CASE NOTE

VICTIM PARTICIPATION IN PLEA AND SENTENCE AGREEMENTS IN SOUTH AFRICA AS A 'RIGHT': ANALYSING *WICKHAM V MAGISTRATE, STELLENBOSCH & OTHERS* 2017 (1) SACR 209 (CC)

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ABSTRACT

Section 105A of the Criminal Procedure Act empowers a prosecutor to enter into a plea and sentence agreement with an accused irrespective of the type of the offence in question. In entering into such an agreement, the prosecutor is required to give the victim of a crime an opportunity to make representations to him or her on the content of such an agreement and the issue of compensation. The section does not provide for the victim of a crime to have a right to make such representations. In *Wickham v Magistrate, Stellenbosch & Others* the Constitutional Court held that a victim of a crime has a right under section 105A to make representations to the prosecutor. Although the Constitutional Court's holding is commended for strengthening the victim's right to participate in the criminal justice system, it is argued in this article that the court should have explained in detail why it held that the victim had a right to make such representations, despite section 105A not expressly conferring such a right. The author also discusses other contributions that this judgment has made to the plea and sentence regime.

Keywords: Section 105A; Plea and Sentence Agreement; South Africa; Criminal Procedure Act; Victim Participation

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INTRODUCTION

Plea and sentence agreements have been part of South African law for some time now. Before 2001, when the Criminal Procedure Act (CPA) was amended to specifically provide for plea and sentence agreements, prosecutors and the accused used to enter into such agreements informally.[1] In 2001, the CPA was amended to include section 105A, which provides for plea and sentence agreements. Section 105A(1)(*a*) provides that '[a] prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into' a plea and sentence agreement. But section 105A(1)(*a*) is very clear that an unrepresented accused cannot enter into a plea and sentence agreement. The reasons for the exclusion of unrepresented accused from entering into plea and sentence agreements were given by the Minister of Justice when the Criminal Procedure Second Amendment Bill was tabled before the National Assembly for the second reading.[2] The Supreme Court of Appeal, in *S v DJ*,[3] explained the purpose of plea and sentence agreement process in the following terms:

> The purpose of the plea-bargaining process is to afford the parties, in advance, an opportunity to make an informed decision regarding whether to agree to and abide by the agreement. This process entails consultation with all the people involved in the offence—the accused, the complainant, the victim and stakeholders—which the prosecution deems relevant for the proper determination of the sentence. Evidently, once plea negotiations are entered into, and in the spirit of transparency, the accused will make his defence known to the state, which will, in turn, make available the contents of its dockets to the accused. In that way both parties will have a fair idea

1 See generally *S v Yengeni* 2006 (1) SACR 405 (T) para 65; *Steyl v National Director of Public Prosecutions & Another* (27307/2013) [2015] ZAGPPHC 407 (9 June 2015); and *S v Blank* (23/93) [1994] ZASCA 115 (15 September 1994).

2 The Minister submitted that 'Firstly it [the Bill] does not apply to the unrepresented accused. We feel that, generally, we should discourage the practice of the accused standing before courts without legal representation as our Constitution provides for legal representation. Secondly, we feel that if the unrepresented accused were covered, there would be an imbalance in the negotiating process in that this would pit the prosecutor, who is obviously well versed in the law and tenets of the Act, against the accused, who, being at an obvious disadvantage, will be vulnerable. The last reason for this exclusion is to protect the integrity of the plea agreement itself. Theoretically, nothing would prevent an unrepresented accused from challenging the agreement once it has been concluded. This would again, theoretically, result in litigation upon litigation which would simply defeat the point of plea bargaining.' See Debates of the National Assembly (Hansard), Third Session–Second Parliament, 9 October–16 November 2001 (2 November 2001) (submission by Minister for Justice and Constitutional Development) 7466. In the National Council of Provinces, one legislator submitted that '[a]n additional safeguard in the Act is that only accused who are legally represented may enter into plea and sentence agreements. This is necessary to both obviate any form of coercion on an accused to plead guilty and exclude this as a ground to appealing or reviewing any conviction or sentence imposed as a result of a plea and sentence agreement.' See Debates of the National Council of Provinces (Hansard) Third Session, Second Parliament, 18 September to 16 November 2001 (15 November 2001) (submission by Mr LG Lever) 3944.

