in Klaaren & Penfold, *op. cit.*, note 294 at 62–16-17; *Unitas Hospital* at paras 21, 44. See also the Constitutional Court’s approach to ‘fishing expeditions’ in the context of classified material in court proceedings in *Masetlha* at para 29 and parliamentary proceedings in *President of the Republic of South Africa v Quagliani* 2009 (4) BCLR 345 (CC) at para 31.

312. See the idea of ‘assistance’ in *Cape Metropolitan Council* at paras 28-29.

313. In *Clutcho v Davis NO*, the SCA rejected a request because no serious risk of harm was shown if the record were not obtained and was it not demonstrated why existing statutory protections would not suffice (at paras 15-18). In *Unitas Hospital v Van Wyk* it rejected a request where an applicant had enough information to launch a case and was held only to be seeking to bolster her claim; it held that such an applicant must wait for discovery (at paras 20-22 (Brand JA); 62-63 (Conradie JA, Harms JA concurring)). See also the view of Cloete JA (Harms JA concurring) at paras 52-54.) These decisions at least imply what is important to victims: where alternative mechanisms are inadequate, and where the refusal to release records *would* cause obstruct a case, it *will* be appropriate to order disclosure.

314. Currie & Klaaren, *op. cit.*, note 280 at 100; *CCL Systems*

315. For a further discussion, see Currie & Klaaren, *ibid.*, at 98-192.

are: policy- and privacy-based limitations of the fundamental right of access to information.³¹⁶ The nature of the South African privacy right will militate against privacy-based exclusions being used to block important claims, because privacy claims are upheld only to the extent that the expectation of privacy is reasonable.³¹⁷ Corporations also enjoy a lesser privacy right than do natural persons.³¹⁸ Any limitation will also have to be reasonable in an ‘open and democratic society based on human dignity, equality and freedom’,³¹⁹ so exclusions are likely to be harder to justify the more public the impact of a corporation.³²⁰ And exclusions are further subject to the two ‘trumps’: tests of product or environmental safety may not be withheld if they reveal ‘a serious public safety or environmental risk’,³²¹ and any ground of refusal may be overridden if the record would reveal ‘a substantial contravention of, or failure to comply with, the law, or an imminent and serious public safety or environmental risk’, and the public interest ‘clearly outweighs’ the harm to the protected privacy or policy interest that disclosure might cause.³²² There is legitimate concern that this override sets the threshold too high and imposes a substantial burden on an applicant.³²³ But read as a whole, the Act will make it difficult for corporations to hide serious rights violations.

A final practical comment is in order. As the length of even this highly compressed discussion reveals, PAIA’s internal complexities make it ‘cumbersome and difficult to implement’.³²⁴ There is as yet little indication of the workings of PAIA in relation to private bodies. The public sector’s implementation has been decidedly mixed –

316. See Currie & Klaaren, *ibid* at 105; Klaaren & Penfold, *op. cit.*, note 294 at 62-18. This also appears to be the view of the SCA: see *Mittalsteel* at para 5; see also *Biowatch* at para 39.

317. See further Currie & Klaaren, *ibid.*, at 116-19.

318. For a good illustration of how the privacy enquiry applies to corporations, see *Gumede v Subel NO* [2006] 3 All SA 411. Corporations have a much narrower privacy right than that of natural persons: *Investigation Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at para 18. While corporate confidentiality has traditionally been strongly protected in South Africa – see Cilliers & Benade *Corporate Law 3 ed* (LexisNexis Butterworths, Durban, 2000) at 137 – the Supreme Court of Appeal has confirmed that these protections are now subject to PAIA: *Clutcho* at para 14. Corporate confidentiality could always be overridden in the public interest – *Sage Holdings Ltd v Financial Mail (Pty) Ltd* 1991 (2) SA 117 (W) at 463G; *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 (4) SA 293 (A) at 303B-304A.

319. Constitution, s 36

320. This fits with the existing interpretation of the privacy right as shrinking in communal spheres such as business – see *Bernstein v Bester NO* 1996 (2) SA 751 (CC) at para 67.

321. PAIA, s 36(2)(c) (public bodies), s 64(2)(b) (private bodies).

322. PAIA, s 46 (public bodies); s 70 (private bodies).

323. Locke note 293 above (2007) at 471; Klaaren & Penfold, *op. cit.*, note 294 at 62-24. For a discussion of the workings of the override, see Currie & Klaaren, *op. cit.*, note 280 at 107-10.

324. Cloete, Fanie & Auriacombe, Christelle ‘Counter-productive impact of freedom of access to information-related legislation on good governance outcomes in South Africa’ (2008) 71 *Tydskrif vir die Hedendaagse Romeinse-Hollandse Reg* 449 at 456; comments of Mr Moses Cloete (Benchmarks Foundation) African Institute for Corporate Citizenship Human Rights and Business Project South Africa Roundtable, Johannesburg, 9 June 2009. The Global Integrity Report ‘South Africa: Integrity Indicators Scorecard’ (2008) available at http://report.globalintegrity.org/South_Africa/2008/scorecard/15 gives South Africa 100% for rights of access to information and 40% for their efficacy.

subject to obfuscation, lengthy delays in replying to requests, and unhelpfully vague responses,³²⁵ though possibly improving as government officials get used to the idea. An NGO which trained persons in 15 community centres to make requests received prompt responses from police and government, and describes PAIA as ‘the most exciting tool that a community has’.³²⁶ It might therefore be a mistake to read too much into early cases where corporations have not been co-operative in response to PAIA requests. A tendency to punish unreasonable refusals with a punitive costs order may also assist if cases get to court.³²⁷ The bigger problem is the finding by a parliamentary commission that costs mean that only ‘a handful’ of PAIA review cases do get to court.³²⁸ Once again, access to legal resources is the most serious obstacle.

3.3.3 Other Important Statutory Mechanisms for Obtaining Information

A number of other important mechanisms exist alongside PAIA. Search warrants for the state, and Anton Piller orders for private parties, exist for obtaining information without the co-operation of a corporation. In both cases, it will be necessary to establish that there is a reason to think that a party will hide or destroy evidence if the normal discovery rules were employed, in order to justify the infringement of privacy attendant on an unannounced search.

Several specific statutory disclosure duties oblige directors to release information about the state of a company to its members.³²⁹ This disclosure is at least

325. On state efforts, see the report of the Public Service Commission on the first five year’s of PAIA’s implementation, Public Service Commission *Report on the Implementation of the Promotion of Access to Information Act, (Act No 2 of 2000) in the Public Service* (2007), available at http://www.psc.gov.za/docs/reports/2007/K-5515_PSC_Report_DevV11.pdf; B Roberts ‘Prerequisites for the successful implementation of the Promotion of Access to Information Act 2 of 2000’ 2 *Journal of Public Administration* 231 (2006); Jonathan Klaaren ‘National Information Insecurity? Constitutional issues regarding the protection and disclosure of information by public officials’ 119 *South African Law Journal* 721 (2002); Cloete & Auriacombe *ibid.*, at 450, 457-58; Verne Harris ‘Using the Promotion of Access to Information Act: The Case of the South African History Archive’ in Claudia Lange & Jakkie Wessels (eds) *The Right to Know: South Africa’s Promotion of Administrative Justice and Access to Information Acts* (Siberlink, Cape Town, 2004).

