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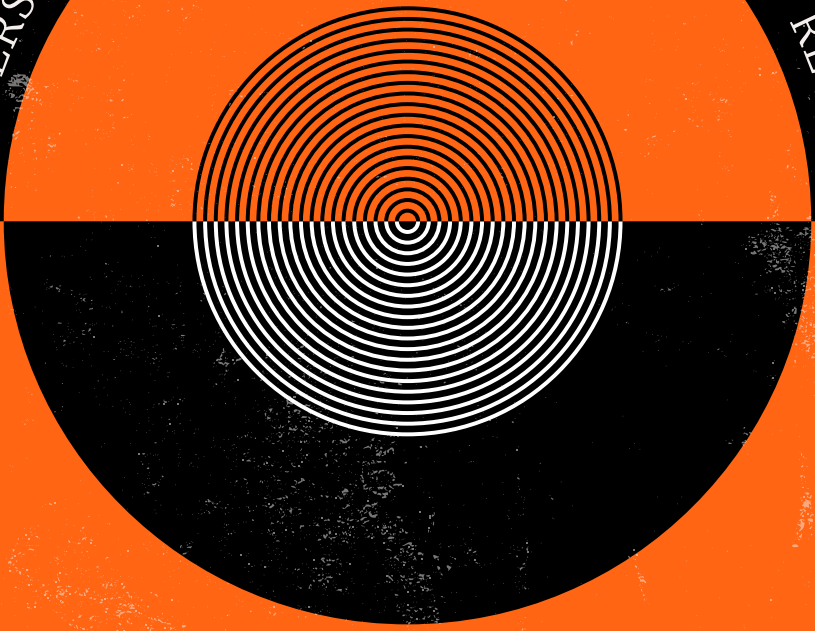

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A Path Towards Achieving Decent Work

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Summary

The hospitality sector in South Africa plays a crucial role in the national economy, yet its full potential remains unfulfilled because of various challenges. Legal shortcomings in the country's labour and social protection systems create significant difficulties in this sector. Consequently, employers often exploit employees by offering low wages, imposing long working hours, providing insufficient representation in trade unions, or even excluding these workers entirely. These issues disproportionately affect low-skilled workers, individuals employed in small and medium enterprises, undocumented migrant workers, and those engaged in informal food trading. A significant portion of the workforce in this sector comprises undocumented migrant workers. Employers frequently prefer to hire these individuals because it allows them to exploit and underpay them more easily than their documented counterparts or South African citizens. Consequently, undocumented workers often occupy the most vulnerable and poorly compensated positions within the industry. Considering these pressing challenges, it is imperative for both the public and private sectors to formulate and implement comprehensive support initiatives aimed at strengthening the hospitality sector. Targeted training and development programmes are essential tools for addressing the systemic obstacles that workers

face. Additionally, reforming the immigration system to facilitate the regulation of low-skilled labour migration between African countries could significantly alleviate the hardships endured by these workers. Implementing such measures is crucial, not only for enhancing the well-being of the workforce, but also for promoting a more equitable and sustainable hospitality sector in South Africa.

Keywords: Hospitality Sector, Employment, Labour Law, Social Protection, Decent Work, Recommendation 204

1. Introduction

South Africa's hospitality sector has seen remarkable growth over the years, establishing itself as a crucial part of the economy.[1] This sector is one of the most lucrative within the tourism industry, characterised by a high degree of labour intensity.[2] However, despite employing approximately 60% of the workforce in this field, the potential of these employees, and thus the sector, remains vastly underutilised and unrecognised.[3]

A significant factor contributing to the underutilisation of the sector is the lack of investment and attention from both employers

1 Olowoyo, Ramaila and Mavuru "Challenges and growth trajectory of the hospitality industry in South Africa. (1994-2020)" 2021 *African Journal of Hospitality, Tourism and Leisure* 1077 1077; This article will follow the definition of hospitality sector employees found in clause 1(2) of Sectoral Determination 14: Hospitality Sector, South Africa. According to this clause: "[The] Hospitality Sector means any commercial business or part of a commercial business in which employers and employees are associated for the purpose of carrying on or conducting one or more of the following activities for reward:

a. providing accommodation in a hotel, motel, inn, resort, game lodge, hostel, guest house, guest farm or bed and breakfast establishment, including short-stay accommodation, self-catering, timeshares, camps, caravan parks;
b. restaurants, pubs, taverns, cafés, tearooms, coffee shops, fast food outlets, snack bars, industrial or commercial caterers, function caterers, contract caterers that serve or provide prepared food or liquid refreshments, other than drinks in sealed bottles or cans whether indoors or outdoors or in the open air, for consumption on or off the premises".

2 CATHSSETTA 2020/21 -2024/25 *Sector Skills Plan 2022/23 Financial Year Update* 1 27, available at https://www.cathsseta.org.za/storage/app/public/strategic_Documents/SSP%202021-25.pdf (08-06-2025).

3 CATHSSETA Sector Plan (n 2) 27.

and government entities.[4] Consequently, many employees are often ill-prepared to meet the industry's evolving demands.[5] The precarious nature of the sector is further exacerbated by several critical issues, including low wages, excessive working hours, and inadequate representation by trade unions.[6] Together, these challenges lead to widespread non-compliance and employee dissatisfaction, ultimately hindering the overall growth of the sector.[7]

While our labour legislation is designed to protect workers, many protections remain inadequate, especially for vulnerable groups such as those employed in small and medium enterprises (SMEs) and as informal food vendors.[8] The primary issues lie not only in the lack of legal protections but also in the exclusionary nature of certain provisions within labour and social protection laws.[9] These regulations often prioritise workers in formal employment, leaving many others without adequate legislative protection.[10] This gap in adequate legal protection highlights a significant gap in the legislative frameworks, necessitating re-evaluation of how laws are applied and who they are intended to safeguard. Without addressing these shortcomings, vulnerable workers will continue to face precarious working conditions.

Despite the hospitality sector's significant productivity and economic potential, many workers still face vulnerabilities and risks of exploitation.[11] To effectively address these challenges, a comprehensive approach is required that not only emphasises the importance of employee training and fair working conditions but

4 CATHSSETA Sector Plan (n 2) 31.
5 CATHSSETA Sector Plan (n 2) 31.
6 Olowoyo, Ramaila and Mavuru (n 1) 1078. These challenges will be mentioned throughout this article.
7 Olowoyo, Ramaila and Mavuru (n 1) 1078.
8 Olowoyo, Ramaila and Mavuru (n 1) 1078; Vettori Challenges facing the Department of Labour in implementing labour policy and labour legislation in the hospitality industry in South Africa" 2018 *African Journal of Hospitality* 1 7; Letsiri *Extending Labour Law Protection to Informal Traders* (2020 dissertation UJ) 3.
9 Letsiri (n 8) 59.
10 Letsiri (n 8) 59.
11 Stemele *Career Advancement of Tourism and Hospitality Management Graduates: The Case of Walter Sisulu University, Eastern Cape* (2020 dissertation DUT) 60; ILO guidelines on decent work and socially responsible tourism 1 11.

also expands legal protections to encompass all workers within the hospitality industry.

2. Decent work and the hospitality sector

2.1 What decent work entails

Decent work was recognised as a sustainable development goal (SDG) during the United Nations (UN) General Assembly meeting in September 2015.[12] The preamble of the resolution emphasised the commitment of all nations to collaborate in implementing a plan to eradicate poverty and restore the planet.[13] To support this agenda, the South African government introduced the New Growth Path (NGP) in 2008. The NGP's objective was to create five million new jobs across various sectors, including tourism, by 2020.[14] It aimed to reduce unemployment by 15%, with most new jobs anticipated to be generated by the private sector.[15] Additionally, the NGP prioritises enhancing labour relations, establishing minimum wage standards, developing youth leadership programmes, and improving SMEs' integration through financial support.[16]

Within the framework of sustainable tourism, the NGP advocates for policies that promote sustainable practices.[17] These initiatives should not only create job opportunities but also utilise tourism as a tool to combat poverty and reduce inequality.[18] By fostering entrepreneurship amongst marginalised groups, such as women and individuals with disabilities, these programmes aim to stimulate economic growth while aligning with the broader objectives of the SDGs.[19] However, despite these financial and policy objectives being

12 *Sustainable Development Goals: Country Report 2019- South Africa* 1 1, available at https://www.statssa.gov.za/MDG/SDGs_Country_Report_2019_South_Africa.pdf (3-01-2024).
13 South African Country Report (n 12) 1.
14 South African Country Report (n 12) 116.
15 South African Country Report (n 12) 116.
16 South African Country Report (n 12) 116.
17 South African Country Report (n 12) 119.
18 South African Country Report (n 12) 116.
19 South African Country Report (n 12) 116.

intended as catalysts for the decent work agenda in South Africa,[20] the author remains critical of the overwhelming focus on economic development as a means to achieve decent work, perceiving it as potentially counterproductive.

This criticism is supported by the views of the International Labour Organization (ILO), which asserts that the decent work agenda encompasses more than just job creation.[21] It emphasises the importance of ensuring workers' rights and extending social protection.[22] While generating jobs is crucial, it is insufficient on its own.[23] The true aim should be to foster sustainable employment, achievable only by improving existing job conditions.[24] Such enhancements are fundamental to ensuring sustainability across various industries and creating new job opportunities.[25]

Despite the ILO's intentions, challenges arise because of the differing approaches employed by the UN in promoting decent work. While the goal remains to improve working conditions, the agenda frequently appears overly focused on increasing production and economic growth, with only two sub-goals explicitly addressing decent work.[26] This emphasis on economic growth is understandable, as it is often seen as a primary driver of development that generates jobs and encourages entrepreneurship.[27] However, an intense focus on economic indicators can detract from the fundamental objective of decent work: eradicating poverty for workers.[28]

Economic growth may enhance overall well-being by improving access to resources, but it does not guarantee that individuals can

20 South African Country Report (n 12) 119.
21 ILO Decent Work and the 2030 Agenda for Sustainable Development 1 2.
22 ILO Decent work Agenda (n 21) 2.
23 ILO Decent work Agenda (n 21) 2.
24 ILO Decent work Agenda (n 21) 2.
25 ILO Decent work Agenda (n 21) 2.
26 Kreinin and Aigner "From 'decent work and economic growth' to 'sustainable work and economic degrowth': A new framework for SDG 8" 2022 *Empirica* 281 286. In this article, the author focuses on the inconsistencies in the sub-goals of SDG 8, as it primarily emphasises the improvement of the economy rather than the advancement of human rights.
27 ILO Decent work Agenda (n 21) 7.
28 ILO Decent work Agenda (n 21) 2.

effectively obtain those resources.[29] Thus, it is essential to shift the focus from abstract economic metrics to the actual needs and rights of workers striving for a better quality of life.[30] By prioritising workers' needs over mere economic indicators, we can pursue a more meaningful quest for decent work and sustainable livelihoods.[31] This shift is crucial to ensuring that the benefits of economic growth translate into tangible improvements in the lives of individuals and families, thereby fulfilling the true essence of decent work.[32]

2.2 *Guidelines on Decent Work and Socially Responsible Tourism*

The hospitality sector faces challenges that extend beyond South Africa; they reflect a global trend affecting the industry worldwide.[33] To tackle these issues, the ILO has developed a comprehensive set of guidelines aimed at assisting countries and various stakeholders in achieving decent work standards.[34]

These guidelines are designed to establish standard practices and policy frameworks that promote decent work principles within the hospitality industry.[35] They target both public and private sectors, addressing critical concerns relevant to governments, employees, and employers.[36] These guidelines aim to enhance labour practices in the tourism sector by serving as essential reference points, ultimately fostering the industry's sustainability and resilience.[37]

2.2.1 Aims of the guidelines

The guidelines emphasise the critical role of the state in fostering sustainability within the tourism sector.[38] This responsibility encompasses the development and implementation of comprehensive

29 Kreinin and Aigner (n 26) 289.
30 Kreinin and Aigner (n 26) 289.
31 Kreinin and Aigner (n 26) 289.
32 Kreinin and Aigner (n 26) 289.
33 ILO Guidelines on decent work in the Tourism Sector (n 11).
34 ILO Guidelines on decent work in the Tourism Sector (n 11).
35 ILO Guidelines on decent work in the Tourism Sector (n 11) v.
36 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.
37 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.
38 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.

policies that operate effectively at both national and local levels.[39] To achieve this goal, collaboration with a diverse range of public and private stakeholders is essential.[40]

One key aspect highlighted in the guidelines is the need for policies that not only bolster the socioeconomic benefits of tourism for host communities but also align with broader sustainability objectives.[41] In this context, the guidelines mandate that strategic policy design aimed at optimising employment opportunities in local and rural areas is essential.[42] This includes a focus on job creation, entrepreneurship, and the effective utilisation of local resources.[43]

Additionally, aligning tourism policies with the overall goals of sustainable tourism is crucial.[44] These goals include the preservation of cultural heritage, the protection of ecosystems, and the safeguarding of essential natural resources that support the tourism industry.[45] The guidelines also highlight the significance of strengthening the nexus between tourism and trade policies, which could facilitate the integration of SMEs into local, regional, and international markets.[46] To enhance the efficacy of these initiatives, robust mechanisms for monitoring and evaluating tourism policies must be established,[47] alongside a legal framework that ensures compliance with decent work standards.[48] Hence, this contribution posits that prioritising full and productive employment through targeted skills development initiatives is vital to augmenting opportunities within the sector.[49] The focus on skills enhancement aligns with the broader objectives of promoting sustainable and equitable growth within tourism.[50]

39 ILO Guidelines on decent work in the Tourism Sector (n 11) 15.
40 ILO Guidelines on decent work in the Tourism Sector (n 11) 15.
41 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.
42 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.
43 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.
44 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.
45 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.
46 ILO Guidelines on decent work in the Tourism Sector (n 11) 17.
47 ILO Guidelines on decent work in the Tourism Sector (n 11) 17.
48 ILO Guidelines on decent work in the Tourism Sector (n 11) 17.
49 ILO Guidelines on decent work in the Tourism Sector (n 11) 17.
50 ILO Guidelines on decent work in the Tourism Sector (n 11) 18.

Thus, the guidelines highlight the importance of effective policy formulation to achieve decent work in tourism.[51] The ILO advocates for the state to develop comprehensive policies to create employment opportunities and empower marginalised groups, particularly women, youth, and migrant workers, through targeted skills development initiatives.[52] However, the author posits that existing policies in South Africa may render new policies unnecessary, a perspective that will be further examined in the subsequent discussion.

Implementation of aims in South Africa

Sustainable development policies for SMEs

One of the key guidelines suggests that efforts should be made to empower SMEs to operate not only at the local level but also on regional and international platforms.[53] Unfortunately, there has been insufficient emphasis on enabling these enterprises to flourish in both contexts, revealing a gap in South Africa's approach to supporting SMEs.[54]

Currently, South Africa's focus on SMEs mainly revolves around driving sales and growth within the small business sector at the local and provincial levels.[55] Most existing strategies concentrate primarily on enhancing networking skills, aiming to create employment opportunities and foster the development of these enterprises.[56] While South Africa's current practices towards the sustainability of SMEs align with some of these guidelines, there are notable shortcomings. Unlike the guidelines, the South African approach has not sufficiently prioritised enabling SMEs to trade beyond local or provincial markets.[57] This limitation largely stems from a lack of

51 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.
52 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.
53 ILO Guidelines on decent work in the Tourism Sector (n 11) 16.
54 Prioritised tourism investment projects in South Africa, May 2018. https://www.tourism.gov.za/AboutNDT/Documents/Department%20of%20Tourism%20%20Investment%20Opportunity%20Booklet.pdf (18-06-2025).
55 CATHSSETA Sector Plan (n 2) 29.
56 CATHSSETA Sector Plan (n 2) 29.
57 Sibiya and Van der Westhuizen "Challenges experienced by SMMEs and interventions by the South African National and Provincial government: A literature review" 2023

capital and inadequate access to resources, significantly affecting their ability to expand and survive in a competitive environment.[58] The absence of access to funding from financial institutions severely hampers the potential for growth and sustainability in the sector.[59]

Furthermore, while the guidelines recommend developing a sector-specific framework, this is unnecessary because South Africa already has a well-established labour and social protection framework.[60] This existing framework is inherently linked to employment contracts by operation of law, and in certain instances, industry standards can be tailored for specific sectors through collective bargaining agreements.[61] Instead of investing valuable resources and time in creating new policies and legislation specifically for SMEs, the state should focus on improving existing laws to better accommodate these businesses.

A crucial area for improvement lies in the examination of taxation laws and their implications for SMEs.[62] Policymakers should reconsider the current tax structures governing these enterprises, as the burden of high taxation ultimately hinders their growth.[63] Elevated tax rates not only reduce their earnings but also require SMEs to bear the additional burden of value-added tax (VAT) on their purchases.[64] Furthermore, SMEs face a disproportionately higher tax compliance burden compared to larger enterprises.[65] This increased

African Journal of Inter/Multidisciplinary Studies 1. In this article, the author discusses how the potential of SMEs remains untapped for various reasons, with the primary factors being the taxes they pay and the inflation rate.

58 Sibiya and Van der Westhuizen (n 57) 5-7.

59 Sibiya and Van der Westhuizen (n 57) 5-7.

60 ILO guidelines on decent work in the Tourism Sector (n 11) 15.

61 The LRA, in s 23, allows for the making of collective bargaining that aims to set terms and conditions that regulate employment in a workplace; s 32 allows for these collective bargaining agreements to be extended to an entire sector in the registered scope of the Bargaining Council.

62 Sibiya and Van der Westhuizen (n 57) 5-6.

63 Sibiya and Van der Westhuizen (n 57) 5-6.

64 Sibiya and Van der Westhuizen (n 57) 5-6.

65 Sibiya and Van der Westhuizen (n 57) 5-6. Deloitte published a report identifying why tax compliance burdens SMEs. They noted the following: "…the regulatory burden and the cost of tax compliance remain a significant challenge for SMEs as they often do not have the necessary staff resources and skills to navigate the complex tax rules to comply with all their tax obligations timeously and fully. The

level of taxation significantly impacts their employability rates and limits their ability to provide decent work opportunities.[66]

By addressing these considerations, it becomes evident how South Africa's non-compliance with the guidelines hampers its ability to achieve the SDGs, particularly in relation to decent work for SMEs. However, by recalibrating the legal framework to better support SMEs, the government can foster a more conducive environment for their development and long-term sustainability. This proactive approach not only aligns with national goals but also supports the broader objective of cultivating a thriving hospitality sector within the framework of sustainable development. Ultimately, prioritising these changes will benefit both SMEs and the overall economy.

Skills development in the tourism sector

In relation to skills development, the guidelines emphasise that achieving decent work in the tourism sector requires a focused approach on training and career development strategies for workers.[67] This emphasis is crucial, as it allows for the development of skills tailored to meet industry needs, fosters a well-trained workforce, improves the quality of tourism services, and enhances overall productivity.[68] In South Africa, the framework for skills development is established through the Skills Development Act 97 of 1998.[69]

The primary purpose of this Act is to cultivate the skills of the South African workforce. Specifically for the tourism sector, there is a dedicated skills development body known as the Culture, Arts, Tourism, Hospitality, and Sport Sector Education and Training

cost of tax compliance can thus add significantly to the cost of doing business for SMEs (e.g., additional resources that have to be employed to comply with tax rules, significant penalties imposed for non-compliance with tax rules, administrative non-compliance penalties imposed for outstanding tax returns, among other costs." The tax compliance burden for small and medium enterprises, available at https://www.deloitte.com/za/en/services/tax/perspectives/the-tax-compliance-burden-for-small-and-medium-enterprises.html (23-04-2025).

66 Sibiya and Van der Westhuizen (n 57) 5-6.

67 ILO guidelines on decent work in the Tourism Sector (n 11) 25.

68 ILO guidelines on decent work in the Tourism Sector (n 11) 25.

69 97 of 1998.

Authority (CATHSSETA).[70] CATHSSETA is tasked with developing a sector skills plan that identifies trends within the industry and highlights the skills that are in demand.[71]

According to the 2022 Sector Skills Plan published by CATHSSETA,[72] the sector faces significant challenges in filling higher-skilled vacancies.[73] Employers report that graduates often lack the necessary practical skills, while experienced workers may not possess the required qualifications.[74] This disconnect creates challenges for sustainable employment in the sector, as employers struggle to find candidates who meet both qualification and experience criteria, despite having a workforce that includes individuals from both groups.[75] This situation highlights the importance of an integrated approach to education and skills training in the hospitality sector, ensuring that both graduates and non-degree workers are better equipped with the skills needed in the industry.

Despite these challenges, CATHSSETA has made promising progress in the hospitality sector. For instance, CATHSSETA has funded 116 students pursuing qualifications in the sector and has provided internships to gain practical experience.[76] Additionally, CATHSSETA has partnered with Technical and Vocational Education and Training (TVET) colleges to develop accredited qualifications aligned with the National Qualifications Framework (NQF).[77] This collaboration also includes promoting worker-initiated training in line with broader sectoral policies, resulting in bursaries and skills programmes that have benefited 68 workers pursuing higher-skilled qualifications.[78]

70 CATHESSETA is vested with the authority to develop a sector skills plan, and this plan will identify the trends in each sector and the skills that are in demand in that sector.
71 CATHSSETA Sector Plan (n 2) 27.
72 CATHSSETA Sector Plan (n 2) 27.
73 According to the CATHSSETA Skills Plan, hard-to-fill vacancies are occupations that take longer than a year to find suitably experienced and qualified candidates for filling.
74 CATHSSETA Sector Plan (n 2) 46-47.
75 CATHSSETA Sector Plan (n 2) 47.
76 CATHSSETA Sector Plan (n 2) 63.
77 CATHSSETA Sector Plan (n 2) 62.
78 CATHSSETA Sector Plan (n 2) 65.

Building on these efforts, CATHSSETA has recently announced its intention to collaborate with large employers to create youth employment opportunities.[79] A notable example is its partnership with McDonald's, which has committed to training 1,400 learners through a hospitality leadership programme culminating in an NQF Level 3 qualification.[80] This programme is designed to serve as a gateway to employment opportunities, equipping participants with both practical skills and industry-specific knowledge.[81] Furthermore, McDonald's has committed to hiring 80% of these learners into formal employment roles after they complete their learnerships.[82] CATHSSETA articulates that the primary objective of this programme is to address the critical issue of youth unemployment in the country by providing a structured pathway for previously unemployed individuals to enter the workforce. By equipping learners with essential tools and qualifications necessary to excel in the fast-food industry, the programme aims to empower them to contribute to both the sector's growth and their personal development.[83]

However, while this initiative contributes to reducing youth unemployment – an explicit goal of the guidelines[84] – it raises important questions regarding the sustainability of the training provided. Specifically, will there be ongoing training offered after students are hired? This enquiry is vital, as a one-time training experience does not adequately support career advancement; ongoing development is essential in this context. Continuous training is necessary to adapt to emerging trends and industry demands; thus, a single training programme may prove insufficient for long-term success.[85] Using McDonald's as an example, their collaboration with CATHSSETA suggests a focus on one-time training. In their official statement, they assert that the learnership aims to provide learners with experience crucial for gaining employment while also promoting

79 CATHSSETA Annual Report 2023/24, available at https://cathsseta.org.za/storage/app/public/annual_report/1732092285.pdf (15-06-2025).
80 CATHSSETA Annual Report (n 79) 11.
81 CATHSSETA Annual Report (n 79) 11.
82 CATHSSETA Annual Report (n 79) 11.
83 CATHSSETA Annual Report (n 79) 29.
84 ILO guidelines on decent work in the Tourism Sector (n 9) 21.
85 ILO guidelines on decent work in the Tourism Sector (n 9) 10, 19.

entrepreneurship to support sustainable tourism.[86] However, such language raises concerns about the sustainability of the tourism sector if ongoing training is not integrated into the learning process. Without a commitment to continuous professional development, the long-term effectiveness of such initiatives remains questionable.