3 *S v DJ* 2016 (1) SACR 377 (SCA).

> of each other's case. The negotiations are conducted in the spirit of give-and-take—the accused will make certain concessions and, if the state is satisfied with his explanation, it will then accept the negotiated plea on the basis of the available facts. There is no doubt that a properly negotiated plea will yield a result which is transparent to all the stakeholders and one that is in the interests of justice.[4]

The High Court has also explained the purpose of plea and sentencing agreements.[5] In *S v Solomons*[6] the High Court held that '[t]he plea bargaining regime is a fundamental departure from the adversarial system of our criminal law.'[7] This is because, the court added, '[o]n the one hand, the State agrees to compound the offence and, on the other hand, the accused waives several of his or her constitutional rights afforded to him or her in a trial.'[8] The inclusion of section 105A in the CPA ensures that plea and sentence agreements are regulated. Since 2001, when section 105A was included in the CPA, the National Prosecuting Authority has concluded hundreds of plea and sentence agreements[9] and case law has started to emerge demonstrating how the courts have grappled with the issue of plea and sentence agreements. These issues have included whether or not the trial judge should inform the parties should he or she be of the view that the sentence proposed in the sentence agreement is unjust,[10] factors that the court is required to consider in determining whether or not the sentence agreed upon between the prosecutor and the accused is just,[11] whether the accused can appeal against a sentence imposed on the basis of a plea and sentence agreement,[12] the fact that a trial

4 *S v DJ* (n 3) para 16.

5 In *Wickham v Magistrate, Stellenbosch & Others* 2016 (1) SACR 273 (WCC) para 63, the court held that '[t]he plea and sentencing process in terms of section 105A, although also having as an objective the giving of victims a say in the plea bargaining process, serves the broader interest of the criminal justice system, where such agreements are entered into to broaden access to justice, to dispose of cases quicker and more cost-effectively, and to give effect to an accused's right to a fair, as well as a speedy, trial.' An accused who has entered into a plea and sentence agreement may also become a state witness against a former co-accused. See *Van Heerden & Another v National Director of Public Prosecutions & Others* (145/2017) [2017] ZASCA 105 (11 September 2017) para 14.

6 *S v Solomons* 2005 (2) SACR 432 (C).

7 *S v Solomons* (n 6) para 7.

8 *S v Solomons* (n 6) para 7.

9 In November 2016, the Minister of Justice and Correctional Services informed parliament that '[t]he NPA furthermore indicated that in order to save valuable court time and speed up the finalisation of cases without impeding on the quality of prosecutions, a total of 1 901 plea and sentence agreements were successfully concluded, comprising of 7 066 counts (see Appendix 1 at the end of the annual report for a full list). This represents an increase of 8.2% compared to 1 757 agreements concluded last year. Even though the number of agreements concluded does not appear to be significant if compared to the total number of finalised cases, the counts involved in these matters would have taken up valuable court time had trials been conducted. In 15 of the cases, the counts involved more than 100 counts per case.' See Justice and Correctional Services, Questions to the Minister, 14 November 2016—NW2343 <https://pmg.org.za/committee-question/4119/> accessed 20 March 2017.

10 *S v DJ* (n 3); *S v Solomons* (n 6).

11 *S v Esterhuizen & Others* 2005 (1) SACR 490 (T).

12 *S v De Koker* 2010 (2) SACR 196 (WCC); *S v Armugga & Others* 2005 (2) SACR 259 (N).

court must first pronounce on the accused's conviction before imposing a sentence,[13] and whether the accused can take his or her conviction and sentence on review.[14]

One of the issues that courts have had to deal with is that of victim participation in plea and sentence agreements under section 105A of the CPA. As mentioned above, section 105A(1) allows a prosecutor who is so authorised by the National Director of Public Prosecutions to enter into a plea and sentence agreement with a legally represented accused. Section 105A(1)(*b*)(iii) provides that the prosecutor may do so

> after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding—(*aa*) the contents of the agreement; and (*bb*) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.