326. Comments of Dr Marjorie Jobson, Director, Khulumani Support Network at the African Institute for Corporate Citizenship Human Rights and Business Project South Africa Roundtable, Johannesburg, 9 June 2009

327. See *Intertrade Two* at paras 20-21, applied against a corporation in *Claese* at para 11.

328. Parliament of the Republic of South Africa *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions* (2007), available at www.parliament.gov.za/live/chapter_9_report.pdf at 174.

329. See 1973 Companies Act, ss 145 and 148 (duties when issuing a prospectus); s 284 (duty to keep accounting records); s 285 (duty to publish annual financial statements); s 302 (duty to publish Directors’ report). In the 2008 Act, see esp. s 24 (company records); s 28 (accounting statements); s 29 (financial statements); s 100 (requirements when issuing a prospectus). See also Securities Services Act 36 of 2004, s 15(1) (duty to disclose on request information relating to securities to securities exchange).

notionally based on the needs of members, not the public at large.³³⁰ But they can be important because they include the obligation to disclose ‘risks’, including a company’s possible exposure to legal liability.³³¹ These legally enforceable³³² duties may therefore be a source of information to victims. They may also be an important mechanism in the hands of conscientious shareholders or shareholders concerned about personal liability under the doctrine of veil-piercing.³³³ Corporate reporting duties are also likely to become more important under the influence of the Report King III, the draft of which shows a clear move away from a purely ‘financial’ focus of corporate reporting. Recognizing the obligations that corporations have to the environment and the community they impact, the Report makes reference to the notion of the ‘triple bottom line’.³³⁴ This means that under King III, a board will be obliged ‘to report to its shareholders and other stakeholders on the company’s economic, social and environmental performance’.³³⁵

Other statutes are also important. Under the Mine Health and Safety Act, employers must maintain a system for the medical surveillance of employees and employees are entitled to have access to these records.³³⁶ Under NEMA, environmental inspectors have wide powers to investigate possible breaches of environmental laws.³³⁷ The inspectors have powers of entry, search and seizure, and arrest, may oblige persons to answer questions and may conduct unannounced routine inspections.³³⁸ The minister may also order an investigation into

330. See the summaries of the purposes of various reporting duties in Cilliers & Benade, *op. cit.*, note 318 at 272-73 (prospectuses); 381 (financial statements); and 383 (director’s reports). The s 15 duty in the Securities Act exists only insofar as necessary to achieve the purposes of the act set out in s 2, which do not include the public interest broadly understood, or upholding the Constitution or human rights.

331. Prospectuses are obliged to state all information that might affect an investment decision – see 1973 Companies Act, s 148(1)(b), which is interpreted as giving effect to the ‘strict and scrupulous accuracy’ standard set out in the English case of *New Brunswick and Canada Rly Co v Muggerridge* (1860) 1 Dr & Sm 363 at 381; see further Cilliers & Benade, *ibid.*, at 270-71, 2008 Act, s 100. Directors are obliged to report on all matters “material for the appreciation of the state of affairs” of the company or group, including “particulars of any contingency not already recognised in the financial statements” (future legal liability is not so recognised) – see the requirements of the Financial Statement as set out in Schedule 4 of the Act, para 35, and of Directors Reports, set out therein at paras 65(2) and 72(a); *Seegers v Gazaz (Tvl) (Pty) Ltd* [1997] 2 All SA 445 (D) at 451. See also FAFO Report, *op. cit.*, note 49 at 1-5; 2008 Act, ss 100, 104, 106.

332. The exact basis for liability may vary: criminal (e.g. fraud charges), statutory (e.g. 1973 Companies Act, s 160(1), which provides that directors are liable to investors who suffer loss as a result of defective information provided in a prospectus), civil (e.g. delictual access for breach of fiduciary duties) or contractual, where directors have concluded a contract with the company.

333. Shareholder and institutional monitoring is crucial: research conducted by Farai Kapfudzruwa of the University of Cape Town’s Environmental Evaluation Unit (unpublished, on file with the author) showed the compliance with reporting and related duties was better in dual-listed South African companies which were exposed to the stricter scrutiny in other countries.

334. King III Draft Report, §2.1-2.2

335. King III Draft Report, §2.1, cl. 1.

336. Mine Health and Safety Act, s 13 read with s 19(1)

337. NEMA, ss 31A-31Q; see esp. s 31D(1)

338. NEMA, ss 31H(1), (3) and (5), read with the Criminal Procedure Act, Chs. 2, 5, 7 and 8. See also the Draft Regulations dealing with inspectors, GG 27903 (12 August 2005), cl. 3 and ann. 1.

‘any matter relating to the protection of the environment’, which includes the power to order the production of documents or appearance to give evidence.³³⁹ Failure to disclose is an offence.³⁴⁰ As noted above, private citizens have some right under NEMA, to apply for a court order compelling an official who does not act to take these steps.

Corporations may also be investigated. Courts have a general power to initiate investigations into any matter before Court.³⁴¹ Under the 1973 Companies Act, the minister and the courts have the power to order the investigation of a company.³⁴² The power has never been used for anything related to human rights violations, although nothing in law prevents this.³⁴³ Under the 2008 Act, an extensive investigation power,³⁴⁴ similar to that in NEMA, is vested in the new independent Commission and Tribunal.³⁴⁵ The Act specifically provides that these bodies are only there to enforce the Act and other commercial statutes.³⁴⁶ The significance to victims of the investigative powers of these bodies will therefore be limited to their utility in enforcing reporting requirements, assisting with their fulfilment, and publicising the results.³⁴⁷ However, as triple-bottom line reporting becomes the norm, this role could become most valuable. It is also worth noting that the 2008 Act takes a step towards making processes like these more inclusive. There is provision for the disclosure of financial information to trade unions in case of business failure.³⁴⁸ When the Tribunal holds hearings, any person with a ‘material interest’ has a right to have their interests represented, to examine documents, and to question witnesses.³⁴⁹

339. NEMA, s 20(a), read with the Commissions Act 8 of 1947, s 3. The regulations referred to in s 20(b), in which the Minister may establish the rules for an enquiry, have yet to be published.

340. Commissions Act, ss 5-6.

341. Supreme Court Act, s 19 *bis*

342. 1973 Companies Act, s 258.

343. Cilliers & Benade, *op. cit.*, note 318 at 311, 311 n 69. A review of the dozen reported applications of the section in the last thirty years reveals use only by shareholders and creditors for company law violations.