2.2.2 Recommendation 204 – Concerning the transition from the informal to the formal economy

This recommendation was introduced to address the pervasive issue of informal work across member states, which frequently results in the exclusion of workers from essential labour and social protections.[87] To tackle this challenge, the recommendations assert that member states should develop employment policies that prioritise decent work as a central objective within their national development strategies.[88] This approach aims to foster the creation of quality formal employment opportunities while incorporating skills development and employment programmes designed to support low-income households living in poverty.[89] By facilitating these changes, we can ensure that individuals in these circumstances benefit from adequate wages and comprehensive social protection policies. Significantly, this strategy should also encompass migrant workers,[90] acknowledging their critical contributions to meeting labour market needs.[91]

Moreover, while the recommendation closely aligns with guidelines established for decent work within the tourism sector, its applicability extends across all industries. The definition of "informal worker" derived from this recommendation has been integrated

86 McDonald's South Africa and CATHSETTA Partnership, available at https://www.mcdonalds.co.za/news-notifications/13-august-2024-mcdonalds-south-africa-collaborates-with-cathsseta-to-develop-workforce (09-01-2024).
87 Preamble of Recommendation 204 (R204).
88 Preamble of R204.
89 Article III (10) of R204.
90 Article III (10) of R204.
91 Article III (11) of R204.

into numerous ILO guidelines, thereby reinforcing its relevance in contemporary discussions surrounding labour protections.[92]

Following the adoption of this recommendation, South Africa was selected as a test case for its implementation.[93] Although the state has yet to officially initiate this process, considerable pressure is mounting from informal economy workers advocating for its adoption.[94] A study conducted by the Women in Informal Employment: Globalizing and Organizing (WIEGO), titled *Implementing ILO R204 on the Transition from the Informal to the Formal Economy: Lessons from South Africa's Experience*,[95] delineates the challenges associated with the implementation of these recommendations.[96] The study highlights that efforts to formalise informal enterprises have predominantly focused on basic activities such as business registration and seeking grants to address deficits in decent work.[97]

The findings reveal that the attempts to formalise informal enterprises have been constrained to rudimentary initiatives, limiting the potential for transformative change.[98] The report specifically examines the circumstances of street vendors, owners of small shops, waste pickers, fishers, minibus taxi drivers, and home-based artisans operating within the informal economy.[99] However, if we broaden the definition of "informal workers" to include all employees within the hospitality sector, it becomes evident that

92 The definition of informal sector workers was established in Art I(2) of the R204. As detailed in the discussion under *Decent work in the Tourism Sector*, the same definition was applied there.

93 Pillay *Job Summit Policy Brief Series – Stream 3, Policy Brief: Informal Economy/Sector* 2018, available at https://iej.org.za/wp-content/uploads/2020/07/Stream-3-Policy-Brief-1-Informal-Economy-Sector.pdf (10-11-2024).

94 WIEGO Technical Brief No 16: April 2024 5; Horn *Implementing ILO R204 on the Transition from the Informal to the Formal Economy: Lessons from South Africa's Experience*. According to this report, workers in the informal sector are pressuring the state to adopt the recommendations.

95 WIEGO Technical Brief (n 94).

96 WIEGO Technical Brief (n 94) detailed various reasons; however, the most important is the narrow approach the court is taking to transitioning the informal economy into the formal economy. The state is merely focusing on registering businesses, which has proven insufficient as exclusions still exist after registration.

97 WIEGO Technical Brief (n 94) 6.

98 WIEGO Technical Brief (n 94) 7.

99 WIEGO Technical Brief (n 94) 8.

these workers also fall under this classification. Their experiences and challenges are deserving of inclusion in the broader discourse on labour protections.

The author contends that the sustainable realisation of R204 necessitates a multifaceted approach to the formalisation of the informal economy, extending beyond mere business registration to address the varied needs of informal workers across diverse sectors.[100] This discussion aligns with the notion that the state can utilise its legislative powers to facilitate not only the operations of SMEs but also to support individual employees and those who are self-employed.

While WIEGO acknowledges the existence of pertinent legislation, it draws attention to critical shortcomings in the implementation of such laws. It also emphasises the need for processes that can navigate the stringent requirements imposed by legislation on individuals who do not neatly fit the traditional definition of an "employee".

Ultimately, the prevalent theme in this discourse is the necessity for the state to fully utilise the available legislative framework, focusing on extending both the legislation and its protective measures to encompass self-employed and informally employed individuals. Furthermore, private stakeholders should also facilitate similar protections for formal employees who earn insufficient wages and receive minimal benefits, thus preventing their moral and practical classification as formal sector employees. Until R204 is effectively implemented and our legislative framework is utilised to its fullest potential, the achievement of decent work for all remains an elusive goal.

2.2.3 Hospitality sector workers as "informal workers"

According to Article I (2) of R204, the informal economy is defined for the purposes of this recommendation as encompassing "all economic activities by workers and economic units that are – in

100 WIEGO Technical Brief (n 94) 7.

law or in practice – not covered or insufficiently covered by formal arrangements".[101]

This definition highlights the multifaceted nature of informal employment, which is not limited to a single economic sector but spans both public and private spheres,[102] including employer–employee relationships and self-employment.[103]

Informal food trading and small family-run restaurants serve as salient examples of this phenomenon. These enterprises play an essential role in providing livelihoods for over 50% of the global population, with a particularly significant rise in participation observed in South Africa.[104] This trend is especially pronounced amongst individuals who face barriers in securing positions in the formal job market or who lack formal educational qualifications.[105] Despite their critical importance, these informal vendors encounter numerous challenges, including abuse and harassment from municipal officials.[106] Such adversities often compel them to withdraw from work, resulting in substantial income loss and heightened vulnerability, as informal trading typically represents their primary source of income.[107] The precarious situation faced by informal workers is mirrored in the small and medium-sized enterprises operating within the formal economy, where employees frequently grapple with low wages, unfavourable working hours, insufficient union representation, and a lack of benefits.[108] These conditions make these workers vulnerable, as they do not enjoy the essential protections necessary for decent work.

101 Art I(2) of R204.
102 Art I(5) of R204.
103 Art I(4) (a)(i)-(ii) of R204.
104 De Beer and Rogerson "Decent work in the South African tourism industry: Evidence from tourist guides" 2014 *Urban Forum* 90 91; Bhoola and Chetty "Experiences and perceptions of economically marginalized women food vendors: An exploratory study of informal food traders in Durban, South Africa" 2022 *Journal of Social Inclusion* 25 25.
105 Bhoola and Chetty (n 104) 26.
106 Bhoola and Chetty (n 104) 25.
107 Bhoola and Chetty (n 104) 27.
108 Olowoyo, Ramaila and Mavuru (n 1) 1078.

In light of these pressing challenges, the recommendation urges member states to systematically assess and diagnose the factors contributing to informal labour.[109] Similar to the guidelines for decent work in the tourism sector, this recommendation emphasises the need for developing and implementing comprehensive laws, regulations and policies to facilitate the transition of informal workers into the formal economy.[110] These recommendations advocate for the formulation and implementation of comprehensive laws, regulations, and policies designed to facilitate the transition of informal workers into the formal economy.[111] They promote tailored approaches that take into account the specific characteristics of various sectors and the diverse national circumstances.[112] Consequently, the recommendations advocate for an integrated policy framework that actively involves informal workers in collective bargaining processes, thereby fostering equitable labour conditions and enhancing their rights within the broader economic landscape.[113]

As stated above, the establishment of entirely new legislation is both impractical and unnecessary. The proliferation of sector-specific legislation would not only be time-consuming but could also impede the overall objective of achieving decent work by 2030. Instead, it is imperative to utilise existing legislative frameworks and explore potential reformations permissible under current laws, which may include the enactment of regulations or new sectoral determinations. This approach promises to expedite necessary reforms while minimising disruptions to the policy landscape.

3. Social protection and the hospitality sector

The right to social security is recognised as a fundamental human right in Article 9 of the International Covenant on Economic, Social, and Cultural Rights (Covenant).[114] It emphasises that the right to

109 Article III(8) of R204.
110 Article III(8) of R204.
111 Article III(8) of R204.
112 Article II(7)(a) of R204.
113 Article V(16) of R204.
114 International Covenant on Economic, Social and Cultural Rights, 1966.

social security is essential for individuals to lead dignified lives.[115] Without this right, living with dignity becomes unattainable.[116]

Article 9 places an obligation on the state to recognise everyone's entitlement to social assistance and social insurance.[117] However, the Covenant does not specify the details of this obligation, leading the Committee on Economic, Social, and Cultural Rights to issue General Comment 19.[118] This document provides a detailed discussion of the right to social security and clarifies the obligations that states must fulfil to uphold this essential human right. [119]

3.1 General Comment 19

The Committee emphasises that the right to social protection is inherently redistributive, aiming to alleviate poverty and combat social exclusion while promoting social inclusion.[120] Despite its significance, the Committee expresses grave concern regarding the alarmingly low levels of access to social security globally, highlighting that more than 80% of the world's population lacks access to formal social protection systems.[121] This widespread denial of access poses serious challenges to realising other rights enshrined in the Covenant, particularly for marginalised and disadvantaged populations.[122] A fundamental aspect is "availability", which mandates that a social security system be established, whether as a singular scheme or a collection of schemes, to address relevant social risks and contingencies.[123] These systems must be developed domestically, with effective administration under the state's purview.[124] Additionally, the Committee emphasises the importance of "eligibility" as a key aspect of "availability", asserting that the qualifying conditions for

115 ILO *Building Social Protection Systems: International Standards and Human Rights Instruments* (2021) 1 2.
116 ILO (n 115) 11.
117 Article 9 of the Covenant.
118 General Comment No. 19: The right to social security (Art 9).
119 General Comments (n 118) par 7.
120 General Comments (n 118) par 7.
121 General Comments (n 118) par 7.
122 General Comments (n 118) par 7.
123 General Comments (n 118) par 11.
124 General Comments (n 118) par 7.

benefits should be reasonable, proportionate, and transparent. In cases where social security programmes require contributions, these contributions must be affordable for everyone, ensuring that they do not impede the realisation of other rights under the Covenant.[125]

The Committee emphasises that states must establish social security provisions, including both contributory and non-contributory retirement benefits for old age, and ensure protection for workers who sustain workplace injuries by covering healthcare costs and compensating for lost earnings, with access to these benefits not contingent upon the duration of employment, insurance coverage, or completed contributions.[126] Moreover, regarding maternity leave, Article 10 of the Covenant specifies that working mothers are entitled to paid leave or leave accompanied by adequate social security benefits.[127] This entitlement extends to all women, regardless of whether they work in the formal or informal sectors. It also includes medical benefits for perinatal, childbirth, and postnatal care, covering necessary hospitalisation.[128] The Committee notes that by implementing these measures, states can significantly improve access to social protection and contribute to the realisation of fundamental rights for all individuals.

The Committee also emphasises the importance of providing social benefits on a non-discriminatory basis.[129] explicitly prohibiting discrimination based on race and origin and affirming that states have an obligation to eliminate any practices that could foster discrimination. [130] The Committee's requirements appear to include undocumented migrant workers, as it specifies that "everyone is entitled to social protection" and strictly prohibits discrimination based on immigration status.[131]

In particular, the Committee calls on states to take comprehensive steps to ensure that social security systems are inclusive of workers

125 General Comments (n 118) par 25.
126 General Comments (n 118) par 15, 17.
127 Article 10 of the Covenant; General Comments (n 118) par 19.
128 General Comments (n 118) par 19.
129 General Comments (n 118) par 29.
130 General Comments (n 118) par 29.
131 General Comments (n 118) par 39.

in the informal sector, especially since many social security frameworks primarily address formal employment.[132] To improve access for informal sector workers, the Committee recommends several measures, including the eliminating of obstacles that prevent these workers from utilising informal social security schemes, such as community-based insurance.[133] It is essential to facilitate access for informal sector workers, and the Committee recommends a range of measures to achieve this, including removing barriers that hinder these workers from accessing informal social security schemes, such as community-based insurance.[134] Additionally, the Committee advocates for the gradual establishment of a minimum level of coverage for risks and contingencies specifically for these workers within formal social security.[135]

Importantly, the Committee further emphasises the need to recognise and support social security schemes that arise from the informal economy, including micro-insurance and micro-credit initiatives.[136] By implementing these steps, the Committee believes that states can create a more inclusive social protection framework that benefits all workers, regardless of their employment status.

3.2 South Africa's social security system

South Africa has a comprehensive social security system that applies to employees as defined by the Labour Relations Act (LRA) 66 of 1995 and to documented migrant workers, as established by the *Khosa* case.[137] However, this system excludes undocumented migrant workers.

132 General Comments (n 120) par 34.
133 General Comments (n 120) par 34.
134 General Comments (n 120) par 34.
135 General Comments (n 120) par 34.
136 General Comments (n 120) par 34.
137 ss 200A and 213 of the LRA; The *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) judgement extended social protection to all documented migrant workers. Mpedi and Smit "Social protection for developing countries: Can social security be more relevant for those working in the informal economy?" 2010 *LDD* 1 167-168.

The committee observes that both social assistance and social insurance should function as an income replacement; however, in South Africa, these two systems serve distinct purposes.[138] Social assistance is intended to ensure that individuals do not fall below a basic minimum standard of living,[139] while social insurance acts as an income replacement mechanism supported by contributions from both employers and employees.[140] This creates an assumption that individuals with financial means should contribute to social insurance, whereas social assistance is reserved for those in genuine need.[141]

Many informal workers are excluded from social insurance because they often do not meet the official definition of an "employee", which limits the protection of individuals in formal employment.[142] Additionally, informal workers may be unable or unwilling to contribute a significant portion of their income to social security, raising concerns about the system's affordability.[143]

Although the government plays an important role in regulating social insurance initiatives, it does not offer voluntary social insurance schemes;[144] instead, these schemes are typically managed by private employers for their employees.[145] This distinction is important: social insurance requires contributions from both employees and employers and is administered by private entities, while social assistance is directly provided by the state.[146] Access to social assistance typically requires passing a means test, which can

138 General Comments (n 120) par 16; Mpedi and Smit (n 137) 161.
139 Mpedi and Smit (n 137) 161.
140 Mpedi and Smit (n 137) 161.
141 Mpedi and Smit (n 137) 161.
142 Mpedi and Smit (n 137) 167-168.
143 Mpedi and Smit (n 137) 160.
144 Brockerhoff "Review of the development of social security policy in South Africa" 2013 *Studies in Poverty and Inequality Institute* 1 16. https://spii.org.za/wp-content/uploads/2018/02/2013-07-SPII-Working-Paper-6-Review-of-Social-Security-Policy.pdf (5-10-2023).
145 South African Human Rights Commission *Social Security and Social Services for Children Report, Chapter 2: Social Security, Social Assistance and Social Services for Children and Social Services for Children.* Part A: Overview, 1 13, available at https://www.sahrc.org.za/home/21/files/Reports/3rd%20ESR%20report%20chapter_2.pdf (28-12-2024).
146 Social Security and Services Report (n 145) 13.

create barriers for many individuals.[147] Consequently, those living in poverty may find themselves ineligible for crucial support, despite urgently needing it.[148]

These challenges emphasise the shortcomings of the social assistance framework. Many individuals who fall just above the means threshold may still be unable to afford social insurance,[149] rendering them vulnerable – especially during periods of unemployment or hospitalisation.[150] Such circumstances highlight the importance of social insurance, particularly for benefits like maternity leave.[151]

Despite the significance of social security, there is no established framework for recognising informal social security arrangements.[152] Consequently, informal sector workers lack a viable pathway to access the existing social protection system, which results in non-compliance with state obligations imposed by the Covenant.[153] Smit and Mpedi[154] advocate for the development of a system that caters specifically to the needs of individuals in the informal economy who are capable of contributing to social security.[155]

To create such a system, the author argues for a re-evaluation of the definition of "employee" within social security legislation, as well as a relaxation of the criteria related to "qualifying periods" and "consistency of contributions". This re-evaluation is crucial, considering that informal sector employees often experience irregular

147 Social Security and Services Report (n 145) 13.
148 Social Security and Services Report (n 145) 13.
149 Mpedi and Smit (n 137) 20.
150 Mpedi and Smit (n 137) 20. Section 24 of the UIF Act 63 of 2001 permits only contributors who fit the definition of an employee in the Act to claim maternity benefits.
151 Mpedi and Smit (n 137) 20; s 24 of the UIF Act; Behari "Lessons on parental leave: A comparative analysis of parental leave in South Africa and the United Kingdom" 2020 *Obiter* 787 792. As employers are not mandated to provide paid maternity leave, women frequently rely on income derived from their Unemployment Insurance Fund contributions during this period. If they have not contributed to the fund, they face a complete loss of income during maternity leave, which further illustrates the precarious situation of low-wage workers.
152 Mpedi and Smit (n 137) 175.
153 Mpedi and Smit (n 137) 175.
154 Mpedi and Smit (n 137) 161.
155 Mpedi and Smit (n 137) 177.

incomes, which diverge significantly from the stable earnings associated with formal employment.[156] The inconsistency of income can severely impede their ability to contribute to social security.[157] Furthermore, the long-term perspective of formal sector insurance does not align with the immediate needs of informal workers, who prioritise essential necessities like food over potential future risks.[158]

To effectively address these challenges, the authors propose either broadening the definition of "employee" within existing social protection legislation or introducing sectoral determinations tailored to specific worker categories.[159] However, the author leans more towards the latter approach, as simply widening the definition does not adequately tackle other critical issues, such as the income irregularity experienced by informal sector workers, which obstructs their ability to contribute consistently.[160] By recognising informal insurance programmes and progressively integrating these workers into formal social security policies, as suggested in General Comment 19, South Africa can take significant steps towards creating a more inclusive and equitable social protection system.[161]

4. Undocumented migrant workers and regional integration

South Africa has significant responsibilities as a member of the Southern African Development Community (SADC) at the regional level.[162] One of its key obligations is to promote "regional integration", a mandate shared by all SADC member states.[163] This regional integration involves collaborative efforts amongst countries to share knowledge, develop coherent policies, promote peace and security, and enhance trade relations.[164] Central to SADC's regional

156 Mpedi and Smit (n 137) 175.
157 Mpedi and Smit (n 137) 175.
158 Mpedi and Smit (n 137) 175.
159 Mpedi and Smit (n 137) 180.
160 Mpedi and Smit (n 137) 175.
161 General Comments (n 120).
162 South Africa joined SADC in April 1994.
163 This obligation is imposed on South Africa by the SADC Treaty. South Africa acceded to the Treaty on 29 Aug 1994.
164 Mlambo "Challenge's impeding regional integration in Southern Africa" 2018 *Journal of Economics and Behavioral Studies* 250 250.

integration efforts for regional integration is the governance framework established by the SADC Treaty.[165] This framework not only aims to promote sustainable economic growth and socioeconomic development but also seeks to alleviate poverty in Southern Africa.[166]

A primary objective of this framework is to eradicate poverty and improve the quality of life for individuals in the region.[167] To effectively achieve these interconnected goals, it is essential to harmonise political and socioeconomic policies amongst member states, thereby creating a cohesive approach to development.[168] Additionally, the establishment of institutions capable of initiating and executing key programmes for SADC projects is crucial.[169] Furthermore, the treaty aims to develop policies that systematically remove barriers to the free movement of capital, labour, and people, fostering a more integrated economic environment and ultimately contributing to the overall success of regional integration efforts.[170]

In this context, South Africa assumes a central role within SADC because of its status as the strongest economy in both Southern Africa and the broader continent.[171] This prominence positions South Africa to effectively lead regional integration efforts.[172] However, it is important to note that South Africa does not have an official regional migration policy. In contrast, Mauritius has implemented a formal temporary labour migration policy within its Export Processing Zones (EPZ), which could serve as a model for other member states.[173]

165 Mlambo (n 164) 250.
166 Article 5(1)(a)of the SADC Treaty.
167 Article 5(1)(a) of the SADC Treaty.
168 Article 5(1)(a) of the SADC Treaty.
169 Article 5(1)(a) of the SADC Treaty.
170 Article 5(2)(a)–(d) of the SADC Treaty.
171 Amos "The role of South Africa in SADC regional integration: the making or braking of the organization" 2010 *Journal of International Commercial Law and Technology* 124; Lu *Mapped: Breaking Down the $3 Trillion African Economy by Country*, available at https://www.visualcapitalist.com/breaking-down-african-economy-by-country/#:~:text=Ranked%3A%20Africa's%20Economies%20by%20GDP,the%20first%20half%20of%202023 (20-11-2024).
172 Gwala *An Analysis of South Africa's Role in Regional Integration in Southern Africa: Prospects and Challenges* (2015 dissertation UKZN) v.
173 Migration and Development – The Mauritian Perspective, available at https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/

As the only SADC nation with a policy specifically focused on the employment and recruitment of low-wage and semi-skilled migrant workers, Mauritius showcases the various approaches that can be adopted to address labour migration issues.[174]

Compounding concerns surrounding labour migration, many African countries grapple with perceptions that categorise some nations as major destinations for migrants while labelling others solely as sources of migrant outflows.[175] This mindset can be counterproductive; reluctance to establish a structured labour migration framework for low-skilled workers often leads to irregular migration. Such irregularities result in the exploitation of undocumented workers and diminish the potential benefits of comprehensive regional integration, ultimately undermining the objectives that SADC seeks to achieve.[176] Therefore, it is essential to implement a diverse range of strategies tailored to the unique circumstances of each member state to facilitate effective regional integration and sustain economic growth across Southern Africa.

4.1 South Africa and regional integration

The issues surrounding undocumented migration in South Africa are primarily driven by the strict requirements outlined in the Immigration Act 13 of 2002,[177] which was designed to limit the unlawful migration of unskilled workers while encouraging the immigration of skilled individuals.[178] This creates a significant barrier for unskilled labourers, severely restricting their opportunities to migrate to South Africa legally.[179]

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microsites/IDM/workshops/return_migration_development_070708/speech_seewooruthun.pdf (20-11-2024).

174 Mlambo (n 164) 253.

175 Mlambo (n 164) 253.

176 Draft National Labour Migration Policy for South Africa Feb 2022 1 33, available at https://www.labour.gov.za/DocumentCenter/Publications/Public%20Employment%20Services/National%20Labour%20Migration%20Policy%202021%202.pdf (21-06-2023).

177 Snyman *Social Protection for the Migrant Workers in South Africa* (2013 dissertation UP) 66; 13 of 2002.

178 s 2(j) of the Immigration Act .

179 Snyman (n 177) 66.

To address the challenges faced by migrant workers, the Department of Labour (DOL) published a paper on Labour Migration in South Africa in February 2022.[180] This paper aims to identify the underlying reasons for the poor regulation of labour migration in the country.[181] Despite the DOL's efforts in releasing this comprehensive policy, it has yet to be enacted into law, leaving South Africa without a formal labour migration framework.[182] As a result, the country continues to rely mainly on the Immigration Act, which does not provide adequate pathways for low-skilled migrant workers to enter legally.[183] Consequently, the unregulated migration of unskilled workers persists, leading to the ongoing exploitation of undocumented migrants.[184]

This hesitance appears unwarranted considering South Africa's historical approach to labour migration. In the past, South Africa established bilateral agreements with neighbouring countries, which facilitated the legal migration of low-skilled workers through mechanisms like the "two-gate policy".[185] While this approach enabled some lawful entry for low skilled migrant workers, it ultimately proved to be exploitative, as it was a scheme of the apartheid government that denied workers access to social benefits and subjected them to deferred payment arrangements.[186] The current

180 Labour Migration Policy (n 176).

181 Labour Migration Policy (n 176) 20.

182 The only strides that have been made since the publication of this policy has merely been public hearings but nothing more. This is confirmed in the following sources: Employment and Labour held a robust dialogue on Labour Migration Policy and Governance – Mpumalanga, available at https://www.gov.za/speeches/employment-and-labour-labour-migration-policy-and-governance (29-11-2024).