The foregoing provision makes it clear that the prosecutor has the discretion whether or not to grant the complainant an opportunity to make representations to him or her regarding the contents of the agreement and the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss. It is also clear that section 105A(1)(*b*)(iii) does not provide that a complainant has a right to make representations to the prosecutor. The High Court in *Wickham v Magistrate, Stellenbosch & Others*[15] did not deal with the issue of whether a complainant has a right to make representations to a prosecutor under section 105A(1)(*b*)(iii) of the CPA. However, on appeal to the Constitutional Court, it was held expressly that the complainant has a right to make representations to the prosecutor in plea and sentence agreements.[16] It should be noted at the outset that although section 105A(1)(*b*)(iii) uses the word 'complainant', in this article the word 'complainant' and 'victim of a crime' are used interchangeably. This is because that is the approach followed by the High Court and the Constitutional Court in the case being discussed; in addition, the drafting history of section 105A(1)(*b*)(iii), as illustrated below, shows that the legislators used these words interchangeably. Although the Constitutional Court's holding is to be commended for strengthening the victim's right to participate in the criminal justice system, it is argued in this article that the court should have explained in detail why it held that the victim had a right to make such representations, despite section 105A not expressly conferring such a right on the victim. The author also demonstrates the contribution that both the High Court and the Constitutional Court make to the plea and sentence agreement regime. The facts, arguments and holdings in both the High Court and the Constitutional Court judgments

13 *Knight v S* (A731/2016) [2017] ZAGPPHC 455 (31 July 2017).
14 *S v Taylor* 2006 (1) SACR 51 (C).
15 *Wickham v Magistrate, Stellenbosch & Others* 2016 (1) SACR 273 (WCC).
16 *Wickham v Magistrate, Stellenbosch & Others* 2017 (1) SACR 209 (CC).

are illustrated next in order to give a clear understanding of the background to the issues being discussed.

FACTS, ARGUMENTS AND HOLDINGS IN *WICKHAM V MAGISTRATE, STELLENBOSCH & OTHERS*

In February 2012, the applicant's 18-year-old son was killed in a car accident as a result of the fourth respondent's negligence. On the basis of section 105A of the CPA, the fourth respondent entered into a plea and sentence agreement with the prosecutor in which she

> admitted that she was negligent based on the fact that while she was driving, she was chatting with her friends and did not give the necessary attention or keep a proper lookout for other vehicles on the road.[17]

On the basis of the plea and sentence agreement, the fourth respondent was sentenced to eighteen months' correctional supervision and ordered to pay a fine or to serve a sentence of twelve months' imprisonment should she fail to pay the fine.[18] The prosecutor had informed the applicant that he intended to enter into a plea and sentence agreement with the fourth respondent 'and gave him a copy of the proposed Plea and Sentence Agreement'.[19] In his representations to the prosecutor, the applicant objected to the plea and sentence agreement because, in his view, it 'was unjust and not in the interests of justice'.[20] This is because

> it failed to address the extent of the negligence on the part of the Fourth Respondent, and to properly acknowledge the speed at which the Fourth Respondent had driven and the severity of the collision … [and] … that the personal circumstances of the Fourth Respondent had been over-emphasized, particularly if regard was had to the fact that she had not shown any remorse or accepted the seriousness of her actions.[21]

The applicant also argued that he and his wife had unsuccessfully requested the magistrate before he accepted the plea and sentence agreement to be 'granted the opportunity to address the court on the devastating consequences' the death of their child had 'had on the family and would continue to have for the rest of their lives'.[22]
The applicant and his attorney had a meeting with one of the prosecutors, who 'expressed her misgivings about taking the case on trial and obtaining a conviction in the absence of a plea and sentence agreement.'[23] The applicant disagreed with the prosecutor, arguing

17 *Wickham* (n 15) para 4.
18 *Wickham* (n 15) para 7.
19 *Wickham* (n 15) para 7.
20 *Wickham* (n 15) para 8.
21 *Wickham* (n 15) para 8.
22 *Wickham* (n 15) para 9.
23 *Wickham* (n 15) para 10.