344. The power are set out in 2008 Companies Act, ss 176-79 (Commission); ss 82-84 (Tribunal).

345. 2008 Companies Act, ss 156(b) and (d) read with ss 185(2)(b) and (3) and ss 193(1) and (2). The bodies may act on the request of the Minister and other regulatory bodies - ss 157(1) and (2), 168(1) and (2) - and raise or take up cases to pursue themselves: s 157(2); see also ss 166, 169 and 170. The tiny size of the projected budgets, however, suggests that this role is intended to remain limited: see ‘Memorandum on the Objects of the Companies Bill’ attached to the 2008 Act in Bill form, para 14.

346. The wording of the equivalent of the 1973 Act’s s 258 is narrowed in the 2008 Act, and the broad - see n 84 - power of a court to order an investigation are removed - see s 163(1). The functions of the Commission (s 187(2) read with s 187(1) and Schedule 4) and Tribunal (s 195(1)) refer to the enforcement of the Companies Act and other commercial legislation. The Minister possibly also could broaden the scope of the Commission’s powers - see s 168(3)(b) - but this is also likely limited: read with s 190(2)(b)(ii).

347. See esp. 2008 Companies Act, ss 170(3)-(4), 186(1)(b)-(e), 187(2)-(7), 188(2)-(3), and more generally the Commission’s powers set out in ss 169-175.

348. 2008 Companies Act, s 31(3)

349. 2008 Companies Act, s 181(c).

3.4 Obstacles During the Court Process

3.4.1 Standing

Standing is unlikely to present an obstacle to victims. The Constitution takes a broad approach to standing,³⁵⁰ which has further been broadly interpreted by the courts.³⁵¹ A person has standing to raise violations of their own rights,³⁵² or of those of another if the alleged victim is unable to act in his or her own name.³⁵³ This includes a person whose inability to act arises from indignity or lack of access of legal aid.³⁵⁴ Standing is also bestowed on those acting as part of or in the interests of a group or class of people, which has been interpreted as introducing a class action into South African law.³⁵⁵ An association acting in the interests of its members also has standing.³⁵⁶

The only major caution applies to public interest standing, for which the Constitution also provides. The ground is generally salutary: it grants standing whenever it is, objectively speaking, in the public interest that a case may be brought.³⁵⁷ This is no doubt intended to create a situation where no publicly important case will be barred by standing requirements. However, the objective approach also means that the case must be brought in the *manner* in which the public is interested; that is, in a manner that will be conducive to the proper resolution of the issues. Relying on public interest standing may therefore require a well-researched case in which all affected parties are joined and key arguments are ventilated early. Such litigation is costly. The approach to public interest litigation is not necessarily wrong, and will likely lead to better judgments, but it may deter such litigation.³⁵⁸ Relief for victims, as opposed to law reform, may sometimes be better sought under other grounds of standing.

350. Constitution, s 38

351. See esp. *Ferreira v Levin* at paras 162 – 68 (Chaskalson P, for the majority) and 208 (Mokgoro J, concurring on this point).

352. Constitution, s 38(a)

353. Constitution, s 38(b)

354. The section is interpreted in this fashion in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E) at 622J – 623A and *Highveldridge Residents* at paras 14, 27

355. *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuza* 2001 (10) BCLR 1039 (A) The SCA judgment does not explicitly require (see at paras 4, 16) that there be at least one injured party bringing the claim – the ‘token plaintiff.’ The suggestion that no token plaintiff should be necessary is in accordance with the South African Law Reform Commission’s proposals on the subject – see *Project 88: The Recognition of Class Actions and Public Interest Actions in South Africa* (August 1998) at 5.4, and section 5 of the Draft Bill annexed to the report – and is also in line with the words ‘as a member of or in the interests of’ of s 38(c).

356. Constitution, s 38(e)

357. *Lawyers for Human Rights v. Minister of Home Affairs* 2004 (4) SA 125 (CC) at paras 14 – 22

358. *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank Ltd* 2006 (6) SA 103 (CC) illustrates this problem, admittedly in the specialised scenario of an attempt by a public interest group to take over and broaden an appeal to the Constitutional Court. The appeal was denied on the grounds that the issues

3.4.2 Delay and Length of Proceedings

Although detailed empirical research has yet to be done, all the indications are that delay is a concern in South Africa. In an address to the National Justice Symposium, Constitutional Court Justice (now Chief Justice) Sandile Ngcobo noted that it often takes two to five years for a matter to get to trial; that there is a “huge backlog” of appeals from the magistrates’ courts burdening the High Courts; and that 600-700 matters awaited a trial date at the Durban High Court alone as of December 2002.³⁵⁹ This is primarily attributed to cumbersome procedures and a lack of facilities.³⁶⁰ The Constitutional Court has noted that ‘endemic blemishes’ in the criminal justice system cause delays, and that ‘multiple postponements are endemic’ in the system.³⁶¹ The legislature has introduced a new s 342A into the Criminal Procedure Act permitting courts to investigate unreasonable delays in cases that arise before them and make orders to circumvent delay. Apart from the telling indicator this is in itself, at least two such investigations have been ordered, and both revealed multiple causes of delay in criminal matters, including a shortage of prison staff, prosecutors and disorganised systems.³⁶² Long delays are the mark of environmental criminal trials.³⁶³ Any litigation that must go through multiple courts will take many years. Although labour matters are dealt with by a specialised labour court system, discussed in the next section, this does not oust the jurisdiction of the mainstream appeal courts. Intractable labour disputes therefore pass through the CCMA and four courts, taking seven years or more to resolve.³⁶⁴ The seminal *Carmichele* case has taken five hearings and 12 years to date.³⁶⁵ If victims can get to court, relief may be a long time in coming.

had not been heard by a lower court and that other interested parties were not joined – concerns with the way in which the case was brought. The result has been that the alleged rights violations have yet to be judicially considered. Statements such as that in *Van Rooyen v S* 2001 (4) SA 396 (T) at 423G-H, that standing is now essentially unlimited, should be approached with caution.

359. Sandile Ngcobo ‘Delivery of Justice: Agenda for Change’ (2003) 120 *South African Law Journal* 688 at 688, 692-93.
360. Ngcobo, *ibid.*, at 693, 705-06
361. *Wild v Hoffert NO* 1998 (3) SA 695 (CC) at paras 12, 30
362. *S v Motsasi* 1998 (2) SACR 35 (W); *S v Maredi* 2000 (1) SACR 611 (T). Both cases are referred to by Esther Steyn ‘Undue Delay in criminal cases: The Scottish and South African courts’ response’ (2003) *Acta Juridica (Criminal Justice in a New Society: Essays in Honour of Solly Leeman)* 139 at 157.
363. Michael Kidd *Environmental Law – A South African Guide* (Juta & Co, Cape Town, 1997) at 211
364. Of the three most recent labour cases in the Constitutional Court: *Sidumo v Rustenberg Platinum Mines Ltd* 2008 (2) SA 24 (CC) took just under seven years to CC judgment; *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 (1) SA 390 (CC) took just over seven years; and *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) took nearly ten years.
365. Dennis Davis & Michelle le Roux *Precedent & Possibility: The (Ab)use of Law in South Africa* (Double Storey, Cape Town, 2009), Ch. 9