183 The preamble of the Immigration Act confirms that the intention of the Act is only to allow exceptionally skilled migrants into South Africa.

184 Vettori (n 8) 3.

185 Section 2.1.1 of the SADC Labour Migration Policy, 2013; South Africa has included these bilateral agreements with countries such as Lesotho to allow for cheap labour in South Africa's mines and on the farms; In the 19th and 20th centuries, South Africa engaged in bilateral agreements with neighbouring countries such as Mozambique, Swaziland, Lesotho, and Malawi, facilitating the legal migration of low-skilled workers through a framework known as the "two-gate policy".

186 UN Internal Organization for Migration *Bilateral Labour Migration Agreements in Two SADC Corridors* 1 7, available at https://publications.iom.int/system/files/pdf/Bilateral-Labour-Migration-Arrangements.pdf (25-11-2024).

government has declared an end to these exploitative practices; however, leniency persists in practice through temporary permits granted to certain populations, such as Zimbabweans.[187] Although these permits offer provisional legal status, they do not provide adequate rights protection.[188]

The reluctance to officially recognise irregular migration, coupled with ongoing legal ambiguities regarding undocumented workers, exacerbates the issue and contributes to further exploitation. Therefore, a reformed immigration policy is essential to facilitate the entry of low-skilled migrant workers while safeguarding their rights.

Establishing a comprehensive labour migration policy would empower the South African government to regulate the activities of undocumented workers, granting them legal status and protections equivalent to their documented counterparts. Such a policy would not only enhance the welfare of migrants but also align with regional integration goals, ultimately fostering a more equitable labour framework that benefits both migrant populations and the broader South African economy.

5. Conclusion

South Africa stands at a critical juncture where it can significantly enhance the rights and protections of workers, particularly those in the informal economy and the hospitality sector. The challenges faced by the hospitality sector highlight its unique characteristics, as employment often shifts between formal and informal economies. While some workers may be classified as operating within the formal economy because of limited legislative protections, the reality is that many continue to experience conditions akin to informal employment. This discrepancy highlights the urgent need for a multifaceted approach that redefines employment and social security, actively facilitating the transition of informal workers into the formal economy.

187 UN Internal Organization for Migration (n 186) 14.
188 UN Internal Organization for Migration (n 186) 14.

To achieve decent work by 2030, South Africa must adopt proactive measures, such as state-supported career advancement programmes that empower workers to gain qualifications and improve their positions within the workforce. Reforming immigration laws to support low-skilled undocumented migrants is equally crucial, as this can safeguard workers' rights and establish better oversight through legal migration channels. Together, these initiatives aim to create a more stable and equitable work environment.

Moreover, any sector-specific policy formulation must occur through existing laws, using mechanisms like sectoral determinations and collective bargaining agreements. Cultivating these specific policies enables the state to address the multifaceted issues within the hospitality sector effectively. This strategy not only enhances trade union participation and strengthens labour rights but also facilitates greater engagement in the economy for this workforce. However, as highlighted by the ILO, legislative protections are of little value without practical enforcement. The persistent negative stereotypes that label the hospitality sector merely as a "transitional sector" for transient workers oversimplify its challenges and undermine the sustainability of its workforce.

Thus, a more equitable and inclusive approach to policy formulation is critical for recognising the vital role that the hospitality sector plays in the broader economy. By implementing these comprehensive steps, South Africa can foster a dignified and secure environment for all workers in the sector, ultimately contributing to a more inclusive and prosperous society.

The Intersection of Multiculturalism and Transformative Constitutionalism

Section 29(2) of the Constitution and the Meaning of "Reasonably Practicable" within School Governance

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Summary

This article contributes to debates on language rights by evaluating the application of the "reasonably practicable" standard in section 29(2) of the Constitution. It focuses on the language policies of public schools in South Africa, particularly Afrikaans-medium institutions, and examines the constitutional and legal implications of state intervention under the Basic Education Laws Amendment Act 32 of 2024. By situating case law and policy within the broader frameworks of multiculturalism and transformative constitutionalism, the article highlights tensions between cultural preservation, racial integration, and equitable access to basic education.

Keywords: Multiculturalism; Transformative Constitutionalism; Language Rights; Reasonably Practicable; School Governance; Mother-Tongue Education

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1. Introduction

The Constitution of the Republic of South Africa, 1996, requires the transformation of the educational system to uphold the values of human dignity, equality, and freedom while addressing historical injustices. Within this context, the debate on "language in education" remains central to the broader project of transformation in South Africa. Language is intimately tied to culture, identity, social relationships, and symbolic meaning.[1] The historical politicisation of language has made the question of medium of instruction deeply contentious, linked to colonialism, apartheid, and ongoing structural inequalities.

The preservation and promotion of languages, particularly in a multicultural society like South Africa, is therefore critical for affirming cultural dignity and promoting inclusion.[2] However, Afrikaans, which carries both a history of anti-colonial resistance and a legacy of apartheid oppression, occupies a complex space within these debates.[3] The transformation of Afrikaans-medium schools into dual-medium schools has sparked disputes regarding cultural preservation, integration, and the right to education in one's language of choice.

The racial integration of South African schools is central to the project of democratisation and transformation in education.[4] However, attempts to transform single-medium Afrikaans schools have raised concerns about whether such interventions undermine cultural identity or serve as necessary measures to overcome historical exclusions. The Court's engagement with these tensions in various cases has highlighted the complexity of balancing integration with language rights.[5]

Section 29(1) of the Constitution guarantees the right to basic education, while section 29(2) provides that everyone has the right

1 Agha *Language and Social Relations* (2006) 190-232.
2 Majidi "English as a global language: Threat or opportunity for minority language?" 2013 *MJSS* 34.
3 *Afriforum v University of the Free State* 2018 4 BCLR 387 (CC) par 4.
4 South African Schools Act 84 of 1996.
5 *Rivonia Primary School v MEC for Education, Gauteng* 2013 12 BCLR 1365 (CC).

to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. This provision introduces a balance between linguistic rights and practical feasibility. However, the interpretation and application of "reasonably practicable" have become the subject of constitutional litigation, primarily concerning Afrikaans-medium public schools.

2. Understanding multiculturalism

The concept of multiculturalism occupies a central place in debates about education, identity, and inclusion in post-apartheid South Africa. Multiculturalism refers broadly to the coexistence of diverse cultural, linguistic, ethnic, and religious communities within a shared political space.[6] However, it is not merely descriptive, it is also normative, raising questions about how states should recognise and accommodate cultural differences in ways that promote justice, equality, and social cohesion.[7]

From a political theory perspective, Charles Taylor introduced the idea of multiculturalism as a "politics of recognition", where acknowledging the cultural identity of minority groups is seen as fundamental to dignity and self-respect.[8] Similarly, Will Kymlicka's liberal multiculturalism framework advocates for minority rights as essential for ensuring substantive equality in pluralistic societies.[9] Kymlicka distinguishes between immigrant minorities, who may seek cultural integration, and national minorities, who may demand autonomy to preserve their distinctive cultural identities.[10]

6 Netshivhambe *Multiculturalism and cultural tolerance*, available at https://www.intechopen.com/online-first/1195937# (30-10-2024).

7 Van der Merwe "Multiculturalism and the humanities" 2004 *SAJHE* 150-162.

8 Bignall "Dismantling the face: Pluralism and the politics of recognition" 2012 *Deleuze Studies* 389-410.

9 Johansson "In defence of multiculturalism – theoretical challenges" 2024 *International Review of Sociology* 81.

10 Johansson (n 9) 81.

Sociological approaches to multiculturalism often reference the "melting pot" versus "salad bowl" metaphors.[11] The melting pot model promotes assimilation into a dominant cultural identity, potentially erasing minority cultures.[12] In contrast, the salad bowl model recognises the distinctiveness of each cultural group while promoting coexistence and mutual respect.[13] In the South African context, the vision of the "rainbow nation" reflects an aspiration towards the salad bowl ideal, where diversity is celebrated as a strength of the national identity.[14]

The historical and structural inequalities that continue to define South African society complicate efforts to promote genuine multicultural inclusion. Race, class, and language remain deeply intertwined, often reinforcing patterns of marginalisation. For example, Afrikaans-speaking communities may view the preservation of Afrikaans-medium schools as vital to cultural survival, while others may perceive such institutions as remnants of apartheid exclusion.

Minority rights are entrenched in section 31 of the Constitution; however, minority groups continue to struggle to protect and preserve their cultural, linguistic, and religious identities within transformative constitutionalism and pluralism.[15] The decentralisation of education has sometimes worsened inequalities rather than reduced them. Widespread inequality within the education system, along with the lasting effects of exclusion and marginalisation amongst racial groups, have made the concept of multiculturalism appear more theoretical than practical.[16]

11 Berray "A critical literary review of the melting pot and salad bowl assimilation and integration theories" 2019 *JECS* 142-151.

12 Berray (n 11) 142-151.

13 Berray (n 11) 142-151.

14 Netshivhambe (n 6).

15 Van Der Walt and Steyn "Recognition of minority groups, their general and educational ideals: Is there another way out?" 2014 *Tydskrif vir Geesteswetenskappe* 825.

16 Sayed and Soudien "Decentralisation and the construction of inclusion education policy in South Africa" 2005 *Compare* 115-125.

South African schools are influenced by the rich cultural, ethnic, and religious identities within their communities.[17] These communities play a key role in shaping the cultural identities and values of both the school and its learners.[18] However, despite this diversity, these communities remain segregated and divided along racial and class lines.[19] In the *Laerskool Potgietersrus* case, the school argued that its language policy aimed to maintain its "exclusively Christian Afrikaans culture and ethos" and that admitting English-speaking learners would "detrimentally affect or destroy" that culture and ethos.[20] "Communitarianism", the antithesis of multiculturalism, is premised on the proposition that a strong sense of community allegiance and responsibility shapes political identity.[21] This explains why minority groups, such as Afrikaners, rationalise the need to preserve their culture and heritage.

The critique of multiculturalism is that it can lead to forced assimilation.[22] This suggests that minority groups may feel pressured to relinquish their history, culture, and identity in favour of adopting the dominant culture.[23] This is often undertaken in an effort to create a unified national identity and promote social cohesion.[24] The South African "rainbow nation" ideal remains a powerful symbol of post-apartheid aspirations, but its realisation depends on translating symbolic commitments into practical policies that foster inclusion, equality, and mutual respect.

17 Meier and Hartell "Handling cultural diversity in education in South Africa" 2009 *SA-Educ Journal* 180–192.

18 Meier and Hartell (n 17) 180–192.

19 Jacobs "Youth identity in desegregated schools of Johannesburg" 2017 *Contemporary Social Science* 205.

20 *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T).

21 Divjak "Communitarianism, multiculturalism and liberalism" 2018 *Balkan Journal of Philosophy* 150.

22 Grootboom "Teacher attitudes and beliefs in language of instruction in a desegregated school environment in South Africa" 2014 *MJSS* 1066.

23 Berry "Aligning interculturalism with international human rights law: 'Living together' without assimilation" 2023 *Sussex Research Open (SRO)* 3.

24 Mason "The critique of multiculturalism in Britain: integration, separation and shared identification" 2018 *Critical Review of International Social and Political Philosophy* 25.

3. Understanding multiculturalism within the context of school governance

Understanding multiculturalism within the specific context of school governance is crucial for evaluating how language policies and education frameworks either promote or undermine inclusion. Schools are not merely institutions of learning, they are also social institutions where cultural values, identities, and power dynamics are negotiated and reproduced.

In South Africa, school governing bodies (SGBs) play a significant role in shaping the culture and ethos of schools.[25] These powers give SGBs considerable influence over how multiculturalism is understood and operationalised at the school level.[26] However, the risk remains that SGBs may use this authority to entrench particular cultural identities at the expense of diversity and inclusion.

The *Laerskool Potgietersrus* case serves as a powerful example of how language policies can be employed as gatekeeping mechanisms. In that case, the school argued that admitting English-speaking black learners would "negatively impact or destroy" its Christian Afrikaans culture and ethos.[27] The Court rejected this justification, holding that cultural preservation could not override the constitutional imperative to promote equality and non-discrimination.[28]

The complex relationship between multiculturalism and school governance is further illustrated by the evolution of Afrikaner identity within post-apartheid South Africa.[29] Historically, Afrikaner nationalism positioned Afrikaans as both a cultural symbol and a political tool for exclusion.[30] However, contemporary Afrikaner communities argue for the preservation of Afrikaans-medium

25 Meier and Hartell "Handling cultural diversity in education in South Africa" 2009 *SA-Educ Journal* 180-192.

26 Meier and Hartell (n 25) 180-192.

27 *Laerskool Potgietersrus* case (n 20).

28 *Laerskool Potgietersrus* case (n 20).

29 Ramutsindela "National identity in South Africa: The search for harmony" 1997 *GeoJournal* 99-110.

30 Afrikaans: the language of Black and Coloured dissent", available at https://www.sahistory.org.za/article/afrikaans-language-black-and-coloured-dissent#:~:text=Indeed%2C%20Afrikaans%20has%20a%20violent,as%20a%20%27White%27%20language (24-04-2025).

institutions as a legitimate exercise of cultural rights, often framing these demands within the language of minority protection.[31] This framing aligns with what Kymlicka describes as "national minorities" asserting claims to cultural autonomy.[32] Yet, as the *Laerskool Potgietersrus* and other cases demonstrate, such claims must be carefully scrutinised to ensure that they do not reinforce patterns of racial and linguistic exclusion.

David Miller's typology of communities provides a useful lens for analysing these dynamics. Miller identifies three broad forms of community: (1) voluntary associations based on shared values, (2) hierarchical communities organised around tradition and authority, and (3) civic communities committed to equality and participation.[33] SGBs, composed of representatives from their respective communities, may reflect any of these models.[34] However, in the South African context, historical patterns of exclusion mean that SGBs may be disproportionately influenced by hierarchical and tradition–based views of community identity. Prejudice, stereotyping, and discrimination remain significant risks when governance structures reflect the interests of dominant groups within divided communities.[35] Within racially and economically stratified societies like South Africa, school governance can become a mechanism for reproducing inequality unless carefully regulated and aligned with constitutional principles.[36]

The South African ideal of the "rainbow nation" aspires to transcend these divisions through unity in diversity. However, this ideal must be operationalised in concrete ways at the level of school governance. Sachs J captured this challenge eloquently when he stated that:

31 Teppo "Moral radicals: Afrikaners and their grassroots ecumenism after apartheid" 2018 *Journal of Southern African Studies* 253–267.

32 Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995) 1013.

33 Miller *Citizenship and National Identity* (2000) 97–100.

34 Polletta and Jasper "Collective Identity and social movements" 2001 *Annual Review of Sociology* 285.

35 Fiske *Prejudice, discrimination, and stereotyping*, available at https://nobaproject.com (20–09–2024).

36 Soudien and Sayed "A new racial state? Exclusion and inclusion in education policy and practice in South Africa" 2004 *Perspectives in Education* 106.

> "The objective should not be to set the principle of equality against that of cultural diversity but to harmonise the two in the interests of both. Democracy in a pluralist society should not mean the end of cultural diversity but rather its guarantee on the secure bases of justice and equity."[37]

At the same time, critics of multiculturalism warn that it may foster cultural separatism or lead to the formation of isolated enclaves.[38] In the context of South African schools, the risk is that single-medium Afrikaans institutions may function as de facto spaces of exclusion under the guise of cultural protection. However, there are concerns that forced integration may lead to the creation of separate classes for English-speaking black and Afrikaans-speaking white learners, which could be seen as contrary to the transformation goals of the Constitution.[39]

The South African national identity, with its long and contested history, is an ongoing project that is constantly evolving and adapting to the changing landscape of a fragmented and polarised society.[40] Nation-building is a complex process that does not guarantee the creation of a shared national identity.[41] It may inadvertently exclude those who refuse to "assimilate," thereby leading to the creation of "parallel national identities".[42] Multiculturalism in South Africa refers to the peaceful coexistence of diverse cultural, linguistic, and religious groups. However, the challenge of "coexisting" and "tolerating" may lead to conflict when the social structure excludes minority cultural, linguistic, or religious identities.[43] A false sense

37 *The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 561 (CC).

38 Berry "Aligning interculturalism with international human rights law: 'Living together' without assimilation" 2023 *Sussex Research Open (SRO)* 3.

39 Grootboom "Teacher attitudes and beliefs in language of instruction in a desegregated school environment in South Africa" 2014 *Mediterranean Journal of Social Sciences* 1066.

40 Palmberg *Identities and democracies in Africa* (1999) 321.

41 Talentino "The two faces of nation-building: Developing function and identity" 2004 *Cambridge Review of International Affairs* 559.

42 Mafuta *Imagined Communities: The Role of the Churches During and After Apartheid in Sophiatown* (LLM dissertation, University of Ottawa 2016) 221.

43 Zembylas "Toleration and coexistence in conflicting societies: Some tensions and implications for education" 2011 *Pedagogy Culture and Society* 390.

of "uniformity" can create a "difference-blind" and "melting pot" outlook on society, which, while not entirely ineffective, falls short of fulfilling the needs of various multicultural communities.[44] Taylor argues for a "politics of recognition" to support minority cultures in diverse social contexts, contending that the dominant culture's pressures force minority cultures to conform, which hinders the development of minority culture and language.[45] While designed to foster unity and inclusivity, the concept of the "rainbow nation" in South Africa can inadvertently create a false sense of inclusion.[46]

4. Transformative constitutionalism

Transformative constitutionalism, as articulated by Klare, refers to "a long-term project of constitutional enactment, interpretation, and enforcement aimed at transforming a country's political, social, and economic institutions and relationships in a democratic, participatory, and egalitarian direction".[47] In the South African context, this concept has become a central framework for understanding how the post-apartheid Constitution seeks to redress historical injustices and promote substantive equality.[48]

The right to basic education, entrenched in section 29(1) of the Constitution, is one of the key rights through which transformative constitutionalism seeks to effect structural change.[49] The Constitutional Court has recognised this transformative potential, emphasising that basic education is "immediately realisable" and

44 Trivedi "Is multiculturalism antiquated? A dialogic debate on negotiating liberalism, finding symmetry sustenance" 2022 *Journal of Studies of Social Science* 1-2.

45 Bignall "Dismantling the face: Pluralism and the politics of recognition" 2012 *Deleuze Studies* 389-410.

46 Ndlazi "Racial inequality and the imperative critique of the South African negotiated settlement" 2022 *Journal of African Philosophy, Culture and Religions* 94.

47 Klare "Legal culture and transformative constitutionalism" 1998 *South African Journal on Human Rights* 150.

48 *Governing Body of the Juma Musjid Primary School v Ahmed Asruff Essay* 2011 8 BCLR 761 (CC).

49 s 29(2) of the Constitution.

not subject to the internal limitations applicable to other socio-economic rights.[50]

Furthermore, transformative constitutionalism challenges traditional legal formalism, which tends to focus on abstract reasoning and neutrality while ignoring structural inequalities.[51] Instead, it calls for a substantive engagement with the lived realities of marginalised groups and the social context in which rights are exercised.[52] This approach has influenced the Court's interpretation of education rights, particularly in cases involving access, equity, and language policy.[53] In the landmark *Basic Education for All* case, the Supreme Court of Appeal affirmed the transformative role of education, declaring that the state's failure to provide textbooks to learners violated their right to basic education. The judgment highlighted the need for the state to take positive measures to ensure that this right is effectively realised, not merely on paper but in practice.[54]

The role of transformation in interpreting the Constitution is an extensive theme that cascades throughout court decisions in South Africa.[55] In the *City of Johannesburg* case, the court emphasised that the Constitution mandates the transformation of society to tackle the persistent effects of racism and inequality.[56] Similarly, in the *Van Rooyen* case, the court highlighted the crucial role of transformation in guaranteeing access to education, particularly through measures such as affirmative action.[57]

Within the context of language in education, transformative constitutionalism has shaped the judiciary's approach to balancing cultural rights with equality and access. Rather than treating

50 Veriava "The Limpopo textbook litigation: a case study into the possibilities of a transformative constitutionalism" 2016 *SAJHR* 331.
51 Albertyn "Substantive equality and transformation in South Africa" 2007 *SAJHR* 254.
52 Albertyn (n 51) 259.
53 Diala "Courts and transformative constitutionalism: Insights from South Africa" in Sterett and Walker *Research Handbook on Law and Courts* (2019) 97.
54 Veriava (n 50) 331.
55 Diala (n 53) 97
56 *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W).
57 *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC).

language rights as isolated entitlements,[58] the courts have evaluated them against the broader constitutional commitments to non-racialism, equity, and historical redress. This is evident in cases such as *Hoërskool Ermelo* and *Laerskool Middelburg*, where the courts scrutinised the language policies of Afrikaans-medium schools, considering their potential to exclude black learners.[59]

The application of transformative constitutionalism requires courts and policymakers to look beyond the formal text of the law and engage with the substantive effects of policies and practices.[60] Within the context of language in education, this means assessing whether language policies promote inclusion and equal opportunity or whether they function as barriers to access for historically disadvantaged learners.

Critics of transformative constitutionalism recognise its potential to bring about significant internal coherence. However, they argue that the doctrine overemphasises the role of the courts and rights discourse, potentially failing to address the deep-rooted structural inequalities within South African society.[61] Despite these critiques, transformative constitutionalism remains a powerful framework for understanding the constitutional mandate to transform South African society. It offers a lens through which to evaluate whether language policies and school governance structures advance the goals of dignity, equality, and freedom or whether they perpetuate patterns of exclusion. The debate on language in education, particularly in relation to Afrikaans-medium schools, presents a crucial test for the transformative potential of the Constitution. These disputes raise fundamental questions about how to balance the preservation of cultural and linguistic identities with the constitutional commitment to non-racialism and equality. Transformative constitutionalism demands that such balancing be informed not only by legal

58 Arendse "Slowly but surely: The substantive approach to the right to basic education of the South African courts post-*Juma Musjid*" 2020 *AHRLJ* 294.

59 *Laerskool Potgietersrus* case (n 20).

60 Fredman "Substantive equality revisited" in Fredman *Discrimination Law* (2016) 720.

61 Klug "Transformative constitutionalism as a model for Africa?" in Dann, Riegner, and Bönnemann *The Global South and Comparative Constitutional Law* (2020) 141-164.

formalism but also by a substantive consideration of social justice and historical context.