that there was strong evidence, including evidence from the applicant's accident-reconstruction experts, to secure the fourth respondent's conviction.[24] The prosecutor also declined the applicant's request to submit a victim impact statement to the court for sentencing purposes because that 'statement did not qualify as a proper victim impact statement'.[25] The applicant was also not called as a witness by the magistrate's court.[26] He argued that the magistrate's refusal to call him and his wife as state witnesses had denied them, as victims, the right to participate in plea and sentence proceedings, although they were eager to do so and had made it clear that they were opposed to the plea and sentence agreement.[27] He also argued that the magistrate had refused to allow his lawyer to submit the applicant's victim impact statement to be considered for sentencing purposes and that this was in violation of his 'rights in terms of the Victim's Charter'.[28] In response, both the prosecutor and the lawyers for the accused argued that the applicant had 'no standing in the proceedings and was not entitled to hand up papers or address the court' and that the applicant's affidavit substantially 'consisted of issues relating to the merits' as opposed to being a 'purely … victim impact statement.'[29] Before the High Court, it was argued for the applicant that the prosecution had committed the following irregularities:

a. Despite having a duty to do so, it failed to address in the plea and sentence agreement the significantly aggravating factor that the Fourth Respondent had travelled at an excessive speed significantly higher than the speed limit;
b. It failed to attach the victim impact statement to the plea and sentence agreement after it had previously undertaken to do so; and
c. It adopted a view in the proceedings before the First Respondent which actively sought to exclude the Applicant's participation in the proceedings as a victim.[30]

The applicant argued further that the magistrate had committed the following irregularities: he disregarded the applicant's right in terms of the Victim's Charter to participate in the proceedings; he failed to have a look at the victim impact statement, although he was aware that the applicant and his wife had objected to the plea and sentence agreement because of the impact the crime had had on them; he failed to call the applicant and his wife to testify in the sentencing proceedings, and he concluded that the sentence agreement was just without considering the victim impact statement that would have enabled him to know the extent to which they were affected by the crime.[31]

24 *Wickham* (n 15) para 10.
25 *Wickham* (n 15) para 16.
26 *Wickham* (n 15) para 16.
27 *Wickham* (n 15) para 17.
28 *Wickham* (n 15) para 17.
29 *Wickham* (n 15) para 18.
30 *Wickham* (n 15) para 19.
31 *Wickham* (n 15) para 20.

The respondents argued, inter alia, that the applicant had no *locus standi* to bring the application.[32] The prosecutor argued that:

> Any *locus standi* … that the Applicant may have is limited to the narrow issue of whether the prosecutor failed to afford him the opportunity to make representations to the prosecution in terms of Section 105A(1)(*b*)(ii) of the Act before entering into the plea agreement. The [prosecutor] submits that he had ample opportunity to do so, he did so and such was seriously considered before entering into the agreement. The [prosecutor] points out that the fact that the complainants or family members of deceased complainants do not have general *locus standi* to contest the merits of plea agreements is in accordance with the prosecutor's role otherwise in criminal proceedings. The prosecutor is *dominus litis* regarding what charge to prefer, what plea to accept and on what basis, what evidence to lead and what sentence to suggest to the court … [T]he fact that [the prosecutor] made a decision with which the Applicant does not agree is thus neither a gross irregularity nor grounds for review.[33]

In resolving the issue before it, the court referred to academic publications and case law on the rationale behind affording a victim an opportunity to participate in the plea and sentence agreements.[34] Against that background, the court held that

> the prosecutor seeking to enter into a plea and sentence agreement with an accused person must afford the complainant or his representative an opportunity to make representations but only where it is reasonable to do so and taking into account the circumstances relating to the offence and the interest of the complainant. This provision is peremptory subject to the proviso that it is reasonable to afford the complainant an opportunity to make representations to the extent where it is reasonable to comply with. The reason … is because in terms of section 105A(4)(*b*), the prosecutor is required to satisfy the court that it has complied with the obligation placed on him or her in terms of section 105A(1)(*b*).[35]