3.4.3 Costs

Costs are fundamentally a matter for the court's discretion.³⁶⁶ In most South African courts, the general principle is that a successful party is entitled to their costs. Different rules apply in the labour courts, where adverse costs orders are usually regarded as antithetical to the notion that there is an ongoing employment relationship between the parties.³⁶⁷ Different rules also apply in constitutional matters. In the Constitutional Court, the general rule is that an applicant who brings a *bona fide* but unsuccessful constitutional challenge will not usually be made to pay the respondent's costs, in order to avoid a 'chilling effect' on these cases.³⁶⁸

This rule is generally applied against the state; its application in the private sphere is more complex. In its recent *Biowatch* decision, the Court rejected on equality grounds the notion that the ability of a litigant to pay should have any bearing on costs decisions, holding that the question is always whether 'a costs order would hinder or promote the advancement of constitutional justice.'³⁶⁹ It appeared to reverse the Court's earlier holding that costs will more readily be awarded against a litigant seeking to advance commercial interests.³⁷⁰ The general rules, post-*Biowatch* and in light of other recent cases, appear to be three. First, in a 'public interest-type' constitutional dispute between private parties, costs will not be awarded against either party, regardless of who is successful.³⁷¹ Unlike ordinary litigation, an unsuccessful victim will not have to pay the other parties' costs. But equally, and unlike public interest litigation against the state, the *successful* victim will not get her costs either. Secondly, if the claim is a 'private' rather than a 'public interest' matter, even if it raises constitutional issues, costs will be awarded to the successful party.³⁷² Thus in delictual or similar claims in response to rights violations by corporations, costs will be awarded for or against victims depending on the result. The differentiation brought about by these two

366. AC Cilliers *Law of Costs* [Service Issue 18 – October 2008] (LexisNexis-Butterworths, Durban) at 2-5-2-6

367. *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* 1992 (1) SA 700 (A)

368. Adrian Friedman 'Costs' in Woolman *et al* note 11 above at 6-1-6-2 and cases there cited.

369. *Trustees for the time being of the Biowatch Trust v Registrar, Genetic Resources (Centre for Child Law and others as Amici Curiae)* [2009] ZACC 14, judgment handed down 3 June 2008, as yet unreported, at para 16; see also paras 17, 22; see also *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 139.

370. *Biowatch* at paras 17, 22; apparently reversing its view in *South African Commercial Catering and Allied Workers Union (SACCAWU) v Irvin & Johnson (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) at para 51, which explained its earlier cost order in *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 116 in these terms.

371. See for example: *SACCAWU* at paras 52-53, *Campus Law Clinic* at para 28; *Barkhuizen v Napier* at para 90; *Shilubana v Nwamitwa* (2) 2009 (2) SA 66 (CC) at para 92.

372. See for example: *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) at para 94; *Lufuno Mphaphuli* at para 279; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] ZACC 16, judgment handed down 10 June 2009, as yet unreported, at para 122 (applicants partially successful in resisting an eviction application, respondents to pay half the applicants' costs).

rules may have a chilling effect on litigation raising law reform issues. Victims will be encouraged to frame cases narrowly, and avoid raising important law reform issues lest their cases be characterised as ‘public’ and they be deprived of their costs if successful, thus hampering legal development.³⁷³ The third rule is perhaps an attempt to soften this result: if the claim is ostensibly between private parties but is really about state conduct – for example, where the state issues a licence, a private party challenges this, and the private licensee opposes – the state will be liable for the costs of the successful party, while the unsuccessful party will bear its own costs.³⁷⁴ Victims’ claims will often fall into this category, and here they can recover their costs.

The rules discussed refer to Constitutional Court practice. Constitutional Court practice has not always been a guide to High Court practice, where costs generally follow the result, with ad hoc exceptions in some constitutional and public interest cases. The Constitutional Court has interfered with individual High Court costs orders in the past, but the general rules it has set out have been phrased as applying in the Constitutional Court alone.³⁷⁵ *Biowatch*, however, appears to lay down guidelines for the award of costs in the High Courts as well.³⁷⁶ Therefore, although costs will remain a matter for an individual judge’s discretion, it seems very likely that the three rules set out above will be increasingly followed in all the courts.

Finally, and importantly, it should be noted that costs orders will rarely cover all the costs actually incurred by a successful party in coming to court.³⁷⁷ The effects of this approach on poor litigants have not been assessed, but it may reasonably be speculated that the fact that some court costs will always need to be paid by an applicant, regardless of the result, will pose a substantial obstacle to victims. Given the need to make the legal system accessible to the poor and the injunction of the s 34 right, it is submitted that the approach to cost taxation needs re-thinking.³⁷⁸

373. Friedman, *op. cit.*, note 368 submits at 6-5 submitted (pre-*Biowatch*) that it would be fair to make companies pay costs when unsuccessful in these cases.

374. *Biowatch* at paras 54-56 makes a definite finding on this point. See also for example: *Occupiers* at para 53 (eviction case, where city paid the successful evictees’ costs and the evictor bore its own costs); *Walele v City of Cape Town* 2008 (6) SA 129 (CC) at para 74 (building permission dispute between neighbours where city failed to follow statutory procedures and paid costs of the successful party, the unsuccessful party paying its own costs).

375. The line of cases, beginning with *Sanderson* at para 44, is discussed by Friedman, *op. cit.*, note 368 at 6-9-6-11.

376. At least the finding as to costs where a private dispute is about state conduct is apparently intended to bind all courts (see paras 54-56); and indeed the whole judgment may naturally be read this way.

377. *LAWSA*, Vol 3(t) at para 289

378. It appears that the Rules Board is considering proposals which would permit successful litigants to recover all reasonable costs incurred – ‘Costs and the Rules Board’ *De Rebus* June 2007 at 33.

3.4.4 Security for Costs

The general rule when suing in South African courts is that a person resident or domiciled in South Africa is not obliged to offer security for costs if they sue in South Africa, and a person not so resident or domiciled is obliged to do so.³⁷⁹ In other words, South African residents who are plaintiffs will not generally be required to provide security, while non-resident plaintiffs suing South African companies will be required to do so. However, the rule is unlikely to operate to the detriment of victims. Considerations of justice and equity have always underpinned the enquiry,³⁸⁰ and among the long-standing exceptions to the general rule is that a person should not be obliged to provide security beyond his means, or where this would prevent him from pursuing his claim.³⁸¹ This rule will now fall under the s 34 right of access to courts. It is submitted that it would very seldom, if ever, be a justifiable limitation of the right to require security where this would prevent a party pursuing a claim.³⁸² However, a party seeking to avoid providing security will bear the burden of showing that having to provide security will indeed prevent her bringing her claim.³⁸³

3.4.5 Delaying Tactics

The Uniform Rules of Court provide for time periods for the filing of papers, giving opposing parties reasonably short periods within which to respond to filings.³⁸⁴ If the respondent does not reply, default judgment may be granted against it.³⁸⁵ If a party responds but fails to file any document in time, it may ultimately be barred from filing it, bearing the consequences of its absence.³⁸⁶ The court retains the power to condone any breach of the Rules, or to extend a time limit, on good

379. Cillers, *op. cit.*, note 366 at 5-3-5-4; see more generally Michelle Havenga 'Security for Costs in Corporate Litigation' 15 *South African Mercantile Law Journal* 354 (2003). The rule underpins Uniform Rule 47, which provides for the procedure for a party entitled to costs to request them but does not state when party will be so entitled. The rule was recognised by the Constitutional Court in *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) at para 7. See also Supreme Court Act, s 29, providing that a South African suing in a court in South Africa other than the one in the area of jurisdiction of which she is resident will not for that reason be treated as a foreigner for the purposes of awarding security for costs.