5. Critical analysis of basic education in South Africa

The transformation of South Africa's education system represents one of the most significant challenges in the post-apartheid era. Historically, education was deliberately structured to reinforce racial segregation and inequality, with the apartheid government systematically denying quality education to black learners through the Bantu Education system. This legacy has left enduring disparities in access, resources, infrastructure, and educational outcomes between different racial and socio-economic groups.[62]

The White Paper on Education and Training of 1995 and the South African Schools Act 84 of 1996 (SASA) set out the legislative and policy framework for the transformation of education.[63] These instruments aim to democratise governance, decentralise decision-making, and promote participatory democracy through structures such as SGBs.[64] The underlying vision was to foster equity, access, and quality in education while promoting cultural and linguistic diversity.[65]

The history of exclusion and inequality has made language in education contentious and divisive. The challenge to fully implement mother-tongue education, worsened by the dominance of Afrikaans and English in the education system, perpetuates inequality and exclusion.[66] The 1976 Soweto uprising is a significant historical event symbolising the rejection of language as a tool of oppression and domination. This uprising was primarily sparked by the apartheid regime's policy to enforce Afrikaans as the medium of instruction in schools, which was perceived as an attempt to entrench apartheid

62 Woolman and Fleisch "The problem of the 'other' language" 2013 *CCR* 153.
63 Motala *Transformation of the South African schooling system* 2017 The Centre for Education Policy Development 17.
64 Motala (n 63) 14.
65 Motala (n 63) 2.
66 Manyike and Lemmer "Research in language education in South Africa: Problems and prospects" 2014 *Mediterranean Journal of Social Sciences* 251.

further and suppress the cultural identity of the black population.[67] The legacy of apartheid, and the polarisation created by an oppressive regime, has unfortunately tainted the important historical role of Afrikaans as an academic language, significantly restricting the role which Afrikaans can play as one of the official languages in the transformation of the educational system in South Africa.[68] The court observed in the *Laerskool Potgietersrus* case that language and culture were operating as "surrogates for race".[69] This has reinforced the perception that "Afrikaans-single-medium schools perpetuate racial exclusion".[70]

While South Africa's Constitution recognises twelve official languages and the Norms and Standards for Language Policy in Public Schools aim to promote active bilingualism and the use of learners' home language for instruction, English continues to dominate as the primary medium of instruction. This entrenched "language hierarchy" marginalises mother-tongue languages, undermining the constitutional commitment to linguistic diversity and equity.[71] In September 2013, South Africa adopted the Policy of Incrementally Introducing African Languages into the Education System.[72] This policy initiative represents a concerted effort to uphold and strengthen the fundamental right to language within the educational system by elevating the status of African languages by promoting them as mediums of instruction, bolstering their proficiency, and encouraging the widespread use of African languages within homes and communities, facilitating their integration into everyday linguistic practices.[73]

67 *Soweto uprising*, available at https://www.britannica.com/event/Soweto-uprising (29-04-2025).

68 Thomas and Maree "A coat of many colours: A critical race theory analysis of language uses at two South African higher education institutions" 2024 *Journal of Language, Identity and Education* 96-110.

69 Woolman and Fleisch "The problem of the 'other' language" 2013 *CCR* 153.

70 Woolman and Fleisch (n 69) 153.

71 Kretzer and Kaschula "Language policy and linguistic landscapes at schools in South Africa" 2021 *International Journal of Multilingualism* 122.

72 *Incremental Introduction of African Languages: Draft Policy*: September 2013.

73 Draft Policy (n 72).

Section 6 of the Constitution states that: "the official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu and South African sign language".[74] The recent constitutional amendment recognising South African Sign Language (SASL) as an official language represents a significant legal development. However, the mere enactment of this provision does not automatically ensure its effective implementation or the realisation of its intended benefits to learners with hearing disabilities. Several factors may present challenges to the full and effective operationalisation of this right, and its realisation will be assessed in accordance with the standard of "reasonably practicable". Further empirical and doctrinal research is required to evaluate how these factors impede the meaningful realisation of the right to education in SASL. Moreover, it is imperative to critically examine the criteria that should govern the determination of what constitutes "reasonably practicable" in providing education in SASL.

6. Analysing section 29(2) of the Constitution and the reasonably practicable test

Section 29(2) of the Constitution provides that "everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable".[75] This provision affirms the right to mother-tongue education but qualifies its realisation by the standard of reasonable practicability.[76] The Constitution does not explicitly define what is "reasonably practicable", leaving courts to interpret the standard based on factual circumstances, policy considerations, and constitutional values.[77] Instead of establishing an objective framework to delineate the scope, nature, and content of

74 S 6 of the Constitution.

75 Malan "The constitution, education authorities and the road ahead for single medium Afrikaans schools" 2010 *Tydskrif vir Geesteswetenskappe* 261–263.

76 Quan, Fambasayi and Ferreira "Transforming education through mother tongue language as a language of instruction in South Africa" 2024 *AFHRL* 274–275.

77 Essop "Children's right to education versus their right to religion and culture in South Africa: With specific reference to the wearing of a headscarf in South African" 2023 *PELJ* 6.

the right to basic education, the courts have embraced a substantive interpretative approach, prioritising entitlements such as the provision of textbooks, furniture, infrastructure, qualified teachers, transport, and nutrition.

6.1 Case law analysis

6.1.1 Matukane v Laerskool Potgietersrus

In *Laerskool Potgietersrus*, black English-speaking learners were denied admission to an Afrikaans-medium school on the basis that admitting them would undermine the school's Christian Afrikaans culture and ethos. The Court found that the refusal amounted to unfair discrimination and held that the right to cultural preservation could not justify exclusionary practices that perpetuated racial segregation.[78] Importantly, the Court in *Laerskool Potgietersrus* did not directly engage with the "reasonably practicable" standard under section 29(2), focusing instead on equality and non-discrimination.[79] However, the case established the principle that cultural rights cannot operate as a defence for racial exclusion, setting the tone for subsequent language rights litigation.[80]

6.1.2 Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys

The *Middelburg* case involved a dispute between the SGB of an Afrikaans-medium school and the provincial education department, which directed the school to admit English-speaking learners. The SGB resisted, citing its language policy.[81] The Court ruled that while SGBs have the authority to determine language policy under section 6(2) of the SASA, this power is not absolute and must be exercised

78 *Primary school renamed as per community's wishes*, available at https://www.edu.limpopo.gov.za/index.php?option=com_content&view=article&id=99:primary-school-re-named-as-per-communitys-wishes&catid=25:the-project (30-08-2024).

79 *Laerskool Potgietersrus* case (n 20) at 231F.

80 *Laerskool Potgietersrus* case (n 20) at 226B.

81 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T).

consistently with the Constitution.[82] The judgment emphasised that language policies should not be used to undermine equitable access to education. The case clarified that reasonable practicability must be assessed based on objective criteria, including the number of learners requesting instruction in a particular language and the feasibility of providing such instruction without undermining the right to education for others.[83]

6.1.3 Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo

In *Ermelo*, the provincial Head of Department withdrew the SGB's authority to determine the school's language policy and appointed an interim committee to revise the policy to allow English-speaking learners admission.[84] The CC upheld the department's power to intervene, finding that the right to education in one's language of choice is subject to the qualification of reasonable practicability. The CC stressed that this standard requires consideration of multiple factors, including resource availability, integration imperatives, and the need to redress past injustices.[85] The legal significance of this case lies in the Court's application of the "rational basis test" to assess the school's Afrikaans language policy.[86] This test evaluated whether the policy was linked to a legitimate aim, such as promoting cultural identity and language rights, or whether it unjustifiably excluded students from accessing basic education in the language of their choice. While the Court recognised the school's constitutional right to select its language of instruction under section 29 of the Constitution, it held that this right was not absolute. Instead, it must be balanced against the public interest in ensuring equal access to education. The Court found the school's decision to operate as a single-medium Afrikaans institution was unjustifiable.

82 *Laerskool Middelburg* case (n 81) par 173, 175.

83 *Laerskool Middelburg* case (n 81) par 61.

84 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) par 1.

85 *Ermelo* case (n 84) par 2.

86 Mawdsley and Beckmann "Language and culture restrictions in K-12 non-public schools in the United States: Exploring the reach of federal non-discrimination law and implications for South Africa" 2013 *De Jure* 340.

6.1.4 Minister of Education, Western Cape v Governing Body of Mikro Primary School

Mikro Primary concerned the provincial department's attempt to compel a single-medium Afrikaans school to adopt a dual-medium policy. The SGB challenged the directive, arguing that its existing language policy complied with constitutional and legislative requirements.[87] The Supreme Court of Appeal ruled in favour of the SGB, finding that the department had not followed the proper procedure to withdraw the SGB's language policy function. The Court also emphasised that state intervention must be legally justified and procedurally fair.[88] Although the case did not reject the state's authority to regulate language policy, it reinforced the principle that any such intervention must comply with due process and respect the autonomy of SGBs within constitutional limits.[89]

6.1.5 Seodin Primary School v MEC of Education, Northern Cape

In *Seodin*, the department sought to convert several Afrikaans single-medium schools into dual-medium institutions as part of an effort to promote racial integration. The schools argued that this amounted to an attack on Afrikaans culture.[90] The provincial department of education requested that all single-medium Afrikaans schools in the Kuruman district in the Northern Cape shall, from the effect of January 2005, change their language policies to double-medium Afrikaans and English.[91] The respective schools challenged the department's decision to convert several Afrikaans-medium schools to double-medium schools. These schools believed that the Department of Education was purposefully targeting them and by attempting to "force racial integration", the department was seeking to "obliterate" Afrikaans and single-medium Afrikaans schools and did not make a reasonable effort to preserve the status of these schools as much as possible and practicable. However, the court

87 *The Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2005 10 BCLR 973 (CC) par 1.
88 *Mikro* case (n 87) par 43.
89 s 22(2)(3) of Act 84 of 1996
90 *Seodin Primary School v MEC, Northern Cape* 2006 4 BCLR 542 (NC).
91 *Seodin* case (n 90) par 3.

rejected the school's argument that the department was attempting to "obliterate" Afrikaans and single-medium Afrikaans schools.

6.2 Judicial approaches to the reasonably practicable standard

Under section 29(2), determining what is "reasonably practicable" involves both factual and normative considerations. The state must assess all reasonable educational alternatives, including single-medium institutions, while weighing factors such as equity, feasibility, and the imperative to redress historical racial discrimination.[92] In making decisions about language in education, the state should consider fairness, feasibility, and historical injustices. It should ensure the consistent use of mother-tongue languages and provide equitable education in all official languages to effectively address past discriminatory laws and practices.[93] The courts use two complementary tests, context-sensitive and objective, to assess the practicality of providing basic education in the language preferred by the learners. In the *Ermelo* case, the court adopted a "context-sensitive test", considering various circumstances, including feasibility and the obligation to remedy past discrimination. In contrast, in the *Gelyke Kanse* case, the court adopted an objective test, requiring an evidence-based approach to determine "reasonable practicability" based on concrete evidence whether it was the feasibility of providing education in a particular language.

6.3 Implications of the Basic Education Laws Amendment Act 32 of 2024

The Basic Education Laws Amendment Act 32 of 2024 (BELA Act) represents a significant development in the ongoing debate over school governance, language policy, and the centralisation of authority within South Africa's education system.[94] Signed into law in September 2024, the BELA Act introduces key amendments to the

92 Malan (n 75) 261-263.
93 Quan, Fambasayi and Ferreira (n 76) 274-275.
94 The Basic Education Laws Amendment Act 32 of 2024.

South African Schools Act (SASA), particularly regarding the powers of SGBs and the oversight role of provincial education departments.[95]

The Act provides that the Head of the Provincial Department of Education holds the authority to approve or override the language and admission policies adopted by SGBs. Specifically, section 6 of the amended SASA now requires SGBs to submit their language policies for approval by the head of department (HOD), who may reject or amend such policies if they are deemed inconsistent with the broader language needs of the community or the principles of equity and inclusion.[96]

Critics have raised concerns regarding the possible reversion to the apartheid education model and its potential impact on language diversity and inclusivity within schools.[97] Supporters of the BELA Act argue that these changes are essential to transform the South African educational system and address the legacy of exclusion, discrimination, and inequality amongst cultural, racial, and linguistic communities.[98] According to the memorandum on the objectives of the BELA Act, the changes were necessitated by a review conducted in 2013 that identified the need to amend the SASA and the Employment of Educators Act 76 of 1998.[99] The BELA Act is highly controversial, particularly regarding its impact on the language policy of single-medium Afrikaans schools in a political environment in which language is an emotional, contentious, and political issue. It remains to be seen whether the shift from a decentralised to a more centralised school governance model will ensure equal access to

95 *Cabinet welcomes signing of BELA Bill into law*, available at https://www.sanews.gov.za/features-south-africa/cabinet-welcomes-signing-bela-bill-law (10-09-2024).

96 Veriava "The Basic Education Laws Amendment Bill: A case study in transformative constitutionalism beyond the courts" 2024 *AHRLJ* 171.

97 Kruger, Beckmann and Du Plessis "Non-educator stakeholders and public-school principals' views on the proposed amendments to the South African Schools Act 84 of 1996" 2024 *PELJ* 10.

98 *Memorandum on the Objects of the Basic Education Laws Amendment Bill*, 2022 available at https://www.gpl.gov.za/wp-content/uploads/2024/02/MEMORANDUM-ON-THE-OBJECTS-OF-THE-BELLA-BILL.pdf (20-09-2024).

99 *Memorandum on the Objects of the Basic Education Laws Amendment Bill* (n 98).

quality education for all students and address the disparities created by the previous system.[100]

7. Conclusion and recommendations

This article has explored the intersection of multiculturalism, transformative constitutionalism, and the right to basic education under section 29(2) of the Constitution, with emphasis on the "reasonably practicable" standard in school language policy. While section 29(2) guarantees the right to education in one's preferred official language, this right is subject to practical considerations including demand, resource constraints, and the need for integration and redress. Courts have applied a context-sensitive, evidence-based approach to balance cultural rights with constitutional imperatives of equality and non-racialism.

The *Matukane*, *Middelburg*, *Ermelo*, *Mikro*, and *Seodin* cases illustrate that cultural preservation cannot justify exclusion. The BELA Act further centralises authority over school language policy, aiming to prevent language-based exclusion. While its supporters view the Act as advancing transformation, critics caution that it may threaten minority language rights. These tensions reflect broader challenges in realising the Constitution's transformative goals. South Africa's education system must navigate historical inequalities, cultural diversity, and legal commitments to equality. Achieving this requires more than symbolic recognition; it demands substantive policies that dismantle structural exclusion. Grounding language policy in both multicultural recognition and transformative constitutionalism is essential for building an inclusive and equitable education system in South Africa.

100 Veriava (n 96) 172.

The Neglect of Minority Creditors

Kransfontein Beleggings (Pty) Ltd V Corlink Twenty-Five (Pty) Ltd 2017 Jdr 1577 (SCA)

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Summary

This case note critically analyses the Supreme Court of Appeal's decision in the matter of *Kransfontein Beleggings v Corlink Twenty-Five (Pty) Ltd* (2017 JDR 1577 (SCA)) and its implications for the status of minority creditors in business rescue proceedings in South Africa. The central issue in this case is whether a business rescue plan which had already been adopted and partially implemented may be lawfully and unilaterally amended to accommodate a minority creditor who had not been notified of business rescue proceedings, as required in section 129(3) of the Companies Act 71 of 2008. The court dismissed the applicant's claim based on procedural irregularities such as a non-joinder, further declining to partially set aside or amend the plan post-implementation. The note asserts that the court's judgment failed to uphold the principles of procedural fairness, creditor equality and *concursus creditorum* which require the collective consideration of all the creditors' interests in the drafting of the business rescue plan. It critiques the pragmatic judicial restraint applied and highlights the absence of meaningful remedies that offer protection to minority creditors under current legislation. Moreso, it analyses the decision of the court within the broader context of South

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African constitutional values and the United Nations Sustainable Development Goal 16 which promotes peace, justice, and strong institutions. Ultimately, the note contends that the court missed an opportunity to strengthen the legitimacy and fairness of the business rescue regime by refusing to rectify a procedural irregularity that led to the exclusion of a legitimate creditor from substantive participation in business rescue proceedings.

Keywords:

1. Introduction

No business entity is an island; it is factually impossible for a company to exist in isolation. This phenomenon is advantageous because the involvement of other parties in a business translates to a broader pool of resources and expertise, enabling the company to thrive – however, it is disadvantageous because the financial position of the business is of interest to all its stakeholders. This includes employees, creditors, and shareholders. Business rescue is a fundamental arm of corporate law as it gives room for the rehabilitation of financially distressed companies. It was established in *Swart v Beagles Investments 25 (Pty) Ltd* (2011 5 SA 422), that the business rescue plan lies at the core of business rescue procedures, as it is aimed at producing the best returns for the company's creditors. In *Kransfontein Bellegings v Corlink Twenty-Five* (2017 JDR 1577 (SCA)) (hereinafter "*Kransfontein*"), the court made a pronouncement on the nature of the business rescue plan and when it may be amended. This paper illustrates the court's failure to protect the interests of a company's creditors, resulting in the prejudicial treatment of minority shareholders in business rescue proceedings. It will first outline the facts of the *Kransfontein* matter, the court's reasoning, and the court's judgment. Secondly, it will highlight the significant role of business rescue in the commercial landscape. Thirdly, it will discuss the principle of *concursus creditorum* as a backdrop for the equal protection of creditors. Fourthly, it will discuss the existing gap in the law governing business rescue proceedings. Finally, the contribution will scrutinise the court's approach to judicial restraint

and the court's failure to uphold the United Nations' sustainable development goals.

2. Overview of the *Kransfontein Bellegings* case

The central question in this matter was whether a business rescue practitioner can lawfully and unilaterally amend a business rescue plan that has been duly adopted. The court was tasked with deciding whether it may "partially set aside and then amend an adopted business rescue plan to alter its operation in relation to one or more of the creditors" (par 17). The applicant was a secured creditor of the first respondent (Corlink). The applicant held the registered bond of a general and special notarial bond in terms of the Security by Means of Movable Property Act 57 of 1993 over movable property owned by Corlink (par 2).

Corlink eventually became financially distressed and passed a resolution placing it in business rescue in terms of section 129(1)(*b*) of the Companies Act 71 of 2008 (hereafter "the Act"). Two business rescue practitioners were appointed to this effect (par 4). A business rescue plan was then prepared at a creditors' meeting; however, the applicant was not invited to this creditors' meeting. The attorney of the applicant then informed the practitioners of the applicant's status as a creditor of Corlink by virtue of the notarial bond, with a request to be added to the drafting and adoption of the business plan (par 4). Despite this fact, the first business rescue plan published by the practitioners did not include the applicant's claim. The creditors resolved to adjourn the meeting to allow the practitioners to rectify the omission. A second meeting was held, and the revised plan was presented to the creditors. However, the revised plan did not include the applicant as a creditor. To this effect, the representative of the applicant voted against the adoption of this plan (par 5). The plan dictated that the majority of Corlink's assets be given to the fifth respondent (ABSA) and sixth respondent (GWK) together with a concurrent shortfall. The plan also dictated that the concurrent creditors would forfeit their settlement if Corlink was liquidated.

The applicant then launched an urgent application before the Free State Division of the High Court, Bloemfontein, to interdict

the implementation of the plan and to request a declaration of invalidity in respect of the plan (par 7). ABSA and GWK were joined as respondents in these proceedings. In their defence, they raised, amongst other things, the non-joinder of the other creditors of Corlink. The High Court consequently dismissed the application with costs (par 11).

The applicant appealed this decision in the Supreme Court of Appeal. This court agreed with the court *a quo* regarding the issue of the non-joinder of the other creditors. The court relied on *Absa Bank Limited v Naude NO* (2016 6 SA 540 (SCA)), where the court held that if the creditors who voted in support of the plan were not joined in the proceedings, their position would be prejudicially affected. Their position with respect to the plan would change; the amount that they believed they would receive would be changed, and any amount they would have already received would have to be repaid. The court added that they were under no obligation to allow the applicant an opportunity to join the creditors that were left out, as the applicant had the opportunity to do so but did not (par 16).

The court also dissected the other reasons for the dismissal of this matter in the court *a quo*. These include the fact that the applicant did not rely on their initial claim to request the court to set aside and amend an already adopted business rescue plan, even though it had already been implemented. The court reasoned that, should the relief sought by the applicant be granted, the implementation of the business rescue plan would then result in the applicant receiving the entire ringfenced amount and GWK receiving a significantly smaller amount than dictated by the plan; however, this result is not what had been agreed upon by the plan. The court therefore dismissed the leave to appeal with costs (par 22).

3. Significance of business rescue

Business rescue is integral to the success of the South African commercial landscape. Section 128(1)(*b*) of the Act defines "business rescue" as "proceedings to facilitate the rehabilitation of a company that is financially distressed…". The solvent continuity of the company is of paramount importance and is an indicator of the success

of business rescue. This provision of the Act provides that business rescue is administered through three pillars; temporary supervision, temporary moratorium, and the development and implementation of a plan to rescue the company. Temporary supervision involves the management of the company's affairs and assets for the duration of business rescue. Temporary moratorium, on the other hand, involves putting a pause on the rights of the company's creditors. Section 128(1)(*b*) of the Companies Act defines the purpose of business rescue. These include: ensuring the continued existence of the company on a solvent basis and ensuring better returns for the company's creditors.

Section 7(k) of the Act provides that should a company find itself in a position of financial distress, the courts are mandated to give preference to business rescue over liquidation. Business rescue involves proceedings aimed at facilitating the rehabilitation of financially distressed companies (see Rosslyn-Smith *Critical Elements for Decision Making in Business Rescue Plans* (2014 thesis UP)). Lastly, the business rescue plan is aimed at restructuring the business affairs, debt, and property in a manner that will ensure the business continues existing on a solvent basis. Throughout this process, the management of the company is held with business rescue practitioners who are skilled in the reorganisation and rehabilitation of these companies.

As established above, the solvent continuity of the business is a key aim of business rescue proceedings. This is illustrated in the fact that it is possible to apply for the commencement of business rescue proceedings even after a final liquidation order has been granted against the company. This is illustrated in the case of *Richter v Absa Bank Limited* (2015 5 SA 57 (SCA)), wherein the manager of a company that had been placed under final liquidation, applied to the High Court seeking an order to have the business placed under business rescue (par 2). The manager brought this order in terms of section 131 of the Act, which provides that the application for business rescue proceedings will suspend liquidation proceedings. This was opposed by Absa Bank who was a creditor of the business. Absa Bank argued that the business could not be placed under business rescue because

liquidation proceedings had begun (par 3). The Supreme Court of Appeal held that the words "liquidation proceedings" in section 131(6) of the Act refers to the entire process of winding up and not just the period before the final liquidation order (par 12), declaring that a business rescue application may be brought in even after the final liquidation order (par 19).

This is confirmed in *GCC Engineering v Lawrence Maroos* (2019 2 SA 379 (SCA)) where the court held that: "An application for business rescue does not terminate the office of provisional liquidators nor does it result in the assets and management of the company in liquidation re-vesting in the directors."

In this analysis of the *Kransfontein* case, it is essential to determine whether a business is financially distressed, as this is the precursor to a company that qualifies for business rescue. A company is financially distressed should it appear to be reasonably unlikely to pay its debts as they fall due and payable or be reasonably likely to become insolvent, within the next six months (Smith, Van der Linde and Calitz *Hockly's Law of Insolvency Winding-Up and Business Rescue* (2022)). A company may enter into business rescue proceedings in two ways: by means of an application brought in by an affected person or by means of a resolution by the company. The directors of *Kransfontein* entered into business rescue proceedings by means of a resolution (par 4).

The prescribed procedure governing the administration of business rescue proceedings by means of a resolution contained in section 129(3) of the Act holds that within five days of filing the resolution, the company must publish a notice of the resolution and the effective date of the resolution to every affected person. Affected persons included, amongst others, shareholders, employees and creditors.