The court added that the purpose of section 105A(1)(*b*) 'is to ensure that the prosecutor has given the complainant an opportunity to make representations.'[36] On the question of whether the prosecutor's exercise of his discretion under section 105A of the CPA is subject to judicial review, the court held that in concluding the plea and sentence agreement, the prosecutor 'performs an administrative action' and that such a decision is reviewable in terms of the Promotion of Administrative Justice Act of 2000.[37] The court made it very clear that

> In a case where a victim or complainant alleges that the prosecutor or Director of Public Prosecutions, in entering a plea and sentence agreement with an accused, did not afford them the opportunity to make representations or did not adequately consult with them, such failure to afford an opportunity to make representations or to adequately consult would be unlawful,

32 *Wickham* (n 15) para 23.2.
33 *Wickham* (n 15) paras 40–41.
34 *Wickham* (n 15) para 52.
35 *Wickham* (n 15) para 54.
36 *Wickham* (n 15) para 55.
37 *Wickham* (n 15) paras 56–57.

> where in the circumstances it was reasonable to do so and in such a case, the complainant or victim would have the necessary *locus standi* in terms of Section 1 of PAJA [Promotion of Administrative Justice Act] or in terms of the common law on the basis of the principle of legality.[38]

The court added that the prosecutor 'is only obliged to give a victim or a complainant an opportunity, which … should be a meaningful one to make representations' and that section 105A does not provide that one of the requirements for a valid plea and sentence agreement is that the prosecutor and the victim or complainant should be in agreement 'as to the precise nature of the plea or sentence agreement it intends to conclude with an accused'.[39] Further, that the plea and sentence regime 'as set out in s 105A cannot be used by victims as a means to interfere with the discretion of a prosecutor where it was exercised properly and in accordance with the law.'[40] In conclusion, it was held that on the evidence before it, the applicant 'failed to show that' the prosecutor had 'failed to afford him or his legal representative an opportunity to make representations'.[41] The court added further that 'the applicant had no right to be called as a witness or to have his evidence presented'.[42] The court emphasised the fact that

> The prosecuting authorities may decide to exercise their discretion to enter into a plea and sentence agreement, against the wishes of a victim or a complainant, where it is justified to do so. They do not act or perform their functions on the instructions or wishes of a victim or complainant; they act in the broader public interests after taking into account the interest of the victim/complainant, society, as well as the accused person. The victim/complainant is … not a party to the criminal proceedings. It is the State through the prosecuting authorities that institutes criminal proceedings against an accused person. A victim or complainant has no right therefore to demand to be heard during the criminal proceedings. Where the State during sentencing proceedings therefore legitimately exercises its discretion not to call a victim or complainant, such failure to do so would not be improper or make the proceedings irregular. Especially where the prosecutor or DPP gave them adequate opportunity to make representations and where the prosecutor properly represented and placed the concerns and wishes of the victim before the court.[43]

Dissatisfied with the High Court's ruling, the applicant appealed to the Supreme Court of Appeal, which dismissed his application and consequently he proceeded to the Constitutional Court. Before the Constitutional Court, he argued 'that the High Court's decision sets a precedent that will undermine victims' rights in terms of the Victims' Charter in future criminal proceedings.'[44] In opposing the appeal, the DPP argued, inter alia, that the applicant's 'rights as a victim of crime were adequately addressed by his

38 *Wickham* (n 15) para 58.
39 *Wickham* (n 17) para 63.
40 *Wickham* (n 15) para 65.
41 *Wickham* (n 15) para 69.
42 *Wickham* (n 15) para 73.
43 *Wickham* (n 15) paras 83–84.
44 *Wickham v Magistrate, Stellenbosch & Others* 2017 (1) SACR 209 (CC) para 20.

extensive participation in the consultations and representations preceding the plea-and-sentence agreement' and that his appeal to the Constitutional Court effectively sought 'to dictate how the prosecutor should conduct' the trial sought.[45] The DPP added that in criminal trials the *dominus litis* is the state as opposed to the victim of a crime[46] and that even if the applicant 'were granted a new trial, the DPP would still be free to conduct the trial in whatever manner he or she saw fit.'[47]