380. See *B & W Industrial Technology (Pty) Ltd v Baroutsos* 2006 (5) SA 135 (W), esp. the discussion and findings at paras 30-43; *Giddey* at para 8 and Christian Schulze 'Should a Peregrine Plaintiff Furnish Security for Costs for the Counterclaim of an Incola Defendant' (2007) 19 *South African Mercantile Law Journal* 393 esp. at 395-98

381. Cillers, *op. cit.*, note 366 at 5-4-5-5; see esp. *Magida v Minister of Police* 1987 (1) SA 1 (A) at 14E-G

382. See *Mohammed Arfan Haffar v Emmad Alprghle*, unreported judgment of the South Gauteng High Court, Case No: WLD 14432/05, judgment handed down 20 June 2008. This has been the approach of the Constitutional Court generally in matters concerning court rules: see *Beinash v Ernst & Young* 1999 (2) SA 116 (CC) at para 16.

383. *Giddey* at paras 8, 31

384. Uniform Rules 6, 19-15, 35, 37

385. Uniform Rule 31(2).

386. Uniform Rule 26

cause shown, and the parties may also agree to extend a time limit.³⁸⁷ If prejudice would follow from a delay, this agreement may be withheld and court extension opposed. Where potential prejudice is substantial, an application may be brought on an urgent basis, and a court may dispense with rules and time limits to the extent it deems fit.³⁸⁸

A party holds, reasonably, the right to object to technical irregularities in the way the other party brings its cases. If entirely frivolous or vexatious points are raised, this may amount to an abuse of court process, and attract a punitive costs order.³⁸⁹ But even where technically correct or justified, they may be overruled as petty or raised in bad faith where important rights are at stake. In this regard, the courts' condonation power and the duty, already noted, to give effect to the Constitution when applying the Rules are most important. A substance over form approach has been displayed in a number of cases involving lay petitions, or where respondents have raised technical objections in important and urgent rights cases. This approach is commendable and ensures that procedure serves effective litigation and not the other way around.³⁹⁰

3.5 Obstacles External to the Court Process

3.5.1 Enforcing Judgments

As far as this study has been able to ascertain, large-scale South African cases against corporations have either been conducted overseas³⁹¹ or have ended in settlement.³⁹² However, there are strong reasons for confidence that if a sizeable judgment were obtained against a large corporation, it would be enforceable. If companies were willing and able to influence the legal process, they would have no incentive to settle. A settlement is not necessarily an acceptance of responsibility, but the many settlements at least suggest a belief on the part of some corporations that they cannot evade liability or that there would be serious costs,

387. Uniform Rules 27(1), 31(3)

388. Uniform Rule 6(12)

389. Cilliers, *op. cit.*, note 366 at 3-11

390. See for example *Highveldridge* (rejecting form over substance when determining grounds for standing on lay papers of a community group); *Lambrecht v Pienaar Brothers* [1998] BLLR 608 (LC) (amendment of incorrectly cited party where made no substantive to litigation); and the comments on the inappropriateness of technical objections in rights matters: see for example the decision of the Supreme Court of Appeal in *Ngxuza* and that of the Constitutional Court in *Njongi*

391. See for example the litigations in England against Cape plc and Thor Chemical and the US litigations under the Alien Torts Act in the *Khulumani, Ntsebeza and Digawamaje* claims.

392. See the cases discussed in Meeran's submission to Ruggie (the test litigation, scheduled for trial in 2010, to which Mr Meeran refers on p. 3 is presently in arbitration to seek a settlement – author's communication with Mr Sibiya of the Legal Resources Centre, 6 June 2009); see also, on the multiple settlements engineered by attorney Richard Spoor 'Reviled and respected: Richard Spoor' *Metal Bulletin* 7 July 2008; 'Spoor: SA mining's bête noire' www.miningmx.com, 6 July 2006; 'Richard Spoor's fight for justice' *Business Day* 9 March 2004.

such as negative publicity, in trying to do so. That points towards a system that can hold corporations accountable. The evidence in other areas bears this out. Labour awards are generally respected and followed. Environmental law has seen orders made against very large companies obeyed, albeit it in 'victimless' legislative disputes.³⁹³ Eviction cases have seen obedience to orders made against large and small companies.³⁹⁴ None of the interviews conducted for this study flagged the enforcement of judgments against large corporations as an area of concern. Where concern was expressed, it was in relation to much smaller companies and close corporations, which may relatively easily close down or shift assets, and so escape the effects of a judgment.³⁹⁵ Large companies usually lack both the ability and the incentive to do this.

The question of rights violations by corporations will often involve the state, for example where licences are issued, projects are approved or, as in environmental law, where a statute envisages enforcement by the government alone and a victim's remedy accordingly lies against the state. In this regard, the ability of the courts to enforce judgments against the state is important. South Africa's judiciary is substantively independent. A range of legal protections for the independence of the courts exist.³⁹⁶ They appear to work. South Africa ranked 9th in the 2003 study used in Transparency International's 2007 *Global Corruption Report* (which tested mostly developed legal systems) on a scale of the actual enjoyment of independence by the judiciary, ahead of all but two countries in Europe.³⁹⁷ Some caution is appropriate. A number of high-profile cases, including against Mr Zuma, the current President, have increased executive tensions and

393. See for example *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 2004 (5) SA 124 (W); *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd*, SCA Case No. 368/94, judgment handed down 16 September 2005, unreported; *Director: Mineral Development, Gauteng Region & Sasol Mining (Pty) Ltd v Save the Vaal Environment* 1999 (2) SA 709 (SCA), as well as numerous decisions against smaller companies.

394. Recent examples include *Occupiers; Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W); *Thubelisha Homes, Machele and 62 others v Mailula* [2009] ZACC 7, judgment of the Constitutional Court handed down 3 December 2008, reasons 26 March 2009, as yet unreported.