4. Non-recognition of concursus creditorum

The South African constitution places emphasis on the values of *Ubuntu*, togetherness and equality for all (*S v Makwanyane* 1995 3 SA 391 (CC)). It is with this in mind that one must introduce the principles of *concursus creditorum* in analysing the court's reasoning in

the *Kransfontein* case. This principle was established in *Walker v Syfret NO* (1911 AD 141), where the court determined that the rights of all the creditors are frozen and must be considered collectively. *Concursus creditorum* is a term which refers to a collective body of creditors. Companies are meant to act collectively rather than individually in pursuing their claims against the insolvent estate (see Prinsloo "Understanding concursus creditorium in liquidation in South Africa" 2023 *Empower Law*, available at https://www.empowerlaw.co.za/understanding-concursus-creditorum/). It further suggests that the affairs of the company be administered for the benefit of all the creditors, ensuring that the creditors are treated as one body. A key feature of *concursus creditorum* is to prevent the preferential treatment of any of the creditors. In this way, no creditor is allowed an unfair advantage over a fellow creditor (Chitimira "Some thoughts on the meaning and application of commercial insolvency in winding-up proceedings involving contingent creditors – *Absa Bank v Hammerle Group* 2015 (5) SA 215 (SCA)" 2017 *Obiter* 454). Although one may argue that this phenomenon is primarily grounded in liquidation proceedings and is established once a company is liquidated, it is relevant to this discussion because the aim of business rescue is also to protect the joint interests of the creditors.

In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (2013 4 SA 539), the court was tasked with making a pronouncement on a scenario where the implementation of the business rescue plan may not be completely fair to dissenting minority holders. It was confirmed that business rescue is meant to be interpreted with recognition for the protection of creditors (Richard "Lending a helping hand – the role of creditors in business rescues?" 2013 *De Rebus* 22). Furthermore, legislation does not make provision for a remedy for creditors who have been unfairly prejudiced by the implementation of the business plan (Kekana, Pretorius and Abreu "Enhancing creditor decision-making in South African business rescue proceedings: a comprehensive analysis of information requirements in business rescue plans" 2024 *International Journal of Law and Management*). It is important to note that the law offers neither protection nor a remedy to creditors whose interests have been prejudiced. It is even more concerning that there is no avenue

for an enquiry to determine whether the creditor has suffered the harm that they claim to have suffered.

The question then arises as to whether this phenomenon was evident in the *Kransfontein* judgment. The new business rescue regime provides that, although not of paramount importance, the interests of creditors are afforded suitable protection during insolvency proceedings. One then questions why the court made little to no effort to recognise and protect the rights of the applicant in this matter. Two competing interests are made manifest; the interests of the applicant who has not made any contribution to the drafting of the already adopted business rescue plan, and the interests of the other creditors whose interests will be affected by the halting and amendment of the adopted business rescue plan. The court's reluctance to allow the amendment of the business rescue plan in order to accommodate the interests of the applicant is in direct contrast to this principle and further enables the exclusion of the applicant in business rescue proceedings.

5. The shortcomings of the law governing business rescue proceedings

The business rescue plan is intended to represent the interests of all of the company's creditors. It is for this reason that the creditors vote in support of a proposed plan before it is adopted and subsequently implemented (Anderson "Viewing the proposed South Africa business rescue provisions from an Australian perspective" 2008 *PELJ* 1). The creditor's votes will be proportional to their voting rights; the creditor with the majority voting rights having the majority vote. Some may argue that this brings about inequality with how the creditors rights are protected and this may have a prejudicial result on creditors, such as the applicant in the *Kransfontein* matter. Should the business plan not be suitable for all the creditors, section 152(1)(*d*) makes provision for it to be referred to the business rescue practitioners for amendment. The business plan, once adopted, becomes binding on the creditors of the company. Tension now arises when a particular creditor raises dissatisfaction with the business rescue plan and

seeks for it to be amended after it has already been adopted and is in the process of implementation.

Although being an important element in business rescue proceedings, business rescue practitioners are not the be-all, end-all as far as business rescue is concerned. In *Booysen v JonkheerBoerewynmaker (Pty) Ltd* ([2017] 1 All SA 862 (WCC)), the court illustrated the role of the business rescue practitioner, highlighting that the business rescue practitioner may not amend the business rescue plan after it has been adopted by the creditors. The participation of the creditors in the adoption of the business rescue plan is central. It is problematic that the participation of all the creditors is not central to the adoption of the business rescue plan. Section 152(4) holds that, once adopted, the business rescue plan is binding on the company, each of its creditors, and every holder of the company's securities, regardless of whether the creditor participated in the drafting and adoption of said business plan. This provision specifically provides that:

> "(4) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person— (a) was present at the meeting; (b) voted in favour of adoption of the plan; or (c) in the case of creditors, had proven their claims against the company."

This raises a red flag for every reasonable legal practitioner who comes across this provision and reads it with the constitutionally provided values of equality and fairness in mind. Locke and Van der Linde agree, holding that (Locke and Van der Linde "Business rescue and the fate of accessory security rights recommendations for the improvement of the business rescue procedure in the Companies Act of 2008" 2018 *TSAR* 839):

> "Dissenting minority creditors or security holders are left without meaningful protection. Having said that, it is accepted that the practitioner must not arbitrarily deviate from the approved business rescue plan. However, it should be sufficient to afford dissenters an opportunity to challenge the plan before the court on special grounds."

One may however question the fairness of business rescue proceedings that were initiated without having notified all the company's creditors and ensuring their participation in the drafting of the business rescue plan.

Corlink entered business rescue proceedings by way of a section 129 resolution. To this end, they were expected to notify every affected person of this decision. Affected persons include shareholders, stakeholders, employees, creditors and holders of securities. The question then arises as to how it was possible for Corlink to enter into business rescue proceedings without the knowledge of the applicant (par 4). The court failed to address this omission and, consequently, the prejudice suffered by the applicant.

6. Judicial restraint as applied by the court

The court exercised a pragmatic approach in dealing with the matter. This approach is not without its shortcomings. The court's approach is overly "procedure-focused", does not take cognisance of the intricacies of the matter, the stakes involved, nor the effect on the parties. Granted, the applicant erred in failing to join the other creditors in proceedings seeking to set aside and amend the already adopted business rescue plan because the plan unanimously affected their interests in a manner that was not projected by the adopted plan. Nevertheless, the issue of the non-joinder was procedural (par 17-18):

> "[17] However, and even if non-joinder was not a sufficient basis for dismissing the application, the application was in any event doomed to fail for the reasons elaborated below. Because the applicant did not persist in the relief originally claimed, it is unnecessary to investigate on what grounds a court may set aside an adopted business rescue plan and whether such relief ceases to be competent once the plan has been implemented. The question is whether a court can partially set aside and amend an adopted plan so as to alter its operation in relation to one or more of the creditors. In my view the answer is no.
>
> [18] A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of s 152 of the Companies Act.

> The court has no power to foist on creditors a plan which they have not discussed and voted on at such a meeting. This is what the applicant was asking the court a quo to do."

The court was able to condone this non-joinder and allow the applicant to remedy this procedural oversight. One could argue that the court should have considered the bigger picture, namely, the effect of implementing a business rescue plan that did not afford every creditor the opportunity to contribute to the interests of their own financial status.

Similarly to *Kransfontein*, the courts applied judicial restraint in the case of *Timasani (Pty) Ltd (in business rescue) v Afrimat Iron Ore (Pty) Ltd* ([2021] 3 All SA 843 (SCA)), wherein the Supreme Court of Appeal intervened in a dispute between *Afrimat* and *Timasani* about the recovery of a deposit paid by *Afrimat* to *Timasani* for the purchase of assets (par 7). The courts applied judicial restraint by declining to interfere in with the business rescue practitioner's commercial decisions, emphasising that the courts may not override the autonomy of practitioners. This judgment is similar to *Kransfontein* in that it reinforced that courts are not willing to intervene in business rescue proceedings as it is a commercial process.

7. The perspective of the United Nations Sustainable Development Goals

The court's refusal to amend the business rescue plan to include the interests of the minority creditor who was not informed of the commencement of business rescue proceedings as is required in section 129(3)(*a*) of the Act which states that: "Within 5 days after filing a resolution to begin business rescue, the company must – (a) publish a notice of the resolution and its effective date to every affected person." According to section 128(1)(*a*)(i), "affected persons" include shareholders or creditors of the company. This requires that the applicant be notified of the commencement of business rescue proceedings. Serious concerns are raised about procedural fairness and accountability. The outcome of this case may be assessed through the lens of the United Nations Sustainable Development Goals.

The United Nations' sustainable development goals are quickly gaining recognition in contemporary society (see Sianes, Vega-Munoz, Tirado-Valencia "Impact of the Sustainable Development Goals on the academic research agenda. A scientometric analysis" 2022 PLOS ONE, available at https://journals.plos.org/plosone/article/citation?id=10.1371/journal.pone.0265409) (14-11-2025). They are a call to action for all the participating nations to do their part to combat global challenges such as hunger, poverty, and pollution, with an aim to make significant progress by the year 2030. South Africa, being a participating nation, has a responsibility to uphold and promote these 17 sustainable development goals (see United Nations in South Africa "UN Results Report 2022" (02 November 2023), available at https://southafrica.un.org/en/251532-un-results-report-2022 (30-07-2025)).

Particularly relevant to this matter is SDG 16: Peace, justice, and strong institutions. This goal aims to promote peaceful and inclusive societies with a focus on creating justice for all. Access to justice is a major issue locally and internationally (Ameermia and Mhodi "The role of SAHRC in facilitating justice through litigation" 2020 *ESR Review* 11). On an international scale, the Universal Declaration on Human Rights, 1948 *provides* that the right to justice is integral to the protection of other human rights. Domestically, section 34 of the South African Constitution provides for the right of access to its courts, as well as the right to justice.

The exclusion of a legitimate creditor from substantive participation in the business rescue proceedings such as the drafting of the business rescue plan undermines the principles of transparency, inclusivity, and fairness that SDG 16 seeks to promote. As a statutory mechanism for the rehabilitation of companies, business rescue should not only aim to rehabilitate companies but also to ensure that all affected persons, especially the vulnerable, such as the applicant, are afforded procedural justice.

This paper has established that the court did not adequately play its role as an instrument of justice by using its authority to protect the interests of the applicant in this matter. It is rather unfortunate that the court maintained a position of judicial restraint and exercised a

pragmatic approach in this matter. The rule of law is not static but is an ever-evolving instrument. The rule of law has been described as "a living system capable of growth" (Mtshaulana "Judicial restraint is judicial wisdom" 2008 *AJA* 45). Using a pragmatic approach, along with judicial conservatism, is neither reflective of the purposes of business rescue, nor conducive to upholding the principles underlying the rule of law. By aligning domestic legal interpretation with SDG 16, South African courts can reinforce the legitimacy of business rescue as a tool for strengthening equitable governance.

8. Conclusion

The court in the *Kransfontein* judgment, was presented with a critical opportunity to uphold the principles of procedural fairness and justice, by condoning procedural irregularities in the interests of justice. While the primary objective of business rescue is to facilitate the solvency of the financially distressed company, this goal must be pursued within a framework that is respectful of *concursus creditorum* and the equality of creditors. The failure to notify the applicant of the commencement of business rescue proceedings, and the court's subsequent refusal to amend the business rescue plan to include their interests undermines the integrity of the minority creditors. Allowing business rescue to proceed without rectifying this irregularity indicates that the court deviated from the collective approach and weakened the legal safeguards intended to protect minority creditors. Moreso, the outcome in this matter is inconsistent with the values of the Sustainable Development Goals of the United Nations, particularly SDG 16 which calls for peace, justice and strong institutions. The exclusion of the applicant as a creditor compromises trust in the business rescue regime.

By failing to intervene, the courts missed a vital opportunity to reinforce the legitimacy of business rescue proceedings as a fair mechanism. This judgment risks entrenching a precedent wherein the rights of minority creditors are subordinate to the interests of majority creditors. Such an approach is contrary to the broader constitutional values of fairness, transparency and justice.

Towards More Effective Protection of Sexual Minorities under the African Human Rights System (A Subset of the African Union Treaty System)

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Summary

This discussion explores the limitations and potential of the African Human Rights System, specifically as a subset of the African Union (AU) treaty framework in advancing protections for sexual minorities. It firstly outlines the institutional architecture of the system, including the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights. The paper then examines the current legal and normative protections available to sexual minorities within this framework, highlighting progressive developments alongside systemic shortcomings. Through detailed case studies of Uganda, Ghana, and Nigeria, the article documents the lived realities of sexual minorities and the persistence of individual as well as state-sponsored discrimination and violence, despite the existence of continental human rights instruments. The paper goes further to conduct a comparative analysis with the European Union and the Organization of American States, identifying effective jurisprudential and institutional practices that promote and protect sexual minority rights in those regions, with the goal of borrowing best practices. Finally, the discussion concludes with a set of

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practical recommendations to improve the African Human Rights system's response to the rights of sexual minorities. These include strengthening enforcement mechanisms, clarifying legal standards within the African Charter, increasing engagement with civil society actors, and fostering political will amongst member states of the African Union. Ultimately, the article argues that a more inclusive and enforceable approach is essential for the African Human Rights System to fulfil its mandate of universal human dignity and equality.

Keywords: Sexual minorities; Kito cases; Civil Society; African values; Discrimination

1. Introduction

Sexual minorities are subject to grave human rights violations in Africa. These violations will be articulated in this paper. For purposes of this discussion, sexual minorities will be characterised as those belonging to lesbian, gay, bisexual, trans, and queer communities (LGBTQ+). As proclaimed in the Constitutive Act of the African Union (AU), the Union was formed (amongst other things) to promote and protect human and people's rights.[1] More comprehensively the Constitutive Act expresses that one of the objectives of the AU will be to promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights ("African Charter") as well as other relevant human rights instruments.[2] The Constitutive Act of the AU further expresses that the Union shall function in accordance with the principle of respect for the democratic principles, human rights, rule of law and good governance.[3] As previously alluded to, the African Charter is the key human rights instrument of the AU, as well as the former Organisation of African Unity (OAU).[4] Thus the African human rights framework, which is a subset of the AU treaty system that deals exclusively in the promotion and protection of human rights, is firmly grounded in the African Charter. This subset

1 The Preamble and Articles 3 and 4 of the Constitutive Act of the African Union (2000/2001).
2 Art 3 of the Constitutive Act of the African Union.
3 Art 4 of the Constitutive Act of the African Union.
4 Preamble of the African Charter on Human and Peoples' Rights.

will be the focus of this discussion as it relates to the human rights protections awarded to sexual minorities regionally.

True to its form and inception, the African Charter prohibits discrimination. Specifically, article 2 of the African Charter provides that every individual shall be entitled to the enjoyment of the rights and freedoms as recognised and guaranteed in the African Charter without a distinction of any kind.[5] This Article lists the prohibited grounds for discrimination, particularly regarding race or ethnic group. The list is non-exhaustive on account of the use of the term "...or other status".[6] There is no express provision, however, calling for the protection of sexual minorities in the African human rights framework.

This paper will holistically analyse the consequences of this omission as well as any other gaps in the compliance mechanism of this framework that hinder the protection of sexual minorities. The contribution considers the following questions: What are the shortcomings of the AU treaty system in providing for the protection and promotion of sexual minorities? To answer this main question the following questions must be discussed: first, what are the current protection mechanisms that provide for the protection of sexual minorities? Second, have these protective mechanisms adequately protected sexual minorities? And, finally, there will be a comparative analysis on how sexual minority rights are protected in other regional human rights frameworks. The purpose of this analysis is to provide for best practices that may be implemented to better protect and promote the human rights of sexual minorities. The aim of the paper is to explore the extent that the conventions and compliance mechanisms of the AU treaty system provide protection for sexual minorities in Africa. Second, the paper seeks to investigate and draw inspiration from best practices implemented in other regional human rights frameworks, namely, the European Union (EU) and the Organization of American States (OAS). Then finally, the paper

5 Art 2 of the African Charter on Human and Peoples' Rights.

6 Namwase, Jjuuko and Nyarango "Sexual minority rights in Africa: What does it mean to be human?" in Namwase and Jjuuko (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (2017) 6.

offers possible recommendations that can strengthen the protection of sexual minorities.

2. Background of the African Union (AU) treaty system

The African Charter came into force on 21 October 1986.[7] Upon its commencement, the Charter became one of the most widely accepted treaties, having been ratified by 54 African states (with the exclusion of Morocco).[8] To ensure compliance with the provisions of the African Charter, the African Commission on Human and People's Rights (African Commission) as well as the African Court on Human and People's Rights (African Court) were established.[9] Aggrieved parties may approach the African Court or the African Commission when their rights under the Charter have been violated.

The function of the Commission is to interpret the provisions of the African Charter and ensure that there is sufficient protection of human and people's rights on the continent.[10] The Commission will interpret the African Charter upon the request of a state party, an organisation that is recognised by the African Union (AU) or an institution of the AU.[11] The Commission sets out in achieving this protective mandate by investigating allegations filed by non-governmental organisations (NGOs), state parties or individual citizens.[12] The Charter makes provision for the Commission to consider all relevant international law principles and judgments when making its decisions.[13]

The African Court was established by article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and People's Rights.[14] The purpose

7 Centre for Human Rights *Guide to the African Human Rights System* (2021).
8 African Union "State Parties to the African Charter" available at https://achpr.au.int/en/states (17-06-2023).
9 Art 30 of the African Charter on Human and Peoples' Rights, 1981; art 1 of the Protocol to the African Charter on Human and Peoples' Rights, 1997.
10 Arts 45 (2) and (3) of the African Charter on Human and Peoples' Rights, 1981.
11 Art 45(3) of the African Charter on Human and Peoples' Rights, 1981.
12 Arts 48 and 55 of the African Charter on Human and Peoples' Rights, 1981.
13 Art 60 of the African Charter on Human and Peoples' Rights, 1981.
14 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

of the African Court is to ensure that there is compliance with the Charter and to enhance the protective mandate of the Commission.[15] Its activities are regulated by its Rules of Procedure.[16] Similarly to other regional court systems, the Court enjoys contentious and advisory jurisdiction. It enjoys contentious jurisdiction in that it may make decisions concerning the interpretation and application of the Charter.[17] The court may also, upon request, provide a legal opinion on a matter concerning the Charter or any other relevant human rights instrument,[18] including United Nations treaties that the respective states have ratified. Decisions handed down by the African Court of Human Rights are binding on the parties in the matter.[19]

3. Shortcomings of the AU treaty system in providing protection for sexual minorities

The gaps in the AU treaty system to provide protection for sexual minorities are both legally and politically driven. The African Charter provides for the rights that African people may enjoy, while the African Court and the African Commission are the focal bodies that interpret those rights and as far as possible ensure that there is compliance with those rights. This is not to say, however, that no other international law instrument may be consulted when determining whether a human rights violation has occurred. True to this, article 60 of the African Charter expresses that other conventions and protocols of the AU treaty system as well as the United Nations (UN) may be used as purposive guidance when determining whether a human right has been infringed.[20] In the absence of an express

15 Art 2 of the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, 1998.

16 'A Guide to the African Human Rights system' (2021) *Pretoria University Press* (PULP); see also The African Court on Human and People's Rights Rules of Court.

17 Art 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

18 Art 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

19 Art 30 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998; see also arts 27 and 28(2) of the Protocol.

20 Art 60 of the African Charter on Human and Peoples' Rights, 1981.

provision calling for the protection of sexual minorities, article 60 is of particular importance, as it allows the African Commission and African Court to better protect sexual minorities that experience human rights violations.

Prior to engaging with the shortcomings of this human rights framework, there must be a discussion on how the current protection mechanisms provide for the protection of sexual minorities. In *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Communication 295 of 2004) [2012] ACHPR 8, the African Commission interpreted non-discrimination in article 2 of the African Charter to include the ground of "sexual orientation".[21] Furthermore, the African Commission passed a resolution 275 "Protection against Violence and other forms of Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity".[22] The resolution interprets the scope of non-discrimination under article 2 of the African Charter to include the grounds of sexual orientation,[23] while also placing a duty on states to protect sexual minorities from human rights violations.[24] The Guidelines on Combating Sexual Violence and its Consequences in Africa, specifically article 4, which provide that the non-discrimination principle should be applied to all, irrespective of their sexual orientation, identity, and gender expression, to name a few listed grounds.[25] These guidelines further denote that states have an obligation to prevent sexual violence, including homophobic discrimination and stereotypes based on gender identity.[26] The African Commission has also issued guidelines on the training of law officials. In these guidelines the African Commission has expressed the view that African governments should protect individuals who

21 Namwase, Jjuuko and Nyarango (n 6) 6.

22 African Commission on Human and Peoples' Rights 2020 report; see also Preamble of African Commission on Human and Peoples' Rights Resolution 275 'Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity' (LV) 2014.

23 African Commission on Human and Peoples' Rights 2020 report (n 22).

24 African Commission on Human and Peoples' Rights 2020 report (n 22).

25 Art 4 of the Guidelines on Combating Sexual Violence and its Consequences in Africa.

26 Art 7 of the Guidelines on Combating Sexual Violence and its Consequences in Africa.

belong to vulnerable groups, including sexual minorities.[27] The special rapporteur on human rights defenders in Africa published a report which called for African states to repeal punitive laws and practices which violated the right to freedom of assembly and association, including those of sexual minorities.[28] Moreover, the African Commission stated that the "failure of a state to prevent/ respond" to acts of sexual and gender-based violence amounts to torture under article 5 of the Charter.[29] The Commission notes that these acts include the psychological as well physical acts committed against victims without their consent, including the "corrective rape" faced by lesbian women and other sexual minorities.[30] The African Commission is very clear in this general comment that sexual minorities are prone to the same violent acts faced by victims of gender-based violence. States should, therefore, take effective measures to adequately address these prevalent issues.[31]

The African Commission in its General Comment on Article 4 of the African Charter, articulated in no uncertain terms that the right to life is a foundational human right in international law.[32] Further that this right is always recognised as customary international law and a *jus cogens* norm (therefore universally binding).[33] Additionally, the African Commission placed a duty on states to ensure the protection of vulnerable groups that are frequently targeted or at risk including on the grounds listed in article 2 of the African Charter and those

27 Human Rights Watch "African Commission Tackles Sexual Orientation, Gender Identity" available at https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity (26-06-2023).

28 Ibid.

29 African Commission on Human and Peoples' Rights *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)* 2017 (par 57).

30 African Commission on Human and Peoples' Rights *General Comment No. 4* (n 29) par 57.

31 African Commission on Human and Peoples' Rights *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)* 2017.

32 African Commission on Human and People's Rights, *General Comment No. 3 on the African Charter on Human and People's Rights: The Right to Life (Article 4)*, 2015.

33 African Commission on Human and People's Rights, *General Comment No. 3* (n 32).

highlighted in resolutions of the African Commission.[34] Thus, any state which sanctions the killing or torture of persons on the grounds of their sexual orientation is committing human rights violations as grounded in the African Charter, international law founding principles as well as other relevant international instruments.

Appreciating that the formation of the AU treaty system was politically motivated[35], it is only natural that its enforceability is for the most part dependent on the political will of the AU member states. The AU Executive Council, which is made up of the Foreign Ministers of the respective member states of the Union,[36] urged the African Commission to consider "African values" when reviewing observer status.[37] In lieu of this, the African Commission stripped the observer status of sexual minorities advocacy group Coalition of African Lesbians (CALS).[38] The Commission, in its 73rd ordinary session, refused to grant observer status to three human rights NGOs (Alternative Côte d'Ivoire; Human Rights First Rwanda; Synergia-Initiatives for Human Rights).[39] What is even more disappointing than this refusal from the Commission, is the rationale behind it. The Commission commented that there are no express provisions calling for the protection of sexual minorities in the Charter and further enunciated that the NGOs' advocacy of sexual minorities was not in line with "African values" as enshrined in Article 29(7) of the Charter.[40] The respective NGOs are now limited regarding the type of protection and advocacy for sexual minorities that they can exercise,

34 African Commission on Human and Peoples' Rights *General Comment No 3 on the African Charter on Human and Peoples' Rights: The Right to Life* (Article 4) (18 November 2015).