The Constitutional Court observed that the 'application substantively depends on the rights of victims contained in s[ection] 2 of the Victims' Charter'[48] and went on to refer to section 2 of the Victims' Charter[49] as follows:

> It is, however, clear from the language contained in s 2 of the Victims' Charter that these rights are not absolute. The Victims' Charter confers neither standing, nor an unqualified right to give evidence or hand up papers, nor a right to be heard on demand. A victim's right to participation in the sentencing proceedings in relation to the plea-and-sentence agreement must be read with s 105A of the CPA, which deals specifically with plea-and-sentence agreements and includes the rights of the victim to participate in the process. Relevant to the specific facts of this case are s 105A(1)(*b*)(iii) and s 105A(7)(*b*)(i)(*bb*) of the CPA, which the High Court took pains to analyse in depth before coming to the conclusion that it did.[50]

The court added that the applicant's 'rights as a victim were duly addressed through the extensive participation that he was afforded by the prosecutor for the duration of the prosecution.'[51] The court referred to section 105A(7)(*b*)(i)(*bb*) and held that '[w]hat is clear from this text is that the exercise of the victim's right to place evidence before the court (either through a statement or by oral evidence) is wholly within the court's discretion.'[52] The court concluded that the magistrate should have permitted the applicant to make submissions to determine whether or not the sentence agreed upon

45 *Wickham* (n 44) para 22.
46 *Wickham* (n 44) para 22.
47 *Wickham* (n 44) para 22.
48 *Wickham* (n 44) para 23.
49 *Wickham* (n 44) paras 24–25. Section 2 of the Victims' Charter states: 'You have the right to offer information during the criminal investigation and trial; The police, prosecutor and correctional services official will take measures to ensure that any contribution that you wish to make to the investigation, prosecution and parole; hearing is heard and considered when deciding on whether to proceed with the investigation, or in the course of the prosecution or Parole Board hearing; This right means that you can participate (if necessary and where possible) in criminal justice proceedings, by attending the bail hearing, the trial, sentencing proceedings and/or Parole Board hearing; It means that you will have the opportunity to make a further statement to the police if you realise that your first statement is incomplete. You may also, where appropriate, make a statement to the court or give evidence during the sentencing proceedings to bring the impact of the crime to the court's attention; Furthermore, you may make a written application to the Chairperson of the Parole Board to attend the parole hearing and submit a written input.'
50 *Wickham* (n 44) paras 26–27.
51 *Wickham* (n 44) para 29.
52 *Wickham* (n 44) para 31.

between the accused and the prosecutor was just 'provided this could be done without infringing upon the rights' of the accused.[53]

Analysing the Court's Judgment

The first point to note about the Constitutional Court's judgment is that the court held expressly that a victim of crime has a right under section 105A(1)(*b*)(iii) to participate in the plea and sentence process. This is the case even though section 105A(1)(*b*)(iii) expressly provides that the complainant should be afforded 'an opportunity'. This is a conclusion that the High Court did not reach. However, there are cases in which the Supreme Court of Appeal and another division of the High Court held or approved the view that a victim should be given a right to make representations under section 105A(1)(*b*)(iii).[54] The Constitutional Court's holding that a victim has a right to make representations to the prosecutor even though section 105A does not expressly provide for that right leaves some questions unanswered.

The first question relates to the language used in section 105A of the CPA. Was it an oversight on the part of the legislators that they used the word 'opportunity' as opposed to 'a right'? The drafting history of section 105A does not support this conclusion. The Criminal Procedure Second Amendment Bill, which sought to amend the CPA by inserting section 105A into it, was debated and passed by the National Assembly on 2 November 2001. The debates in the National Assembly (Hansard) show that the issue of victim participation was emphasised by some of the legislators. During the second reading of the Criminal Procedure Second Amendment Bill, three legislators in the National Assembly made submissions on section 105A(1)(*b*)(iii). The first legislator stated:

> [I]n this Bill … there is a role created for victims of crime. In terms of the Act, the prosecutor, prior to finalising the formal agreement with the accused, has to consult with the investigating officer and the victim in the matter concerned. The victim in this regard is able to do two things. Firstly, they are able to make representations as to the proposed charge and sentence. Secondly, the victim can insist on the inclusion in the agreement of the compensation provision relating to any damages suffered.[55]

Another legislator submitted that he supported the Bill because, inter alia, of the fact that victims of crime will be able to make representations to the prosecutor on the question of compensation before a plea and sentence agreement is concluded with the accused.[56]

53 *Wickham* (n 44) para 34.