395. Interview with Johan Kruger, Solidarity, a view confirmed by another respondent.

396. See generally Hugh Corder 'Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa' in Peter H. Russell and David M. O'Brien (Eds) *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia, Charlottesville and London, 2001); Currie, Iain & De Waal, Johan *The New Constitutional and Administrative Law Vol. I* (Juta & Co, Cape Town, 2001) at 299-311. The Constitution provides for the independence of the judiciary – s 165; stipulates the judges' benefits may not be reduced – s 176(3); and provides that judges may only be removed by two-thirds of the National Assembly on grounds of incapacity, gross incompetence or gross misconduct – s 177(1). Dismissals and appointments are conducted through the Judicial Services Commission, a multi-partisan body comprising government and opposition parliamentarians, presidential appointees, the Chief Justice and head of the Supreme Court of Appeal, and representatives of the legal profession – ss 174(3)-(4) and (6), 177(1)(a), 178(1)

397. The full study is Lars Veld & Stefan Voigt 'Economic Growth and Judicial Independence: Cross-country evidence using a new set of indicators' (2003) 19 *European Journal of Political Economy* 492; see at 525 for ranking. The study is relied upon in Transparency International *Global Corruption Report* (Cambridge University Press, Cambridge, 2007) at 25. The two countries ranking higher than South Africa were Austria and Switzerland.

affected the public image of the judiciary in recent years.³⁹⁸ Plans to ‘rationalise’ the courts, which involved increasing executive control over the courts in various ways,³⁹⁹ were shelved in 2006 in response to judicial protests but are now being revived for passage, possibly in revised form, during 2010. Either could have a negative effect on the independence of the judiciary.

But this caution should not be over-stated. The position of politicians and government has generally remained one of respect for the courts and their judgments, and occasional statements to the contrary have invariably been withdrawn or ‘clarified’.⁴⁰⁰ If there is a danger of state non-compliance, it relates to incapacity or incompetence; analogously to the position with smaller companies, such a danger also lies in respect of the lower, less visible levels of government. The whole position is well-illustrated by the recent *Nyathi* case: owing to government errors, Mr Nyathi was not paid out a settlement for severe injuries arising out of negligence in a state hospital, and died waiting, unable to afford proper treatment. In the subsequent Constitutional Court case, it was revealed that the state had not complied with a number of orders. A structural and supervisory interdict was issued, to which the Director-General of the Department of Justice and Constitutional Development continues to comply, subject to some ongoing difficulties at lower levels. While there is sure to be tension and debate around these measures, and the related proposed constitutional amendment, these are all signs that the relationship between courts and state, despite some problems, continues to function.

In the state sphere, the courts have been willing to use their powers creatively to respond to rights violations.⁴⁰¹ If this has been done against the government,

398. Between 2003 and 2009, the courts heard a number of cases relating to corruption charges against now-President Jacob Zuma. The National Prosecuting Authority ultimately withdrew the charges on 6 April 2009). A high-profile judge, John Hlophe, was accused by members of the Constitutional Court of attempting to influence one such decision that was pending before the Court, in favour of Zuma. This has resulted in a protracted legal and media battle involving the judge, the judges of the Constitutional Court and the Judicial Services Commission which is responsible for hearing the complaint against Hlophe. In this environment, public comments from senior government officials have not always displayed full respect for the independence of the judiciary.

399. See Cathi Albertyn ‘Judicial Independence and the Constitution Fourteenth Amendment Bill’ (2006) 22 *South African Journal of Human Rights* 126; General Council of the Bar Conference on the Justice Bills: Judicial Independence and the Restructuring of the Courts, transcript available at <http://www.lrc.org.za/images/stories/IssueConstitution/transcript.pdf>; Nick Dawes ‘Thabo Mbeki axes Judges Bills’ *Mail & Guardian*, 30 June 2006

400. See for example ‘More Damage Control after Manto says “No”’ *Independent on Saturday* 25 March 2002 and Ministry of Health Press Release, 27 March 2002, available at www.doh.gov.za/docs/pr-f.html, accessed 3 April 2009); ‘Zuma just wants neutral judges – Phosa’, 15 April 2009, available at www.polity.org.za/article/zuma-just-wants-neutral-judges-phosa-2009-04-15.

401. Key examples include the cases arising out of the state cancellation of social benefits, centred in the Eastern Cape (the important issues appear from *Ngxuzza (E)* and *Ngxuzza (A)*, *Kate (E)* and *MEC for the Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA), and *Njongji*); *Modderklip*; and *Nyathi v Member of the Executive Council for Health, Gauteng* 2008 (5) SA 94 (CC) (supervisory jurisdiction in respect of every judgment against state current unsatisfied after a plaintiff died waiting for payment).

with the separation of powers issues that entails, there is every reason to expect the same in corporate cases. It should also be noted that the role of civil society groups has been critical to monitoring the enforcement of orders.⁴⁰²

3.5.2 Enforcing Foreign Judgments

The enforceability of foreign judgments in South Africa is regulated in two ways. The first, by statute, is preferable, because it is simple and inexpensive.⁴⁰³ It is therefore unfortunate that South African statutes are crippled by the fact that the executive must designate a country before its judgments may be recognised under the statute. Thus, for example, the Enforcement of Foreign Civil Judgments Act 32 of 1988, providing for recognition and enforcement of foreign judgments cheaply in the Magistrates' Court, has long applied only in respect of Namibian judgments.⁴⁰⁴ The fact that statutory recognition depends on an executive foreign policy decision is open to abuse, and also means that rights enforcement may depend on a decision that is hard to review.⁴⁰⁵ The Law Reform Commission is presently considering by the matter.

The common law provides for a more complex alternative.⁴⁰⁶ A judgment will be recognised if, amongst other things, the foreign court had jurisdiction; the decision is final; and is not contrary to public policy considerations. A foreign court will be treated as having jurisdiction if the defendant submitted to its jurisdiction or is resident there, or if the legal wrong arose in its jurisdiction and the defendant was at least present there when proceedings were instituted.⁴⁰⁷ These rules are therefore, for no apparent reason, stricter than those that determine when South African courts' jurisdiction, imposing an unnecessary restriction on the enforcement of foreign judgments. There must also be compliance with the Protection of Businesses Act,⁴⁰⁸ which provides that no judgment may be enforced without ministerial permission⁴⁰⁹ if it relates to any act or transaction 'connected with mining, production, importation, exportation, refinement, possession or use or

402. The Legal Resources Centre was crucial in the grants cases; see also Mark Heywood 'Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health' (2003) 19 *South African Journal of Human Rights* 278 (role of civil society body in litigation to compel state provision of Nevirapine).

403. Christa Roodt 'Recognition and Enforcement of Foreign Judgments: Still a Hobson's Choice among Competing Theories?' (2005) 38 *Comparative and International Law Journal for Southern Africa* 15 at 24

404. Christa Roodt 'The Recognition and Enforcement of Foreign Judgments, Maintenance Orders and Arbitral Awards: A Proposal for Structural Reform' (2004) 45 *Codicillus* 64 at 65

405. *Ibid.*, at 24-25, 28-29

406. *Ibid.*, at 24

407. Christian Schulze 'International Jurisdiction in Claims Sounding in Money: Is *Richman v Ben-Tovim* the Last Word?' (2008) 20 *South African Mercantile Law Journal* 61, esp. at 63

408. The leading judgment is *Jones v Krok* 1995 (2) SA 677 (A).

409. Protection of Businesses Act 99 of 1978, ss 1(1), 1A, 1D

sale of or ownership of any matter or material...'.⁴¹⁰ This could leave the enforceability of many judgments entirely subject to ministerial discretion, but it appears that Act is not being enforced.⁴¹¹

Ultimately, a simple, quick and cheap procedure is currently lacking, and haphazard complications may arbitrarily deny recognition. Statutory reform is needed.