35 Preamble to the Constitutive Act of the African Union (2000/2001).

36 Art 10 of the Constitutive Act of the African Union (2000/2001).

37 The Mail & Guardian *African Values Under Threat: African Commission Must Defend Them* https://mg.co.za/thought-leader/2025-06-02-african-values-under-threat-african-commission-must-defend-them/ (14-06-2025).

38 The Mail & Guardian (n 37).

39 Human Rights Watch *Statement on African Commission's Rejection of Observer Status Applications for Three Human Rights Organisations*, available at https://www.hrw.org/news/2022/12/16/statement-african-commissions-rejection-observer-status-applications-three-human, accessed (11-08-2023).

40 Human Rights Watch (n 39).

as they are not able use the compliance mechanisms of the African Human Rights Framework.

The omission of sexual minorities forming part of the listed grounds for non-discrimination in the African Charter has created hurdles in achieving protection for sexual minorities. The African Commission has been proactive in limiting such consequences with its interpretation of the non-discrimination in article 2 of the African Charter to include sexual minorities.[41]The African Commission has also made great strides by introducing resolution 275, which places a duty on State parties to promote and protect sexual minorities.[42] Seemingly however, this progress has been derailed because of the political pressure of regressive voices in the AU. The core issue undermining the compliance mechanisms of the AU is both legal and political. The solution will thus be found in the legal and political spheres.

4. Domestic violations of human rights for sexual minorities

To demonstrate the grave human rights violations experienced by sexual minorities in Africa, three states will be used as case studies (Ghana, Uganda and Nigeria). What follows is a discussion on the regressive laws, as well as political attitude that, in most instances, promotes the violation of the rights of sexual minorities. By the end of this discussion, it will be apparent that the AU treaty system as it stands, has been inefficient in protecting sexual minorities.

4.1 Ghana

More recently, in February 2024, the Ghanaian parliament passed the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill.[43] The Bill (certainly one of the most regressive of its kind) criminalises sexual relations amongst sexual minorities as

41 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 28 (ACHPR 2006).

42 African Commission on Human and Peoples' Rights, Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity (2014).

43 Human Rights Watch: *Ghana: President Should Veto Anti-LGBT Bill*, available at https://www.hrw.org/news/2024/03/05/ghana-president-should-veto-anti-lgbt-bill (14-06-2025).

well as criminalises the promotion and advocacy of sexual minority rights on the basis that these acts infringe on the "family values" of Ghanaian society.[44] Pressure from the UN, World Bank and International Monetary Fund delayed the official coming into force of this legislation by way of presidential assent.[45] Individuals, as well as civil society, were also instrumental in halting the official enactment of the Bill. To this end, private individuals filed legal challenges in the Ghanaian Supreme Court on the parliamentary procedure followed and the constitutionality of the Bill.[46] To date, the Bill has lapsed.[47]

While the Bill never had any legal force in Ghana, the passing of the Bill alone is indicative of the political climate in Ghana regarding sexual minority rights.[48] Since the introduction of the Bill back in 2021, the domestic police have raided and shut down a centre designed for sexual minorities.[49] Moreover, twenty-one sexual minority activists were unlawfully arrested and detained for organising a human rights meeting, on the grounds that they were promoting homosexuality.[50] The above punitive measures illustrate the myriad of ways in which sexual minorities are violated in Ghana, especially by the state.

4.2 Uganda

The treatment of sexual minorities in Uganda is an extreme example. Uganda's Anti-Homosexuality Act expressly prohibits and punishes any person engaging in sexual relations with another person of the same sex.[51] The Act is an example of the most draconian anti-

44 Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021 (Ghana), Memorandum; ss 3–6.

45 France24: *Ghana Supreme Court clears path for anti-LGBT law amid human rights concerns*, available at https://www.france24.com/en/africa/20241218-ghana-supreme-court-clears-path-anti-lgbt-law-human-rights-concerns (14-06-2025).

46 Citinewsroom "LGBTQ is not natural and I still oppose it – Bagbin", available at https://citinewsroom.com/2025/06/lgbtq-is-not-natural-and-i-still-oppose-it-bagbin/ (19-06-2025).

47 Citinewsroom (n 46).

48 Human Rights Watch (n 43).

49 Human Rights Watch (n 43).

50 Human Rights Watch (n 43).

51 Anti-Homosexuality Act, 2023 (Uganda), Preamble.

homosexual laws – the death penalty may even be imposed on anyone convicted of a listed homosexual act.[52] After its enactment, attacks against sexual minorities have significantly increased. "Defend defenders", a Kampala based organisation that defends human rights activists reported that within 24 hours of the Ugandan parliament passing the law they identified eight cases of sexual and physical violence against sexual minorities.[53] In addition, a coalition of Ugandan sexual minority rights organisations (Strategic Response) documented seventy cases of physical violence against sexual minorities between January and August 2023, coinciding with the inception and passage of the Anti-Homosexuality Act.[54] While the causal link between the enactment of the Anti-Homosexuality Act and the intensified human rights violations against sexual minorities cannot be proven, the Act coming certainly has not improved the situation in Uganda. Instead, it is in direct contravention of the African Charter, insofar as it sanctions discrimination against sexual minorities.

4.3 Nigeria

In Nigeria, same-sex marriage contracts or civil unions are prohibited.[55] As provided for in section 5(1) of the Prohibition of Same-Sex Marriage Act, if anyone commits this offence, they may face imprisonment for up to 14 years.[56] Even an individual who administers or witnesses a same-sex marriage could be liable to 10 years' imprisonment.[57] The suppression and violation of sexual minority rights in Nigeria is not only codified law but also administered by state. In October 2023, 76 people were arrested by

52 Anti-Homosexuality Act, 2023 (Uganda), s 3.

53 Human Rights Watch: *They're Putting Our Lives at Risk: How Uganda's Anti-LGBT Climate Unleashes Abuse*, available at https://www.hrw.org/report/2025/05/26/theyre-putting-our-lives-risk/how-ugandas-anti-lgbt-climate-unleashes-abuse (19-06-2025).

54 Human Rights Watch (n 53).

55 See the Nigerian Same Sex Marriage (Prohibition) Act of 2013.

56 Nigerian Same Sex Marriage (Prohibition) Act.

57 Nigerian Same Sex Marriage (Prohibition) Act.

Nigerian security forces for organising a gay wedding.[58] Further, in June 2022, a Sharia court ruling convicted three men to stoning to death, for committing same-sex sexual acts.[59] These are gross violations of the rights enshrined in the African Charter, especially the right to non-discrimination and the right to not be arbitrarily deprived of the right to life.[60] Attacks on sexual minorities are not only perpetrated by the Nigerian state. In 2023, an estimated 70% of human rights violations on sexual minorities were "kito" cases.[61] 2024 saw 241 recorded instances of assault, 173 instances of blackmail and 28 instances of mob violence.[62] While these actions were not administered by the state, the state is still responsible regarding its inaction to provide protection to sexual minorities. Instead of enacting regressive laws that violate sexual minority rights, the state should promote their rights and ensure, through education and awareness programmes, that the rights and freedoms contained in the African Charter are respected.[63] African states' duties in terms of the African Charter do not exclude sexual minorities.

5. Comparative study on protections of sexual minorities from different regional human rights frameworks

5.1 The European Union (EU)

The European Union's Human rights framework is one of the most progressive regional frameworks when it comes to the promotion and protection of sexual minorities. This protection mechanism is twofold. Firstly the protection of sexual minorities is codified in key EU treaties and guidelines, making it easier to provide protections for sexual minorities. Article 21 of the Charter of Fundamental Rights

58 Human Dignity Trust: *Nigeria*, available at https://www.humandignitytrust.org/country-profile/nigeria/ (14-06- 2025).

59 Human Dignity Trust (n 58).

60 Arts 2 and 4 of the African Charter on Human and People's Rights, 1981.

61 Human Dignity Trust (n 58). "Kito" cases refer to the blackmail of sexual minorities through entrapment, see BBC: *The Nigerians lured into a trap and blackmailed for being gay*, available at https://www.bbc.com/news/world-africa-65560062 (14-06-2025).

62 n 58 above.

63 Art 25 of the African Charter on Human and Peoples' Rights, 1981.

of the European Union prohibits any form of discrimination based on one's sexual orientation.[64] Secondly, the EU enjoys rich legal jurisprudence that very clearly sets out the means to which sexual minority rights should be promoted and protected.[65] In the *Dudgeon v The United Kingdom* case, the European Court on Human Rights (European Court) ruled that the criminalisation of homosexuality was a violation of the right to private life.[66] The European Court has also in multiple occasions declared that same-sex partners are vested with equal rights as opposite-sex partners.[67] Furthermore, in the *P v S and Cornwall County Council* case heard in the European Court of Justice (ECJ), the ECJ interpreted an EU Directive on the implementation of the principle of equal treatment of men and women in the workplace.[68] This was a landmark decision, as the ECJ in this case broadened the scope of the directive to apply to discrimination arising from the gender reassignment of a person.[69]

5.2 The Organization of American States (OAS)

The establishment of the OAS was to create an order of peace and justice, to promote their collaboration and strengthen the solidarity of American States.[70] The OAS has made significant strides of its own in promoting and protecting the human rights of sexual minorities. This is a result of the Inter-American Court system fully stretching out its power when it comes to granting protections to sexual minorities. Specific reference can be made to the landmark decision in the *Atala and Daughters v Chile* case.[71] In this case, the father of a child filed a complaint claiming that his child was at serious risk if she continued to stay with her lesbian mother (Mrs Atala) and her partner. The

64 Art 21 of the Charter of Fundamental Rights of the European Union.
65 *P v S and Cornwall County Council* [1996] ECR I – 2143, Case C-13_94.
66 Namwase, Jjuuko, Nyarango (n 6) 6.
67 Namwase, Jjuuko, Nyarango (n 6) 6; see also *Karner v Austria* (2003) 38 EHRR 528.
68 *P v S and Cornwall County Council* (n 65); see also Article 1 of the EU Council Directive 2000/78/EC (27 November 2000) "establishing a general framework for the equal treatment in employment and occupation".
69 *P v S and Cornwall County Council* (n 65).
70 Art 1 of the Charter of the Organization of American States, 1967.
71 Rudman "The protection against discrimination based on sexual orientation under the African human rights system" 2015 *African Human Rights Law Journal* 6.

Chilean Supreme Court ruled in favour of the father and held that the child was indeed put in a situation of great risk, which put them in an adverse position in their social environment.[72] Mrs Atala filed a petition with the Inter-American Commission. The Inter-American Commission and the Inter-American Court both found that Chile violated the right to equality and non-discrimination.[73] The case is significant, as the court interpreted article 1 of the Inter-American Convention of Human Rights to include sexual minorities.[74] Further, in the *Marta Lucia Alvarez Giraldo v Colombia* case, the Inter-American Commission agreed to hear a case which dealt with a decision not to allow intimate prison visits on account of the prisoner's sexual orientation, as doing so would violate the prisoners' right to privacy.[75] Evidently, judicial decisions have been essential in protecting sexual minorities in the Americas.

6. Recommendations and conclusion

A key take-away of this discussion is that, for a state to progress and protect sexual minority rights, both the letter of the law and political will should be utilised. Superseding its predecessor (the Organisation of African Unity), the AU was established to be the driving force to achieving continental integration.[76] Through the establishment of its treaty system, peace-building and the protection of human rights are critical in achieving its extensive continental integration.[77] It has become time for the AU to exercise strong progressive leadership to enhance the protection of sexual minorities on the continent. The AU is empowered by article 22 of its Constitutive Act to impose sanctions on any member state that fails to comply with its decisions and/or

72 Rudman (n 71) 12.
73 Rudman (n 71) 12.
74 *Atala Riffo and Daughters v. Chile* Inter-American Court of Human Rights, Advisory Opinion OC-24/17 (2017).
75 Namwase, Jjuuko, Nyarango (n 6) 6.
76 Babatunde *Transcending Member States: Political and Legal Dynamics of Building Continental Supranationalism in Africa* (2022); see also the Preamble of the AU Constitutive Act.
77 Arts 3(a) and 3(h) of the AU Constitutive Act; see also Babatunde (n 76); see also the Preamble of the AU Constitutive Act.

policies.[78] Furthermore, the AU is permitted to intervene in states in the case of grave circumstances such as war crimes or crimes against humanity.[79] Thus, should the situation necessitate, the AU has bite. However, whether the AU is willing to act against the discrimination of sexual minorities is another matter. The Ghanaian speaker of Parliament, in a visit to Uganda, proudly proclaimed that recognition of sexual minorities does not form part of traditional "African values". He stated that "LGBT is not African. It is not natural, and God did not create it. This is an imposition that we must all resist".[80] This is an indication that if any action is to be taken by the AU to progress sexual minority rights, this action needs to be informed by the will of the people.

As demonstrated above, sexual minorities are often "othered" and characterised as a threat to traditional African values. This narrative is largely rooted in colonisation.[81] The introduction of Christianity and Victorian morality sparked the first wave of homophobia.[82] Regrettably, Western influences from conservative religious groups are still lighting the fire for the spread of homophobia on the continent.[83] A recent conference organised by the African Christian Professionals Forum, advocated for the opposition to abortion, sexual minority rights and comprehensive sexuality education.[84] These kinds of regressive advocacy efforts significantly undermine the strides made by individuals and civil society in advancing the rights of sexual minorities. This emphasises the urgent need for progressive actors to adopt a stronger, more coordinated, and multifaceted approach – one that combines legal, social, and political strategies to counter backlash and sustain momentum for inclusive human rights protections.

78 Art 22(2) of the AU Constitutive Act, see also Babatunde (n 76); see also the Preamble of the AU Constitutive Act.
79 Art 4(h) of the AU Constitutive Act.
80 Citinewsroom (n 46).
81 Namwase, Jjuuko, Nyarango (n 66) 6.
82 Namwase, Jjuuko, Nyarango (n 66) 6.
83 The Mail & Guardian (n 37).
84 The Mail & Guardian (n 37).

In the landmark case, *Letsweletse Motshidiemang v The Attorney-General*, the Botswana High Court decriminalised consensual same-sex sexual acts.[85] In its decision, the court purposively interpreted the Constitution so that the rights and freedoms (dignity, privacy, liberty, and non-discrimination) contained in the Constitution are extended to sexual minorities.[86] Furthermore, the court referred to Article 10 of the African Charter on the Rights and Welfare of the Child in making its point that the applicant is entitled to the right to privacy.[87] Notably, the court relied on the expertise of a prominent human rights advocacy group: Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) in making its decision.[88] This case is a perfect illustration of the progress that can be made when civil society is engaged in providing protection to sexual minorities.

Moreover, more grassroots-level work needs to be performed in education and advocacy regarding sexual minority rights. Indeed, religious leaders and human rights organisations should champion for the free expression of gender identity and sexuality in society.[89] Ordinary people need to be convinced of the inherent humanity of sexual minorities, so that governments can be pressured to play a more proactive role in the AU when it comes to realising the rights of sexual minorities. Furthermore, states such as South Africa, Mozambique and Cape Verde, which are the most progressive in their recognition of sexual minority rights, need to lobby the AU to advocate for the protection of sexual minority rights on the continent.

The AU treaty system remains largely ineffective in safeguarding the rights of sexual minorities, because of both legal and political barriers. Foremost, there is the notable omission of an explicit provision in the African Charter on Human and Peoples' Rights prohibiting discrimination based on sexual orientation or gender

85 Esterhuizen "Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curae)*" 2019 *African Human Rights Law Journal* 843.

86 Esterhuizen (n 85) 850.

87 *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curae)* MAHGB-000591-16 (par 121).

88 Esterhuizen (n 85) 857.

89 Ibrahim "LGBT rights in Africa and the discursive role of international human rights law" 2015 *African Human Rights Law Journal* 263.

identity. This legal gap is compounded by the political dominance of conservative voices within the African Union, many of whom actively advocate for the criminalisation of same-sex relationships under the guise of protecting "African values". Consequently, efforts to advance the rights of LGBTQ+ individuals face both institutional inertia and ideological opposition. Meaningful change will require sustained grassroots advocacy aimed at shifting public perceptions and challenging the notion that sexual diversity is un-African or contrary to African values. Only through this kind of societal transformation can governments be pressured to adopt more progressive stances within the AU and take concrete steps to advance the rights and protections of sexual minorities across the continent.

The Disappearance of South African Indigenous Languages

A Look at the South African Legal System and Workplace Model

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Summary

In an era of quick clicks and fast-paced artificial intelligence, it is easy to forget that before technology there were humans who shared stories and information through indigenous languages. Languages connect people but can constitute a barrier to society's understanding of one another. Nevertheless, languages are essential for communication. Salawu mentions that "[l]anguage is not only a necessary condition for culture, it is itself a culture".[1] Society has moved towards a culture of globalisation to keep up with international comparative standards, but we must remain mindful of our origins. In essence, the suit and tie or work uniform should not be used to reject indigenous languages from the workplace. They should rather be embraced. This article considers the use of indigenous languages in the South African legal system and workplace model compared to Nigeria, with modest reference to the literature and education systems.

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1 Salawu "Essentials of indigenous languages to journalism education in Nigeria" 2008 *Global Media Journal* 4.

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1. Introduction

Current societal observations show that South Africa's indigenous languages are becoming less prominent.[2] This is evident in the culture of globalisation, with English becoming the main language of communication.[3] Indigenous languages are only used in private spaces and do not reach the workplace.[4] Indigenous languages usually refer to languages that existed in a specific area for a long time before the arrival of other groups,[5] however this article uses the terms "indigenous languages" and "official languages" interchangeably. South Africa has been coined the "rainbow nation" with one of its most recognised features being the twelve official languages.[6] The debate raised is what the aim of recognising twelve official languages is if the state does not intend to make use of them when communicating with the public. This article discusses the constitutional framework for the protection of indigenous languages as well as how it has been interpreted by the courts. Consequently, the impact of language policy in tertiary education, the legal fraternity and literature, is considered together with a brief comparative study between South Africa and Nigeria's treatment of these languages.

2 Mphaphuli *et al* "Careers in Languages: Awareness by Grade 12 Tshivenda learners in Thembisa, Gauteng" 2024 *Journal of Literary Criticism, Comparative Linguistics and Literary Studies* 1.

3 Rao "The role of English as a global language" 2019 *Research Journal of English* 66.

4 Bauer *How the teaching of indigenous languages among disparate multicultural groups in a South African corporate setting affect cohesion* (2022 thesis SA) 66.

5 Lor "Preserving, developing and promoting indigenous languages: things South African librarians can do" 2012 *Journal of Appropriate Librarianship and Information Work in Southern Africa* 30.

6 Montle "Rethinking the rainbow nation as an exponent for nation-building in the post-apartheid era: a successful or failed project?" 2020 *Journal of Nation Building and Policy Studies* 8.

2. Historical background of indigenous languages

Previously, indigenous languages were not recognised under the apartheid system.[7] While the Constitution never explicitly stated that Afrikaans and English were the official languages of the Republic, it is implied that Afrikaans and English were the only languages officially accepted by the National Party.[8] This is also evident in the fact that the apartheid regime tried to implement Afrikaans as a medium of teaching in schools across the country, culminating in the 1976 Soweto Uprising.[9] This event is significant and one of the most notable occurrences of bloodshed in an effort to fight against South Africa's oppressive regime. Even though the apartheid system was primarily bilingual, indigenous African languages were still spoken amongst black people, though severely marginalised from an academic point of view.[10] These languages seemed to have earned their freedom in the 1996 Constitution.[11]

3. The legal framework

3.1 The Constitution

The Constitution aimed to transform society by recognising a more diverse nation, as noted by the late Chief Justice Pius Langa. Langa famously penned that, "[t]he Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance".[12] Section 6(2) of the Constitution provides that the

7 Bauer (n 4) 65.

8 Republic of South Africa Constitution Act 32 of 1961.

9 De Villiers "Media freedom: on the slippery slope to repression" 2011 *South African Family Practice* 256.

10 Nkosi *et al* "The use of a situational approach in teaching isiZulu language to non-mother tongue speakers" 2014 *Alternation* 276.

11 Constitution of the Republic of South Africa, 1996 (hereafter to as 'the Constitution'); s 6(1) of the Constitution provides that: "The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, isiZulu and South African Sign Language (SASL)."

12 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 1 SA 545 (CC) par 21.

state must take positive and practical measures to recognise and elevate the status of indigenous languages.[13] The state has attempted this by establishing the Pan South African Language Board, which is mandated to monitor the use of official languages per section 6(5)(*a*) of the Constitution.[14] Section 6(2) recognises that indigenous languages have been diminished historically and attempts to give languages a broad platform to shine, yet the reality is far from it.[15]

Many other languages such as Hindi, Arabic and Portuguese are not officially recognised although a considerable part of the population use these languages.[16] Section 6(5)(*b*) of the Constitution merely provides that such languages must be respected.[17] This is because such languages did not originate in South Africa, yet Afrikaans, having Dutch origins, and English were not initially indigenous languages because they were brought to South Africa by European settlers.

3.2 Statutory provisions

Section 4(3) of the Use of Official Languages Act provides that the state is meant to communicate with the public in at least three languages,[18] which they are not adhering to. This is understandable, as it is impractical and ineffective for the national government to communicate and disseminate all information in all the official languages at a time. Nevertheless, this provision regrettably does not apply to provincial and local governments, who are closer to the people and are meant to act in the interests and well-being of their specific residents.[19]

3.3 Judicial interpretations of language use including higher

13 See s 6(2) of the Constitution.
14 See s 6(5)(*a*) of the Constitution.
15 *S v Mtsholotsholo* 2023 JOL 62632 (WCC) par 27 (hereafter *Mtsholotsholo* case).
16 Makalela *Not Eleven Languages: Translanguaging and South African Multilingualism in Concert* (2022) 6.
17 See s 6(5)(*b*) of the Constitution.
18 See s 4(3) of the Use of Official Languages Act 12 of 2012.
19 See s 6(1) of the Use of Official Languages Act 12 of 2012.

education

The legal position towards the use of official languages was changed after the *Lourens* cases before the court, which put its use in the spotlight.[20] Lourens took to the courts with the aim of compelling state organs, such as the office of the President and the Speaker of the National Assembly, to comply with their obligations to publish legislation in all the official languages and to distribute public communiqués in at least two official languages under section 6(3)(a) of the Constitution.[21] These cases led to the enactment of the Act. Still, the state is not adhering to its provisions by publishing in three languages, bringing into question the effectiveness of the Act.[22] Thus, the promulgation of this Act simply brought cosmetic changes, as no changes were adequately brought into practice.

The use of indigenous languages is also undermined by institutions of tertiary education. Tertiary education is primarily given in English and the move towards single-medium tuition is supported;[23] however, this seems contrary to the section 29(2) "right to be educated in a language of choice by simply removing the choice".[24] This was questioned in the *University of the Free State* case and subsequent appeals.[25] The court ruled in favour of the University of Free State because the practical considerations of using all languages constituted a barrier to learning. It is highly impractical to teach a diverse student body in their preferred language. Rather than using one indigenous language and promoting its importance,

20 *Lourens v President of the Republic of South Africa* 2013 1 SA 499 (GNP); *Lourens v Speaker of the National Assembly* 2015 1 SA 618 (EqC).