54 *Jansen v The State* 2016 (1) SACR 377 (SCA) para 17; *S v Saasin & Others* (84/02) [2003] ZANCHC 44 (20 October 2003) para 11.4

55 Debates of the National Assembly (Hansard), Third Session–Second Parliament, 9 October–16 November 2001 (2 November 2001) (submission by Minister for Justice and Constitutional Development) 7467.

56 Debates of the National Assembly (Hansard) (n 54) (submission by Dr JT Delport) 7469.

Another legislator submitted that her political party welcomed the Bill particularly because of

> [t]he fact that victims of crime must, where it is reasonably possible to do so, be afforded the opportunity to make presentations regarding the contents of the agreement and the inclusion of a condition relating to the compensation of the rendering of the complainant of some specific benefit or service. The prosecutor must also consult regarding the interests of the community. Thus, not only are victims' rights included, but community interests are also considered.[57]

The above discussion illustrates the fact that during the debates in the National Assembly, victim participation in plea and sentence agreements was not considered as a right. After the Bill was passed by the National Assembly, it was tabled before the National Council of Provinces,[58] where two legislators made submissions on the issue of victim participation in the plea and sentence agreements. The first legislator stated that his party supported the Bill because '[i]t is a detailed and excellent piece of work which ensures that the rights of both the victims of crime and the accused are not overlooked where such a plea bargain arrangement or sentence is made a court order.'[59] The second legislator submitted that his party also supported the Bill because, inter alia,

> [w]here it is reasonable to do so, the prosecutor must allow the complainant or his or her legal representatives to make representation regarding the contents of the agreement and the possibility of including, in the agreement, a condition relating to compensation or rendering of some benefit or service in lieu of compensation to the complainant.[60]

The above drafting history of section 105A shows that the legislator did not provide for the right of the victim to make representations to the prosecutor; what they provided for was the opportunity for the victim to make such representation. Had they wanted to provide for such a right, nothing would have prevented them from stating so expressly and in particular by replacing the word 'opportunity' with 'right' and making the necessary changes to the section. Therefore, the court's conclusion that a complainant has a right to make such representations would have benefited from a detailed explanation of the basis of the right and what it entails. For example, the court should have explained why the 'opportunity' referred to in section 105A is the same thing as the 'right' it held that a victim has. It should also be remembered that in cases where the legislators wanted to provide for rights in the CPA they did so expressly. These cases include the right to institute a private prosecution,[61] the right to prosecute,[62] third-party rights in the

57 Debates of the National Assembly (Hansard) (n 55) (submission by Mrs C Dudley) 7472.
58 This was in accordance with s 44 of the Constitution of South Africa, 1996.
59 Debates of the National Council of Provinces (Hansard) Third Session–Second Parliament, 18 September to 16 November 2001 (15 November 2001) (submission by Mr PA Matthee) 3942.
60 Debates of the National Council of Provinces (Hansard) (n 58) (submission by Mr PA Matthee) 3944.
61 Section 8, CPA.
62 Section 18, CPA.

property ordered to be forfeited to the state,[63] the right to institute bail proceedings,[64] the right to legal representation,[65] the right to be tried before another judicial officer should the prosecutor and accused withdraw from the plea and sentence agreement,[66] and the right of complainants to make representations in some cases where the offender is being considered for parole.[67]

The question that has to be answered is this: why is it that, if the legislators wanted to provide for a right, they chose to provide for an opportunity? Explaining why the victim has a right as opposed to an opportunity to make representations to the prosecutor, notwithstanding the fact that the legislator did not expressly mention that right, would have clarified the ambiguity that is likely to be created by the court's ruling on whether the victim in fact has a right or it remains an opportunity.