3.5.3 Reprisals

Several statutes protect whistle-blowers. The Protected Disclosures Act was enacted, according to its preamble, to facilitate the constitutional accountability of the state and private parties. Protected disclosures under the Act are those made by an employee against an employer relating to, *inter alia*, an actual or likely criminal act or failure to comply with a legal obligation, or a danger to the environment or the health and safety of an individual.⁴¹² No employee making a protected disclosure in good faith may be subjected to any occupational detriment, which is broadly defined.⁴¹³ Such protections though are only afforded to the employee making the disclosure and would not cover irrational actions taken by an employer against victims of the abuse (though other remedies could apply in such an instance). Witnesses could be understood to be making such a protected disclosure and so offered protection under the Act, particularly if they are employees of the employer concerned.

The 2008 Companies Act extends this protection to disclosures made by directors, shareholders and trade unions,⁴¹⁴ and to disclosures made to the new Commission and Tribunal, and to directors.⁴¹⁵ A company is obliged to set up an internal confidential system for receiving these disclosures.⁴¹⁶ The Labour Relations Act provides that any dismissal for making a disclosure protected under

410. Protection of Businesses Act, s 1(3)

411. South African Law Reform Commission *Report: Project 121: Consolidated Legislation Pertaining to International Judicial Co-operation in Civil Matters* (Dec 2006) at 5.2.1. The Commission's recommendation is for repeal and replacement by a much narrower statute: see at 5.3.1-4. Should it be enforced, it would be appropriate to interpret the Act narrowly in line with its initial purpose, which was to oppose attempts by the United States to impose its own competition law on the alleged price-fixing of foreign uranium producers: see Dugard, *op. cit.*, note 6 at 153.

412. Protected Disclosures Act 26 of 2000, definition of 'disclosure' in s 1(i). For a recent case in which a whistle-blower was dismissed, and reinstated by a court, see Siphon Masondo 'CDC man wins job back as employers warned' *Herald Reporter*, 8 April 2009.

413. A disclosure made to a legal representative is protected even if not made in good faith, in accordance with legal privilege, but otherwise good faith is a requirement: Protected Disclosures Act, ss 6(1), 7, 8(1), 9(1).

414. 2008 Companies Act, s 159(4)-(5)

415. 2008 Companies Act, s 159(3)(a)

416. 2008 Companies Act, s 159(7)

the Disclosures Act is automatically unfair.⁴¹⁷ Following 2002 amendments, the LRA also makes it an ‘unfair labour practice’ to impose any occupational detriment less than dismissal as a result of a making a disclosure protected under the Disclosures Act.⁴¹⁸ The National Environmental Management Act protects whistleblowers against ‘dismissal, discipline, prejudice or harassment’.⁴¹⁹

An employee may also not be dismissed for taking part in a legal strike, or for engaging in union activity or exercising any other labour right.⁴²⁰ Shop stewards are sometimes subject to victimisation, but the courts police this strictly, and it does not deter union activity: as one respondent put it, ‘this is a country of unions’.⁴²¹

417. Labour Relations Act 56 of 1995, s 187(1)(h); see also the cases discussed by Grogan, note 88 above at 152-54

418. Labour Relations Act, s 186(2)(d); see further Grogan, *ibid.*, at 270-71

419. NEMA, s 31(4)

420. Labour Relations Act, ss 187(1)(a), 187(1)(d); see further the cases discussed in Du Toit, *op. cit.*, note 92 at LRA 8-28(2)-(3); LRA 8-28(5)-(6)

421. Author’s interview with Johan Kruger, attorney at the Solidarity trade union’s Labour and Constitutional Law Unit, 27 May 2009.

Conclusions and Recommendations

The previous discussion has shown that South African law does indeed offer the possibility of remedies for victims of corporate human rights violations but that there are several shortcomings in the protection that it offers. Many areas of South African law also remain to be developed in line with the Constitution which will enable such victims to access remedies with greater ease. These areas have been identified throughout the study. This section will briefly recapitulate some of the discussion and outline a number of key reforms that are necessary to improve access to remedies for such victims. The following are key areas that need attention:

1. Access to the Legal System Needs to Be Improved

- One of the key attributes of the legal system is that most people have very limited access to legal resources. There need to be greater access to *pro bono* legal services and stronger requirements on attorneys to provide such services.
- There already exist a number of public interest litigation groups but none focus on corporate violations. Such a group could be formed or the issue could be taken on as a project under existing public interest groups.
- The approach to costs needs to be reviewed and, particularly, in litigation in the High Court needs to be more favourable to victims

2. Development of Non-Judicial Remedies

Whilst judicial remedies are indispensable for implementing and enforcing human rights protections, non-judicial remedies can complement and not replace the availability of judicial remedies. In this connection, non-judicial remedies may be more accessible to victims: this is illustrated by labour law which is good at giving effect to labour rights: the reasons for this relate to competent representation and also the development of a specialised forum – the Commission for Conciliation, Mediation and Arbitration (the CCMA) – to hear the majority of cases. According to one union lawyer interviewed for this study, CCMA cases usually produce a ruling in weeks; a review in the Labour Court takes two years or more.⁴²² In this context:

- A range of non-judicial remedies needs to be considered. Specialised independent tribunals like the Competition Commission can be valuable in their domains. The enabling of the equivalent bodies created by the

422. Author's interview with Johan Kruger, attorney at the Solidarity trade union's Labour and Constitutional Law Unit, 27 May 2009. As noted in the section on delay, a case that goes beyond the Labour Court may take seven or more years to resolve.

2008 Companies Act should therefore be strongly encouraged, as should the creation of a specialised tribunal to adjudicate information requests under the Promotion of Access to Information Act, which is currently being reviewed by the South African Law Reform Commission.⁴²³ The possibility of a similar ombudsman-type body could be considered in other areas, such as to receive and adjudicate community concerns arising out of mining activities. On the strength of this study, it is clear that bodies such as these, despite having certain problems, can be invaluable in protecting the rights of victims.

- The role of the Human Rights Commission should also be strengthened given its place in the protection and promotion of all human rights in South Africa and that it has adopted Business and Human Rights as a focus area and provided a useful report on the mining relocation discussed above.