21 See s 6(3)(*a*) of the Constitution.

22 Mohlahlo and Ditsele "Exploring multilingualism at the national department levels in South Africa post Use of Official Languages Act of 2012" 2022 *Journal of Literary Criticism, Comparative Linguistics and Literary Studies* 7.

23 Makhanya and Zibane "Student's voices on how indigenous languages are disfavoured in South African Higher Education" 2020 *Language Matters: Studies in the Languages of Southern Africa* 23-24.

24 s 29(2) of the Constitution reads that "Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable."

25 *AfriForum v Chairman of the Council of the University of the Free State* (A70/2016) [2016] ZAFSHC 130 (21 July 2016); *University of the Free State v AfriForum* 2017 4 SA 283 (SCA); *AfriForum v University of the Free State* 2018 2 SA 185 (CC).

the University favoured English as the largest commonality. It was, therefore, not unconstitutional to move from bilingual tuition to a single language.

The issue of "reasonable practicability" was again highlighted in *Studenteplein v Stellenbosch University*, after the institution had committed itself to multilingualism and then reneged on the policy since it was not practicable. The University emphasised that the competing language demands,[26] and limited resources, did not permit them to offer classes and other learning materials in different home languages. The institution developed a new policy after its 2016 monolingual policy was declared unconstitutional in the *Gelyke Kanse* case.[27] The University argued that the 2021 policy and commitment to multilingualism could not be fulfilled because of constraints placed on them by the coronavirus disease 2019 (COVID-19) pandemic.[28] The court had favoured the University and dismissed the application.[29]

Contrastingly, conflicting case law is presented in the *Unisa* case,[30] where the court ruled that it was unconstitutional to move towards a single-medium tuition system. The court noted that this was because of the high demand for multiple teaching languages since the University caters to distance learners all over the country. The *Unisa* case seemed to focus more on multilingualism, but this approach is inefficient without meaningful steps.[31] Neglecting multilingualism means acting contrary to the values of the nation and a democracy that is based on human dignity, equality and freedom.[32]

26 *Studenteplein v Stellenbosch University* 2022 JOL 55314 (WCC) par 80 and 81.

27 *Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch* 2019 BCLR 1479 (CC).

28 *Studenteplein* (n 26) par 82.

29 *Studenteplein* (n 26) par 85.

30 *AfriForum v Chairman of the Council of the University of South Africa* (54450/2016) [2018] ZAGPPHC 295 (26 April 2018); *AfriForum NPC v Chairperson of the Council of the University of South Africa* (765/2018) [2020] ZASCA 79 (30 June 2020); *Chairperson of the Council of the University of South Africa v AfriForum NPC* 2022 2 SA 1 (CC) (hereafter the *UNISA* case).

31 Laubscher "Recognition of language rights in South Africa: Innovation or dismal failure?" 2022 *Gdańskie Studica Prawnicze* 63.

32 See s 39(1)(*a*) of the Constitution.

The move towards English as the global language means that on a global scale, populations that do not speak English could also be isolated.[33] This can affect economies in terms of trade and communications.[34] Although indigenous languages were never meant to permeate international borders,[35] they are becoming endangered within the borders of South Africa within the workplace and higher institutions of learning amongst other areas.[36] Consequently, there does not seem to be any meaning behind having official languages because neither institutions of higher education, nor the state at all levels, are adhering to the need for translation of public communiqués.

4. Indigenous languages in the age of technology

Technology has brought new ways of disseminating information that were not even dreamt of before. Social media has increased the amount of information, particularly in English, that people consume.[37]

Technology promotes the use of indigenous languages because people from around the world have exposure to such languages. Now more than ever, people have access to new languages with language-learning applications (apps) like *Duolingo* and *Babbel*.[38] Yet, people are not willing to learn such languages because it is not believed to be useful.[39] Moreover, social media usually promotes the use of slang words from indigenous languages and thus, people are never fully exposed to the true pedagogy of the language.[40] Spelling, grammar and pronunciation have also been distorted through the use of social

33 Ralarala "A case study on the language and socio-cultural challenges experienced by international students studying at Cape Peninsula University of Technology" 2016 *South African Journal of Higher Education* 235.

34 Rao (n 3) 67.

35 Crystal *English as a Global Language* (2003) 4.

36 Lasagabaster and Van der Walt "Students' perceived language competence and attitudes towards multilingualism at a South African university" 2024 *Language Matters: Studies in the Languages of Southern Africa* 183.

37 Lasagabaster and Van der Walt (n 36) 183.

38 Sakalauksė and Leonavičiūtė "Strategic analysis of Duolingo language learning platform" 2022 *Science – Future of Lithuania* 2-3.

39 Lasagabaster and Van der Walt (n 36) 183.

40 Haque "The use of social media platforms in language learning: a critical study" 2023 *Journal of Global Research in Education and Social Science* 21.

media.[41] Thus, the overall literacy and understanding of indigenous languages are never fully realised.[42] Many argue that using specific languages isolates one from specific groups of people. For example, disseminating information in the media in isiZulu means excluding Afrikaans-speakers. Thus, English is the most promoted, as it is widely spoken.

Teaching and understanding a language without a holistic approach means that it is best that the language is not taught at all. Without understanding the language holistically, people will not be able to communicate properly in any setting, meaning harmful consequences for culture and the language itself.[43] Many do not see the need to learn an indigenous South African language because it does not increase the availability of employment opportunities, and learning such languages will limit its use to the borders of this country.[44] In contrast, learning foreign languages like French or Spanish is preferred as it increases job opportunities, which inevitably encourages learning a new culture.[45]

Traditionally, corporate South Africa is structured around Western ideas such as hierarchal structures and valuing individual performance because of the influence of colonialism, but this poses a risk since the South African workforce is not heterogeneous.[46] There is a need to diversify the workplace model to account for the varying demographics and the lack of using indigenous languages does not assist its progress. South Africa is famous for having twelve official languages, but there is no meaning attached to this if those languages are not effectively utilised by the population.

41 Natsir *et al* "The impact of language changes caused by technology and social media" 2023 *Journal of Linguistics, Literary and Language Teaching* 116.

42 Natsir *et al* (n 41) 116.

43 Natsir *et al* (n 41) 116-117.

44 Lasagabaster and Van der Walt (n 36) 183.

45 Thomas "Bringing foreign language learning into the 21st century" 2003 *Journal for Language Teaching* 26.

46 Bechan and Visser "The influence of language and culture on a South African corporate: research article" 2005 *Communicare: Journal for Communication Studies in Africa* 68-69.

5. Treatment of indigenous languages: Nigeria

Studies have shown that Nigeria, much like South Africa, is moving away from using indigenous languages.[47] These languages include Yoruba, Igbo, Fula and Hausa.[48] This is because of their relentless pursuit of Western education in order to compete with the world powers.[49] The continuous neglect of indigenous languages in literature, by implication, means that those who do not understand English will never reap the full benefit of the South African education system.

Several authors like Salawu stress the importance of directing efforts towards rationalising language policies to avoid losing a significant part of culture.[50] The older generation in Nigeria, much like in South Africa, primarily use language to express themselves. Without striving to keep indigenous languages alive, communication between communities and generations will be hampered.[51] Salawu contends that many people in Nigeria pride themselves for not understanding their own language.[52] Furthermore, understanding of the English language is rewarded and sought after in terms of admission to tertiary institutions in Nigeria over and above any other language.[53]

Recently, there have been calls in Nigeria, to focus on the development and preservation of indigenous languages as a medium of communication and learning.[54] This was because of a qualitative study concluded regarding the COVID-19 pandemic. The results of the study indicate that people understood information better in their various indigenous languages and changed their perception

47 Salawu (n 1) 5-6.
48 Meshesha and Jawahar "Indigenous scripts of African languages" 2007 *Indilinga African Journal of Indigenous Knowledge Systems* 133.
49 Salawu (n 1) 5-6.
50 Salawu (n 1) 5.
51 Salawu (n 1) 5.
52 Salawu (n 1) 5.
53 Salawu (n 1) 10.
54 Fadipe *et al* "Indigenous languages as predictors of understanding and accepting COVID-19 vaccines in Nigeria and South Africa" 2024 *Communicare: Journal for Communication Sciences in Southern Africa* 77.

of the information that they were receiving.[55] Consequently, as of 2025, Nigeria is placing more focus on publishing and disseminating information to the public in various languages. This is an initiative which has existed in South African jurisprudence for a long time but is simply not adhered to. Nigeria has already noted a similar problem regarding this shift in focus. The government's inability to disseminate information in this way because of a lack of resources and competent workers which create an aversion to using indigenous languages for effective communication.[56]

Moreover, youth languages like Nigerian Pidgin are only beginning to gain traction in mainstream media.[57] The Nigerian youth, in place of the government, have assumed the responsibility of preserving and developing indigenous languages. The language contains various indigenous languages but finds its basis in English.[58] Even though the language is gaining traction through youth communities, the government shows apathy and hesitance to name it as an official language, particularly because English is valued over and above other languages.[59] Although spoken by the youth, the language also does not serve as a medium of instruction for students at tertiary level.[60] This is regrettable since students might be able to connect with their learning materials more effectively if the material was taught in a manner that they could better understand. All this, much like in a South African context, indicates the unwillingness of the government to stand up to the challenge of developing indigenous languages and preserving them.

55 Fadipe *et al* (n 54) 86.
56 Fadipe *et al* (n 54) 87.
57 Isiaka "A tale of many tongues: towards conceptualising Nigerian youth languages" 2020 *Language Matters: Studies in the Languages of Southern Africa* 69.
58 Isiaka (n 57) 71.
59 Isiaka (n 57) 69.
60 Isiaka (n 57) 73.

6. Indigenous languages in the legal fraternity

Writers, particularly in the legal field, emphasise the notion that the curriculum must be decolonised to suit a diverse group of students;[61] however, decolonisation means including indigenous languages in curriculums, which is not being done. The LLB curriculum perpetuates unfair discrimination by not giving learners the ability to learn in the indigenous languages that they prefer.[62] The legal field does not even make use of indigenous languages, evident in the fact that English is the only language of record.[63] Previously, English and Afrikaans were used by the courts until former Chief Justice Mogoeng Mogoeng announced that English would be the only medium used in the courts.[64] The move from a bilingual system undoubtedly weakens the legal system and does not promote inclusivity.[65] The lack of multilingualism within the legal system conflicts with South Africa's language demographics.[66]

This is especially problematic during court proceedings where translators are to be used. This was highlighted in the *Mthethwa* case, where the accused was charged with theft.[67] The accused was denied a trial in isiZulu after application to the court through his attorney in accordance with his section 35(3)(*k*) constitutional right to a fair trial conducted in a language the accused understands.[68] Not conducting the trial in a language which the accused understands constitutes a form of unfair discrimination.[69] Docrat comments that the court

61 Masiya and Mdluli "Critical legal education: A remedy for the legacy of colonial legal education?" 2020 *Pretoria Student Law Review* 71–72.

62 Dladla "Breaking the language barrier in legal education: A method for Africanising legal education" 2020 *Pretoria Student Law Review* 61.

63 *Mathebula v S* 2020 1 SACR 534 (ML) par 18.

64 Dladla (n 62) 62.

65 Dladla (n 62) 63.

66 Docrat "A review of linguistic qualifications and training for legal professionals and judicial officers: A call for linguistic equality in South Africa's legal profession" 2022 *International Journal for the Semiotics of Law* 1711.

67 *Mthethwa v De Bruyn* 1998 3 BCLR 336 (N) (hereafter the *Mthethwa* case).

68 s 35(3) of the Constitution reads that "[e]very accused person has the right to a fair trial, which includes the right – (*k*) to be tried in a language that the accused person understands, or if that is not practicable, to have the proceedings interpreted in that language".

69 *Mtsholotsholo* (n 15) par 31.

believed that it was impractical to conduct the trial in isiZulu because the legal practitioners in the Vryheid jurisdiction were not proficient in the language.[70] Critics such as Dladla argue that the solution would be for all legal practitioners to receive training and certification in at least one African language to avoid circumstances such as these in the future.[71] The aim of this training would be for legal practitioners to assist as best by being proficient in another language. Nonetheless, training and certification produces a problem in respect of what indigenous language to choose with the likes of isiZulu and isiXhosa being the most widely spoken.[72] The inclusion of this training and certification may create a more inclusive legal system but will still emphasise the importance of certain languages over others.

The common link between most anglophone African countries lies in the English language brought and taught to them by colonisers. The lack of African languages in literature creates a barrier between South Africa and its neighbours and the same goes for Nigeria. This Eurocentric approach to literature only means that African nations are submitting themselves to the legacies of the past and creating literature that is merely an extension of English works.[73] Montle suggests that Africa's true independence and pride in indigenous languages will only be won if complex literature is written in African languages.[74] Indeed, the failure to reclaim these African languages may very well be the downfall of African society and culture.

7. The way forward

In order to produce a sound recommendation, the arguments for and against the promotion of indigenous languages must be considered.

Firstly, the promotion of indigenous languages increases valuable communication because the provincial government can

70 Docrat *The role of African languages in the South African legal system* (2017 Thesis SA) 249.

71 Dladla (n 62) 67.

72 Lasagabaster and Van der Walt (n 36) 167.

73 Montle "Rethinking the alienation of African indigenous languages to African literature: A post-colonial perspective" 2021 *Technium Social Sciences Journal* 825.

74 Montle (n 73) 827.

better understand the needs of the community and satisfactorily serve them. The use of these languages within communities will also endorse the need for literary works even if they only cater to a specific community. For example, a predominantly Venda-speaking community's needs can be better fulfilled if the officials in the community are proficient in the Venda language.

Secondly, the use of indigenous languages must be promoted to provide meaning to South Africa's "rainbow nation". Tourists are invited to visit South Africa because of its diversity,[75] but if the diversity in question is not practiced by the population, then the very notion of diversity is hollow. We should instead coin the term "rainbow advertising" if there is no substance and tolerance to support the notion of diversity.[76] Unfortunately, it is disheartening if the same state in all areas – including the executive, legislature and judiciary at all three national, provincial and local levels – that are meant to promote the use of these languages undermine their usage. The use of indigenous languages strengthens the bond between communities and promotes healthy kinship through shared ideals. Ngulube has noted that social interactions depend on language and are, therefore, an essential element for significant dialogue.[77] Significant change is only enacted if language does not constitute a barrier and promoting a greater understanding of indigenous languages is a step in the right direction towards change in South Africa.

Contrastingly, the reality of the 21st century is that the move towards English being the global language is attributable to the development of technology.[78] Many people do not consider it necessary to learn and promote indigenous language that does not

75 Du Plessis *et al* "Explore changes in the aspects fundamental to the competitiveness of South Africa as a preferred tourist destination" 2017 *South African Journal of Economic and Management Sciences* 1.

76 Maree and Jordaan "Rainbow nation, rainbow advertising? Racial diversity of female portrayals in South African television" 2016 *Gender and Behaviour* 6817.

77 Ngulube "Revitalising and preserving endangered indigenous languages in South Africa through writing and publishing" 2012 *South African Journal of Libraries and Information Science* 11.

78 De Jager *et al* "The innovative use of social media for teaching English as a second language" 2020 *The Journal for Transdisciplinary Research in Southern Africa* 1.

serve a purpose on an international scale.[79] The reality is that many people do not want to be connected to a particular tribal community like Nguni-speaking communities or Xhosa communities because large-scale migration has characterised the movement of people worldwide for economic reasons.[80]

Several people view indigenous languages as archaic and remark that it has no place in the new South African system. This is only a bigger call for indigenous languages to be developed. Nevertheless, the push for globalisation is the very reason that indigenous languages are in danger and require preservation and development.[81] Since language is the key to mobilising communities and making group decisions, its very demise signals the end of culture.[82] This is cause for South Africans to preserve their heritage from extinction so that future generations can experience the magic of diversity, or else it will be a distant story told to younger generations.

The promotion of indigenous languages may imply that other non-indigenous languages should be overlooked. Municipalities will be faced with challenges when attempting to serve communities that are not proficient in any of the country's official languages. For example, a municipality cannot adequately satisfy the needs of a community that it does not understand because of a language barrier. The question is: where does that leave speakers of non-indigenous languages within South Africa and non-English speakers, such as Portuguese-speakers or Hindi-speakers, on a global scale? Non-indigenous speakers will have to become more proficient in one of the indigenous languages to survive and receive adequate municipal service. On a global scale, a lack of proficiency in English does not bode well for economies that seek to participate intercontinentally. Non-English-speakers will be cast aside from the global trade system because of globalisation.

79 Lasagabaster and Van der Walt (n 36) 171.

80 Khamidov "Nature of labour migration and characteristics of its emergence" 2022 *American Journal of Economics and Management* 87.

81 Meighan "Decolonising the digital landscape: the role of technology in Indigenous language revitalisation" 2021 *AlterNative* 397.

82 Ngulube (n 77) 12.

All arguments considered, there is a strong need for endangered indigenous languages to be preserved because it addresses the cultural inequalities, promotes tolerance in communities and facilitates full participation in all aspects of the economy.[83] Therefore, the best way for indigenous languages to be preserved is for the national government to take practical and positive measures. The standing of these measures rests on the state's obligation to respect the rights of linguistic communities.[84]

The first measure would be for the national legislature to amend existing legislation, so that the provisions apply to provincial and local governments. This would encourage the use of indigenous languages because these levels of government are more accessible to the people of South Africa and can affect more meaningful change to the language demographics of the country. The second measure would be for the national government to allocate adequate funding to the provinces and local governments for the promotion of languages. This involves the supported training of officials in at least one African language to expand understanding and proficiency in these areas. These budgets will provide the lower levels of government with the platform to effect social media campaigns, school visits and increased awareness about indigenous languages prevalent in the area.

Social media campaigns will entice the younger generation to use indigenous languages more and spark their interest to participate in future campaigns in communities. School visits by organisations and committees that promote the use of these languages can be undertaken to make children aware of the use of indigenous languages. This is not to be misconstrued for carrying these languages over into the workplace but merely as a starting point for indigenous languages to enjoy some continuity and consistency. The languages promoted may be left to the discretion of the municipal and provincial governments, based on practical considerations such as the most widely spoken languages in the community.

83 Ngulube (n 77) 13.
84 See s 31 of the Constitution.

Furthermore, the state should look to develop a national terminology policy to enhance societal multilingualism.[85] This could be used particularly to intellectualise indigenous languages for different academic areas such as the legal space or literature.[86] This will facilitate accessibility to the workplace for individuals who are not proficient in English and offer better communication particularly in a diverse workplace where there are recurring language barriers.

The recommendations may seem far-reaching but are easily attainable with the correct leadership in place to take this country to greater heights. These are undoubtedly goals that South Africans can and should work towards to preserve the uniqueness of our nation.

8. Conclusion

Language is a crucial component of life that no one can escape. Through the prism of language, cultures are connected, individuals communicate, and societies revolutionise. Prioritising non-indigenous languages over indigenous languages not only perpetuates the idea the long-standing view that indigenous languages are not important, but it also risks endangering indigenous languages because of their minimal usage. South Africans should instead embrace the uniqueness of linguistic and cultural communities. Failure to do so may result in the disappearance of indigenous languages that our ancestors fought hard to preserve. There is a need to develop and promote the use of indigenous languages in various spaces like the workplace, learning institutions and literature. This can be achieved by amending existing legislation, allocating funding to provincial and local governments, social media campaigns promoting awareness and creating a national terminology policy.

85 Alberts "The need to develop a national terminology policy for South Africa" 2025 *Lexikos* 4.

86 Mabela and Ditsele "Exploring intellectualisation of South African indigenous languages for academic purposes" 2024 *Journal of Literary Criticism, Comparative Linguistics and Literary Studies* 1.

A Critical Re-Examination of the Remuneration of Business Rescue Practitioners after Failed Business Rescue Proceedings

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Summary

The first half of the 2010s marked the dawn of a new corporate rescue mechanism in South Africa. In May 2011, business rescue replaced a remarkably unsuccessful rescue procedure in the form of judicial management in a bid to improve the rescue of financially ill companies. The *Diener v Minister of Justice and Correctional Services 2019 4 SA 374* (*Diener*) case was not a striking exception to the assumed promissory import and apt interpretation of business rescue provisions. The reality of the current rescue mechanism is that it has not only benefited significantly from judicial pronouncements but sparked lively debate about its obscure and poorly drafted provisions. In *Diener*, the Constitutional Court had to provide clarity on the status of unsettled remuneration and expenses of a business rescue practitioner (practitioner) after business rescue proceedings were converted into liquidation proceedings. The Constitutional Court held that a practitioner has no super-preferential claim to their unpaid remuneration and expenses against the insolvent estate. The finding of the Constitutional Court also means that a practitioner must prove a claim for unpaid remuneration and expenses against the insolvent estate. However, this current order of preference is not

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barren of criticism based on policy considerations and stakeholder relations under business rescue. This note argues that the current ranking of the practitioner's unpaid claim undermines the integrity and effectiveness of business rescue and proposes a legislative amendment to restructure the current order of the practitioner's post-rescue ranking. This note further investigates the possibility of exempting a practitioner from proving a claim against the insolvent estate. By extension, this note extrapolates arguments relating to the oversight of a practitioner's fees to justify the exemption of proving a claim against the insolvent estate. Ultimately, this note proposes policy-based recommendations to restructure and streamline the practitioner's post-rescue remuneration framework.

Keywords: Business rescue; Practitioner's remuneration; Post-rescue standing; Free residue; Super-preference.

1. Introduction

Business rescue is a corporate mechanism used to rehabilitate a financially distressed company under the temporary supervision and control of a practitioner. A financially troubled company must have a reasonable prospect of being rescued before the initiation of business rescue.[1] A reasonable prospect denotes an expectation of the uncertain eventual rescue of a company or better return for creditors or shareholders based on an objectively reasonable ground.[2] To rescue such company, a practitioner must develop a plan to restructure a company's affairs in a way that maximises the likelihood of it continuing to exist on a solvent basis; or if that is not possible, results in a better return for a company's stakeholders than they would receive from immediate liquidation.[3] This means that the successful rescue of a faltering company is premised on the realisation of the primary goal of return to solvency and/or secondary

1 s 131(4)(*a*) of the Act.

2 *Newcity Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd* case no 12/45437 (GSJ) (unreported) par 14; *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 LTD* 2013 1 SA 542 (FB) par 12.

3 s 128(1)(*b*)(iii) of the Companies Act 71 of 2008 (the Act).

goal of a better return.[4] A practitioner must have the integrity to discontinue business rescue if a reasonable prospect to achieve a contemplated goal no longer exists.

A practitioner is *entitled* to basic remuneration and expenses incurred during business rescue in accordance with the tariffs prescribed by the minister.[5] These remuneration tariffs range from a minimum amount per hour to a maximum fee per day, depending on the size of the company.[6] In addition to basic remuneration, a practitioner may claim expenses for disbursements made for actual expenses incurred if they are reasonably necessary to carry out a practitioner's functions and facilitate rescue.[7] A practitioner may also conclude a contingency fee agreement with the company and/or success fee agreement with a third party for further remuneration.[8] During business rescue, the claim for a practitioner's remuneration and expenses (and business rescue costs) rank above every other post-commencement claim.[9] However, once business rescue is discontinued in favour of liquidation, the ranking of the practitioner's claim for unpaid fees is controversial and ambiguous. On one hand, section 135(4) stipulates that the remuneration preference created during business rescue does not change, subject to the costs of liquidation. On the other hand, section 143(5) places the practitioner's claim for outstanding remuneration ahead of all secured and unsecured claims. However, as the discussion below will demonstrate, the apparent disjuncture between these sections has been clarified in *Diener v Minister of Justice and Correctional Services* (*Diener*).[10]

It is noteworthy that *Diener's* interpretative analysis of the impugned sections has been a subject of adverse academic criticism. However, this note welcomes the *Diener* judgment and mounts

4 *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 4 SA 539 (SCA) par 26.
5 s 143 of the Act.
6 reg 128(1) of the Companies Regulations 2011 issued under the Act.
7 reg 128(3) of the Companies Regulations 2011 issued under the Act.
8 *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 5 SA 35 (SCA); s 143(2) of the Act.
9 s 135(3) of the Act.
10 2019 4 SA 374 (CC).

a direct challenge against the legislative failure to streamline the ranking of a practitioner's unpaid fees after a failed business rescue. The divergent approach between academic literature and judicial interpretation is duly considered. By examining these approaches, this note contextualises the subsequent critical evaluation of the continued viability and potential restructuring of the practitioner's status after unsuccessful rescue. Finally, this note proposes a legislative amendment to reconfigure the practitioner's post-rescue standing.