3. Court Procedures That Are Friendlier to Victims

Inequality in resources, legal representation and knowledge between the parties to legal proceedings is a constant feature in litigation involving large businesses. As has been mentioned, the CCMA has been successful in providing access to justice in the field of labour law and a large part of this relates to its emphasis on speedy, more inquisitorial procedures ahead of formality or precedent.⁴²⁴ Apart from labour law, similar points apply in the areas of environmental law (where environmental inspectors are the primary enforcers); competition law (where an autonomous body conducts investigations and imposes penalties) and eviction law (where a number of NGOs operate and where the government, in terms of legislation, is often involved). In all these cases, little or no victim input is required for rights to be protected, although input is certainly valuable, the procedures adopted also tend to be speedier, and more inquisitorial and focused upon achieving a just result in the context.⁴²⁵ In areas where more is required of victims – notably private law where the victim must build a complex case – this study has found that there tend to be major obstacles in the face of accessing remedies for corporate rights violations. In this context:

- A move to more inquisitorial procedures in both courts and non-judicial bodies may be considered to deal with the inequality of the respective parties, their access to information and access to resources. Any

423. See Kate Allen & Iain Currie 'Enforcing Access to Information and Privacy Rights: Evaluating Proposals for an Information Protection Regulator for South Africa' 23 *South African Journal of Human Rights* 570 (2007).

424. See *National Education Heath and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) at paras 34-35; *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); for a description of the system, see Grogan, *op. cit.*, note 88 Ch. 24

425. Even in eviction law, where the courts are routinely involved, the case is often resolved by negotiating a case-specific solution between landlord, occupier and municipality.

inquisitorial procedure should be consistent with the independence and impartiality of the judiciary.

- Pre-action discovery involving enforceable requirements of disclosure by parties is important for enabling victims to gain information that can provide the basis for a case.

4. Courts Must Adopt Clear Substantive Rules that Enable Victims of Rights Violations to Have Access to Justice

A number of substantive points of law have not been decided and in several areas of this study, we have had to speculate as to the result a court would reach. If cases are not coming to court (and we have suggested reasons why this is so), victims of potential rights violations will be best served by maximal clarity in advance, such that all parties know, so far as possible, what their rights imply in practice. They are *least* served by narrow findings which apply clearly to few future cases. The latter approach would not provide guidance to individuals concerning their rights and often allow abuses to take place which cannot be remedied as victims are unable to go to court or uncertain as to the result.⁴²⁶ The courts' current general minimalism goes against an ethos that seeks to give *effect* to rights.

The following are some of the areas of law that need reform (some of these must be statutory reform but others can be through judicial action):

- The law should generally avoid placing a burdensome onus upon victims in cases where their rights are violated. It was noted that, in contract law, courts would likely refuse to enforce clauses incompatible with rights, but that the clauses would operate unless the applicant could establish that it would be contrary to rights to enforce a clause.⁴²⁷ A more inquisitorial approach, whereby a court asks whether it can enforce a clause rather than placing an onus on the applicant would reduce this burden without necessarily being any less fair to defendants.
- Jurisdiction rules should be simplified and be victim friendly. Reform could take place on the basis that every foreign corporation (like domestic

426. Restraint of trade agreements offer an example of how such a balance between competing rights, contractual freedom and legal certainty may be struck. The comparison is Deeksha Bhana's; see generally her 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) 24 *South African Journal of Human Rights* 300

427. The current case law does not really consider this possibility; it may not rule it out entirely. There is sometimes a legal duty to point out certain terms of a contract – see *Afrox* at paras 34-35. Otherwise, the recent cases clearly consider the applicant to bear the onus of establishing factors significant to public policy – see *Napier v Barkhuizen* (SCA) at paras 22, 24; *Barkhuizen v Napier* (CC) at paras 66, 70 – and the consideration of such issues *mero motu* appears chiefly from the minority judgments in *Barkhuizen* (CC) of Moseneke DC at paras 110-18 and Sachs J at paras 177-83. But since very little factual material was before the courts in that case, and since neither party was vulnerable, the courts may well react differently in future cases.

corporations) is deemed to be resident at its registered office.⁴²⁸ This is simpler for all parties;⁴²⁹ because of the *forum non conveniens* doctrine there is no reason why it should be unfair to defendant companies;⁴³⁰ and it is also in line with international trends.⁴³¹

- To solve the uncertainty in the law, consideration should be given to passing a statute akin to the United States Alien Tort Claims Act which would enable companies registered in South Africa to be held liable for violations of rights beyond South Africa's borders
- Explicit fiduciary duties should be recognised upon directors to realise fundamental rights
- The rules relating to enforcement of foreign judgments in South Africa need to be revisited and reformed
- Courts should demonstrate greater remedial flexibility both to recognise public elements of rights violations as well as private ones

5. Companies Must Play a Role in Having Their Responsibilities Articulated in Law and Provide Remedial Mechanisms of Their Own

- The trend towards directorial or management responsibility for human rights abuses is important and needs to be developed
- If specific fiduciary duties are recognised against conduct impairing human rights, this would have the effect that directors will now have an incentive to ensure their obligations are clearly understood.
- This stratagem can also be used to address the lack of articulation of corporate constitutional responsibilities. The Companies Act could be

428. Currently, the requirement that an external company have a registered office is understood as facilitating service, not grounding jurisdiction (although the only clear authority for the proposition that an external company is *not* resident at its registered office is now *Joseph v Air Tanzania*). See 1973 Companies Act, definition of 'external company' read with ss 170(1)(b), 322(1)(a); 2008 Companies Act, definition of 'external company' read with ss 23(2), 23(3), and also *ISM Inter Ltd* at 114G-116H.

429. It would no longer be necessary for either side to contend with the uncertain phrases 'principal place of business' and 'carries on business'.

430. This responds to the reason usually given against more expansive jurisdiction of foreign companies in South Africa, which is that it would not be reasonable to exercise jurisdiction in respect of all the actions of a foreign company just because it does business in South Africa - *ISM Inter Ltd*, esp. at 117F, and cases cited in that judgment.

431. It also fits with the fact that, while prescription does not run against a South African if the creditor is foreign, prescription does run if the creditor is a foreign *company* - Saner, *op. cit.*, note 241 at 3-54; *Dithaba Platinum*. If foreign company doing business in South Africa have the same benefit of prescription as regards their liabilities as locals do, victims should not have to establish jurisdiction over them as foreigners.

amended to require the inclusion in a company's memorandum of association of an undertaking to comply with the applicable provisions of the Bill of Rights.⁴³² Apart from confirming that the Constitution affects the duties of the company and directors,⁴³³ this would similarly put the constitutional duties of corporations 'in play', creating an incentive to decide what they are.

- Companies must also set up internal procedures to deal with abuses of rights which could include grievance mechanisms and disciplinary procedures⁴³⁴
- Companies must be required to report on whether they have violated rights and the extent to which they contribute towards facilitating the realisation thereof

432. Bilchitz (2009), *op. cit.*, note 25 at 781.

433. It may also serve to distinguish constitutional obligations from discretionary charitable giving, and emphasise that rights compliance is non-negotiable, rather than a potential liability to be factored into decision-making, decisions that the draft King III Report may be guilty of failing to draw clearly: see Bilchitz SAIFAC Submission to King Committee

434. John Ruggie has recognised the importance of companies also providing grievance mechanisms in 'Protect, Respect and Remedy: A Framework for Business and Human Rights' available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

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