2. Facts and background litigation

In *Diener*, the Constitutional Court had to determine whether a practitioner had the benefit of a "special and novel preference" over unsettled remuneration and expenses once business rescue was converted to liquidation. The applicant, Ludwig Wilhelm Diener (Diener), was appointed as the practitioner for JD Bester Labour Brokers CC (JD Bester), a close corporation with a single immovable asset encumbered to FirstRand Bank, its sole secured creditor.[11] Two months after his appointment, Diener realised that there was no reasonable prospect to rescue JD Bester and took steps to discontinue business rescue in favour of liquidation in terms of section 141(2)(a) of the Act.[12] Diener then submitted a claim to the joint liquidators for his unpaid fees and expenses.[13] He alleged that his claim of unpaid fees enjoys a "special and novel preference" to be paid from the proceeds of secured assets ahead of *all* creditors.[14] Diener relied on the joint reading of sections 135(4) and 143(5) to argue that a practitioner's unpaid claim ranks higher than all secured and unsecured claims after a failed business rescue. The issue was initially referred to the Master for determination and went all the way to the Constitutional Court.[15]

Both the High Court and the Supreme Court of Appeal dismissed Diener's argument. The High Court confirmed the Master's decision

11 the *Diener* case (n 10 (2019)) par 3, 9.
12 the *Diener* case (n 10 (2019)) par 13.
13 the *Diener* case (n 10 (2019)) par 14.
14 the *Diener* case (n 10 (2019)) par 43.
15 the *Diener* case (n 10 (2019)) par 14.

that a practitioner's unpaid fees and expenses could only be settled from the free residue after defraying liquidation costs.[16] The Supreme Court of Appeal further clarified the relationship between sections 135(4) and 143(5). According to the court, section 135 addresses the ranking of claims relating to post-commencement finance (PCF), whereas section 143 deals with a practitioner's right to remuneration during business rescue.[17] However, section 135(4) also addresses the order of preference beyond business rescue.[18] Section 135(4) confirms the retention of the preferential order created over PCF on liquidation, subject to liquidation costs.[19] Consequently, the Supreme Court of Appeal concluded that the preference in section 143(5) only applies retrospectively to secured and unsecured creditors who provided the company with PCF.[20] Accordingly, that preference is a limited reference to post-commencement creditors to the exclusion of secured pre-business rescue creditors.[21]

3. The Constitutional Court ruling

The Constitutional Court (Khampepe J) unanimously dismissed the application for leave to appeal. Khampepe J acknowledged that section 143(5) grants a practitioner a preference over secured creditors when business rescue is in motion.[22] However, the preference does not live beyond business rescue because of the wording of sections 97 (costs of liquidation) and 89 ("costs to which securities are subject") of the Insolvency Act.[23] Generally, liquidation costs are paid from the balance of the free residue and do not outrank secured assets with the exception of liquidation expenses relating to encumbered assets

16 *Diener v Minister of Justice* case no 30123/2015 (GP) (unreported) par 50, 60. The free residue is the "portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention". See s 2 of the Insolvency Act 24 of 1936 (Insolvency Act).
17 *Diener NO v Minister of Justice* 2018 2 SA 399 (SCA) par 42-43.
18 the *Diener* case (n 17 (2018)) par 42.
19 the *Diener* case (n 17 (2018)) par 42.
20 the *Diener* case (n 17 (2018)) par 43, 49.
21 the *Diener* case (n 17 (2018)) par 43.
22 the *Diener* case (n 10 (2019)) par 47.
23 the *Diener* case (n 10 (2019)) par 48-49.

under section 89(1) of the Insolvency Act.[24] Therefore, a plain reading of sections 135 and 143 does not expressly create a preference for unpaid remuneration and expenses over secured assets in liquidation, whereas section 89(1) of the Insolvency Act clearly does so in defined circumstances for costs of liquidation.[25]

Furthermore, the contextual and purposive interpretation of a super-preference does not equitably balance the interests of all stakeholders.[26] Khampepe J was at pains to emphasise the absurdity of a practitioner's claim ranking above liquidation costs when there was no free residue to satisfy liquidation costs.[27] A super-preference would further dilute security and impose costs on secured pre-business rescue creditors without consultation even if they did not support the resolution to institute business rescue.[28] Accordingly, the Constitutional Court confirmed that the preferential claim of a practitioner's unpaid claim lies against the free residue, after payment of liquidation costs.[29] Thus, the judicial scrutiny of the dichotomy (or relationship) between sections 135(4) and 143(5) resulted in uniform judicial interpretation. While the legislature had abysmally failed to consider the appropriate ranking after business rescue, the courts managed to streamline and contextualise the ranking of a practitioner's unpaid claim on liquidation. The courts' doctrinal exegesis of the subject-matter illustrates harmonised understanding and synthesis of the applicable statutory provisions and irregularities of a super-preferential claim. Consequently, the courts successfully navigated the practitioner's remuneration framework to attribute purposive and contextual interpretation to conflicting provisions.

Be that as it may, the judicial analysis of the practitioner's post-rescue ranking cannot escape policy-informed criticism in the greater scheme of business rescue. The policy charge lies against the lack of legislative clarity rather than judicial ranking of the unpaid fees and expenses. Suffice to state at this point that the

24 the *Diener* case (n 10 (2019)) par 48.
25 the *Diener* case (n 10 (2019)) par 49.
26 the *Diener* case (n 10 (2019)) par 55.
27 the *Diener* case (n 10 (2019)) par 56, 63-64.
28 the *Diener* case (n 10 (2019)) par 57.
29 the *Diener* case (n 10 (2019)) par 49-62.

court-sanctioned ranking, albeit in harmony with the normative regulatory framework, has the potential to breed conflict of interest, disincentivise practitioners, erode confidence in business rescue and delay the eventual failure of rescue. Accordingly, it is expedient to reconsider the protection of business rescue's integrity and legitimacy against the relative polarity of stakeholder rights and policy factors.

4. A synopsis of academic commentary

Delport correctly points out that the purpose of section 143(5) is not necessarily clear.[30] Generally, the poor drafting and efficacy of business rescue provisions has received considerable academic criticism and judicial scrutiny over the years.[31] The courts have devised a framework to assign a sensible, contextual and purposive interpretation to prevent any anomalous consequences of the poor drafting of chapter 6 of the Act.[32] In doing so, section 5 of the Act guides the courts to interpret and apply the Act in a manner that gives effect to section 7 thereof. Section 7(k) states that the purpose of business rescue is to extricate financially troubled companies while balancing the interests of all relevant stakeholders. These provisions seek to ensure that the construction of impugned business rescue provisions align with the purpose of the Act.[33] This is to say that courts are mandated to balance the interests of all relevant stakeholders when interpreting and applying business rescue provisions. Accordingly, the proper order of preference for a practitioner's unpaid fees must be considered against the backdrop of business rescue's purpose.

According to Burdette and Jacobs, the *Diener* case failed to consider the practitioner as a relevant stakeholder who agrees to execute a difficult and complex appointment.[34] They argue that the court-sanctioned ranking contributes to the potential disenfranchisement

30 Delport *Henochsberg on the Companies Act 71 of 2008* (2025) 526.

31 Barends *A Critical Analysis of Section 129 of the Companies Act 71 of 2008* ((2017 dissertation UWC); *Panamo Properties (Pty) Ltd v Land and Agricultural Development Bank of South Africa* 2016 1 SA 2022 (SCA) par 1.

32 the *Panamo* case (n 31) par 27.

33 *FirstRand Bank Ltd v KJ Foods CC* 2017 5 SA 40 (SCA) par 75.

34 Burdette and Jacobs "Queue politely! South African business rescue practitioners and their fees in liquidation" 2019 *Wolverhampton Law Journal* 61 67.

of practitioners.[35] To them, the clear intention of section 143(5) is to create first priority for a practitioner's outstanding fees over *all* secured and unsecured creditors.[36] This is the reason that the learned commentators criticise the marriage of the distinct import of section 143(5) with an unrelated claim under PCF in section 135.[37] However, the interpretation of the learned commentators ignores the main charge against a super-preferential claim. In the absence of a free residue, a practitioner's remuneration and expenses would be paid before the costs of liquidation from the proceeds of secured property.[38] While this anomaly casts doubt on the plausible survival of a super-preference beyond business rescue, Setlhako nevertheless maintains that the Act places a practitioner's outstanding remuneration and expenses ahead of secured claims at all times.[39]

Van Der Merwe correctly remarks that the effect of the court-sanctioned ranking on the practitioners' conduct requires further research.[40] This is because of the courts' indifference towards the consequences of recognising the practitioner's claim as concurrent after business rescue.[41] A practitioner's fees only enjoy priority in business rescue as there is still a goal-driven possibility of rescuing the company.[42] However, limiting this priority to business rescue does not account for a practitioner's potential to preserve their own interests during business rescue at the expense of liquidation.[43] This ranking may also undermine the purpose of business rescue and disincentivise practitioners from accepting appointments on the fear of non-payment and liability towards liquidation costs.[44] Conversely,

35 Burdette and Jacobs (n 34) 65-67.
36 Burdette and Jacobs (n 34) 65.
37 Burdette and Jacobs (n 34) 64-65.
38 the *Diener* case (n 10 (2019)) par 56, 63-64.
39 Setlhako *The Status of the Claims for the Remuneration and Expenses of Business Rescue Practitioners after the Conversion of Business Rescue to Liquidation* (2020 dissertation UP) 102.
40 Van Der Merwe *Business Rescue Practitioners' Remuneration after Institution of Liquidation Proceedings* (2021 dissertation UP) 30.
41 Setlhako (n 39) 106.
42 Phungula *The Evolution of an Effective Business Rescue Statutory Regime in South Africa* (2021 thesis UKZN) 176.
43 Burdette and Jacobs (n 34) 68.
44 Setlhako (n 39) 109; the *Diener* case (n 10 (2019)) par 67.

it may push practitioners to act bona fide and avoid appointments lacking any reasonable prospects of rescue.[45] Nevertheless, the current ranking still pays peripheral regard to the likelihood of a practitioner protracting business rescue to evade non-payment.[46] Furthermore, the current ranking is likely to erode confidence in the institution of business rescue.[47] However, it must be borne in mind that a practitioner assumes the role of a director and may be held liable for conduct constituting gross negligence in the exercise of the powers and performance of the functions.[48]

5. Discussion

5.1 The practitioner's remuneration after a failed business rescue

It stands to reason that there is no interpretation of the appropriate ranking for unpaid remuneration without its own problems.[49] The legislature has exceedingly failed to consider the appropriate ranking of a practitioner's unpaid fees after the conversion of business rescue to liquidation. This is a textbook illustration of the failure to line up the statutes governing business rescue after its introduction.[50] It seems that the confusion about the preferred ranking after business rescue hinges on the internal qualifier in section 135(4) and the failure to situate a practitioner's remuneration within a specific ranking. Section 143(5) is explicit in establishing a practitioner's extraordinary ranking above secured and unsecured creditors. However, the wording of section 135(4) relegates the remuneration of a practitioner to the free residue and weakens the textual relevance of section 143(5) beyond business rescue. Yet, the sole reading of section 143(5) does not seem to apply beyond business rescue.

45 the *Diener* case (n 10 (2019)) par 68.
46 Burdette and Jacobs (n 34) 67-68.
47 Setlhako (n 39) 109; Boraine, Evans, Roestoff and Steyn "The pro-creditor approach in South African Insolvency Law and the possible impact of the Constitution" 2015 *Nottingham Insolvency Law and Business Law e-Journal* 59 62.
48 s 140(3)(*c*)(ii) of the Act.
49 the *Diener* case (n 10 (2019)) par 66.
50 Calitz and O'Brien "Must a business rescue practitioner pay costs of liquidation *de bonis propriis*?" 2023 *TSAR* 247 250 citing the Act; the Companies Act 61 of 1973 and Insolvency Act.

These sections invite unnecessary legal uncertainty and lay fertile ground for a variety of interpretations that are all reasonably sound. The sharp divergence of opinion between the unanimous judicial interpretation and academic analysis on the correct reading of the relevant sections is not without merit. The search for a suitable ranking within the current legislative framework invariably results in legislative fragmentation or inadequate consideration of all relevant circumstances.

The South African post-rescue remuneration framework is also out of sync with the post-rescue remuneration arrangements in comparable jurisdictions. The administration procedure in Canada is closely similar to business rescue and the United Kingdom's (UK) system of administration has influenced its structure.[51] In Canada, a court may secure a monitor's fees and expenses and order that the security ranks above any secured claim.[52] The monitor is entitled to receive their fees and expenses even if a company is in the process of liquidation.[53] In the UK (England and Wales), Schedule B1, paragraphs 99(1)-(3) and 70 of the Insolvency Act 1986 state that a former administrator's remuneration and expenses are payable ahead of any security from the property that the administrator had control over before vacating office. This position entails that the company's assets remain charged with the administrator's fees during the winding-up process after unsuccessful administration. Unlike South Africa, an administrator's fees and expenses in the UK and Canada are statutorily regulated in clear terms and enjoy sufficient priority to guarantee payment for work completed and disbursements incurred.

The authors submit that the appropriate ranking for outstanding fees must happen through legislative reform. A practitioner must be paid *parri passu* and rateably with liquidation costs under section 97(2)(*c*) of the Insolvency Act. However, the legislative drafting must avoid blurring the line between business rescue and liquidation proceedings. To avoid classifying the practitioner's remuneration as liquidation costs and possibly undermining the fabric of liquidation,

51 Setlhako (n 39) 108.

52 s 11.52 of the Companies Creditor Arrangement Act read with s 136(1) of the Bankruptcy and Insolvency Act (BIA).

53 Setlhako (n 39) 99; s 39 of the BIA.

the legislature must situate the fees in accord with section 97(2)(c) through the redrafting of section 143(5). To that end, section 143(5) may be amended as follows:

> "To the extent that the practitioner's remuneration and expenses are not fully paid after business rescue proceedings are superseded by a liquidation order, the practitioner's claim for those amounts will rank *parri passu* and in equal proportions if necessary with the costs of sequestration contemplated in section 97 (2) (c) of the Insolvency Act."

It is advisable to retain the existing PCF order of preference during business rescue proceedings. The preference for a practitioner's fees during business rescue must not be "underplayed".[54] However, the extension of section 135(4) to liquidation must retain the PCF order of preference without the practitioner's claim (as it would rank alongside liquidation costs). It follows that section 135(4) must read as follows:

> "Subject to section 143 (5), if business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation."

However, there are considerations that militate against the immediate benefits of the proposed ranking and it is not suggested that these are the only interpretational difficulties thereof. A practitioner afforded preferent post-rescue privilege may incur unnecessary fees and disbursements in the covert efforts to rescue a chronically ill company for purposes of self-enrichment.[55] Some experienced practitioners already charge companies more than the prescribed hourly tariffs.[56] The inflation of the practitioner's fees, in view of the proposed ranking, would have a knock-on effect on liquidation

54 the *Diener* case (n 10 (2019)) par 60.

55 *Montic Dairy (Pty) Ltd (in liquidation) v Mazars Recovery and Restructuring ((Pty) Ltd* 2021 3 SA 527 (WCC) par 33-36.

56 Marumoagae and Thambi "Should payment of additional remuneration to business rescue practitioners outside section 143 of the Companies be prohibited" 2024 *SAMLJ* 378 388.

costs and increase the possibility of a contribution towards these costs and simultaneously decrease chances of realising the original claim for unsecured creditors. All the while, a practitioner has the freedom to bargain for payment before the cessation of business rescue,[57] subject to payment before commencement of the winding-up process.[58] However, there is no logical reason to leave unattended a practitioner's wide discretion to wantonly exploit the remuneration arrangement and abuse the process. The legislature must ordain supervisory safeguards for the allocation of fair, reasonable and proportionate remuneration to a practitioner. An oversight entity must have authority to allow, reduce or disavow the practitioner's expenses and disbursements. On the other hand, the uncritical acceptance of a practitioner's prima facie bargaining power is an oversimplification of the professional risk and complex dynamics of business rescue. The *ex post facto* consequences of the current ranking are well-documented in this note. The authors hasten to add that the effect of unsuccessful rescue may, in practice, subject the initiation of business rescue to parameters beyond the legislative framework. This is so that practitioners may (consciously or subconsciously) use the higher threshold of reasonable probability to assess reasonable prospects of rescue in order to circumvent the uncertain rescue of a faltering company. Furthermore, a practitioner might not garner the requisite support to adopt and implement any extra-legal agreement with stakeholders. Therefore, the routine protection of the practitioner's profession is important to the health of business rescue and retention of highly skilled and competent professionals while ordaining adequate oversight over their conduct.

It is not always practically feasible to protect the interests of all affected parties in insolvency proceedings.[59] The notion of self-direction goes against the creation of an efficient and *regulated* rescue procedure.[60] Risk-sharing is also inevitable amid a corporate

57 the *Diener* case (n 10 (2019)) par 60.

58 *Mazars Recovery & Restructuring (Pty) Ltd v Montic Dairy (Pty) Ltd (in liquidation)* 2023 1 SA 398 (SCA).

59 Mokoena "The philosophy of business rescue law" 2019 *Journal of Corporate and Commercial Law and Practice* 1 4-5.

60 the *Diener* case (n 17 (2018)) par 40.

crisis. However, this should not be understood as a mechanical preference for practitioners and myopic exclusion of creditors. The premise for the proposed ranking is the most favourable protection for the effectiveness of the corporate insolvency regime. It is directed at promoting efficient business rescue practices and balancing the interests of all relevant stakeholders in insolvency proceedings. Similarly, this ranking purports to stifle competition between the interests of creditors and practitioners, thereby protecting the security of assets and avoiding the distortion of normal commercial activity and legitimate rescue initiatives. As a result, the proposed ranking is the optimal path to achieve fairness and equity in insolvency proceedings for affected stakeholders.

5.2 Proving a claim

Section 44(1) of the Insolvency Act states that a pre-liquidation creditor who wishes to share in the distribution of the assets in an insolvent estate must prove a claim against that estate. The Supreme Court of Appeal held that a practitioner, as a pre-liquidation creditor, must prove a claim for unpaid fees and expenses before it could be recognised and paid in liquidation proceedings.[61] The court differentiated a practitioner (pre-liquidation creditor) from persons who render services relating to the administration of the estate, as the latter persons need not prove a claim.[62] A practitioner is not included in the list of those who render such services because of the distinction between business rescue and liquidation.[63] The main difficulty with the court's finding is that a practitioner will risk non-payment for work actually completed (or expenses incurred) and liability for a contribution towards costs of liquidation if the free residue funds are insufficient.[64] Setlhako notes that this may be an "unintended" consequence of the constitutional court judgment.[65] This issue did not arise before the Constitutional Court as it rejected application for leave to appeal.

61 the *Diener* case (n 17 (2018)) par 62.
62 the *Diener* case (n 17 (2018)) par 61.
63 the *Diener* case (n 17 (2018)) par 61.
64 Calitz and O'Brien (n 50) 267; s 14(3) read with s 106 of the Insolvency Act.
65 Setlhako (n 39) 54 and 102.

On the other hand, this position seems prudent as the Act does not provide for the taxation of a practitioner's fees and expenses.[66] The absence of independent scrutiny over the fee structure seems unwise in light of the practitioner's entitlement to "liberal hourly and maximal daily tariff".[67] To exacerbate absence of independent oversight, courts have no inherent authority to order forfeiture of a practitioner's fees where their conduct warrants censure.[68] It has been noted that ordaining independent oversight over the practitioner's fees and expenses may be for the legislature to consider in contemplation of further amendments to the Act.[69] To avoid the effect of proving a claim, Setlhako submits that a practitioner *must* receive fixed remuneration ahead of secured creditors and liquidation costs after business rescue makes way for liquidation.[70] As the authors propose that the unpaid claim must be payable as *if* it formed part of liquidation costs, the practitioner's exemption from proving a claim must be considered against independent oversight of the proposed ranking.

An argument in Levenstein's seminal thesis noted that it would be "problematic" for a practitioner to contribute towards a shortfall in the free residue.[71] The intended post-rescue position was for a practitioner's unpaid claim to rank as an administrative expense before liquidation costs.[72] This argument ignored the lack of legislative safeguards against practitioners' proximity to abuse of funds and concomitantly low dividends for stakeholders. Setlhako contends that a practitioner's remuneration must be determined by a creditors resolution (or court in the event of compulsory business rescue) and filed with the Master or court for approval.[73] Alternatively, that the

66 *Murgatroyd v van Den Heever* 2015 2 SA 514 (GSJ) par 4; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2012 3 SA 273 (GSJ) par 49.

67 Borraine, Burdette and Kunst *Meskin's Insolvency Law and its operation in winding-up* (2025) par 18.14.6.

68 *Cawood NO v Murray NO* case no A127/19 (unreported) (GP).

69 the *Oakdene* case (n 66) par 49.

70 Setlhako (n 39) 112.

71 Levenstein *An Appraisal of the New South African Business Rescue Procedure* (2015 thesis UP) 424.

72 Levenstein (n 71) 424.

73 Setlhako (n 39) 112.

practitioner's remuneration must be fixed on a percentage basis against the company's asset value.[74] However, even if the current tariff-based structure is retained, the authors submit that affected parties must have the legislative licence to challenge a practitioner's claim in court. Courts must have wide powers to make any just and equitable orders, including levying necessary adjustments and interest or penalties on any unjustified remuneration and expenses incurred for purposes of self-enrichment and abuse of process. Alternatively, the legislature may consider the *extension* of the taxing master's jurisdiction to authorise independent supervision over the reasonableness of the practitioner's remuneration and disbursements. The use of the taxing Master's technical expertise is particularly attractive as courts may exercise deference to an oversight entity's decision. By doing so, the practitioner will only qualify for remuneration and expenses reasonably necessary to conduct business rescue and perform related functions.[75]

6. Conclusion

It is difficult to fault the judicial limitation of the practitioner's preferential claim to the free residue, subject to the liquidation costs. The applicable statutory mechanisms necessitated a sensible interpretation out of the conundrum of shoddy drafting. However, in the spirit of stifling (or balancing) competition between the interests of all relevant stakeholders and evading the distortion of normal commercial activities, it is hopeful that one day the legislature will give serious consideration to a novel order of preference after failed business rescue. In doing so, the legislature must protect the integrity of the business rescue regime, evade the multiplicity of practical issues against ill-considered rankings and strike an equitable balance between the competing interests of all stakeholders. It is preferable to elect a ranking of a practitioner's unpaid claim which serves as a proactive public interest measure against catastrophic socio-economic implications of a tainted business rescue regime.

74 Setlhako (n 39) 112.

75 the *Murgatroyd* case (n 66) par 21.