It should also be noted that in the past the Constitutional Court, though in a different context, has drawn a distinction between a 'right', on the one hand, and an 'opportunity', on the other. For example, in *Doctors for Life International v Speaker of the National Assembly & Others*[68] the Constitutional Court had to deal with the right of citizens to participate in law-making. The court made reference to Article 25 of the International Covenant on Civil and Political Rights, which provides that '[e]very citizen shall have the right and the opportunity … [t]o take part in the conduct of public affairs, directly or through freely chosen representatives.' It is clear that Article 25 of the International Covenant on Civil and Political Rights makes the distinction between the right to take part in the conduct of public affairs, either directly or through freely chosen representatives, and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives. The court referred to Article 25 of the International Covenant on Civil and Political Rights and held that

> [s]ignificantly, the ICCPR [International Covenant on Civil and Political Rights] guarantees not only the 'right' but also the 'opportunity' to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.[69]

The court added that citizens should have 'the effective opportunity to exercise the right to political participation'.[70] The court also refers to other human rights instruments

63 Section 35, CPA.
64 Section 50(1)(*b*), CPA.
65 Section 73(2A), CPA.
66 Section 150A(9)(*d*), CPA.
67 Section 299A, CPA. Cases in which this section has been invoked include *Madonsela v S* (A 176/2013) [2014] ZAGPPHC 1013 (4 December 2014); *Derby-Lewis v Minister of Correctional Services & Others* 2009 (6) SA 205 (GNP), 2009 (2) SACR 522 (GNP), [2009] 3 All SA 55 (GNP).
68 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC).
69 *Doctors for Life International* (n 68) para 91.
70 *Doctors for Life International* (n 68) para 92.

that distinguish between the right and the opportunity of a citizen to participate in the political affairs of his country.[71] In *Wickham v Magistrate, Stellenbosch & Others* the court also does not explain the status of the right under section 105A(1)(*b*)(iii). It should be noted that section 39(3) of the Constitution provides that

> [t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

It is not clear whether the right the court refers to under section 105A(1)(*b*)(iii) is 'recognised or conferred by common law, customary law or legislation'. In other words, is it a statutory right, a common-law right or a customary-law right? It would have been helpful if the court had clarified the source of the right under section 105A(1)(*b*)(iii).[72] Much as there remains questions about the right the court refers to under section 105A(1)(*b*)(iii) of the CPA, one should not lose sight of the fact that the court's holding strengthens the position of the victim to participate in the criminal justice system. The time is therefore probably ripe for the legislature to amend section 150A to expressly provide for the right of the victim to make presentations to the prosecutor.

Another issue to note about the Constitutional Court's judgment is that it does not disagree with the High Court that a prosecutor's decision to enter into a plea and sentencing agreement with the accused under section 105A is not beyond scrutiny.[73] Such a decision is an administrative action which may be reviewed under the Promotion of Administrative Justice Act 2000 or on the basis of the principle of legality. The High Court held that victim participation in plea and sentencing proceedings should be meaningful; the Constitutional Court does not disagree with this holding. This is the case even though section 105A does not provide expressly that the participation has to be meaningful. However, although the court does not refer to the drafting history of section 105A, this history, as demonstrated above, supports the view that victim's participation has to be meaningful. The implications for this holding is that prosecutors should be aware of the fact that although section 105A does not provide for the right of a complainant to make representations to the prosecutor before he or she enters into a plea and sentence agreement, failure to afford the complainant an opportunity to make such representations could be challenged successfully by the victim. This means that victims or complainants have an opportunity to scrutinise the process that was followed in concluding a plea and sentence agreement. However, what the courts do not deal with is the question of whether there is any relationship between section 105A(1)(*b*)(iii) of the CPA and section 1(*ff*) of the Promotion of Administrative Justice Act,[74] which

71 *Doctors for Life International* (n 68) paras 94, 97.

72 For a brief discussion of s 39(3) of the Constitution see I Currie and J de Waal, *Bill of Rights Handbook* (5 edn, Juta 2005) 162.

73 *Wickham* (n 44) para 16.

74 Promotion of Administrative Justice Act 3 of 2000.

provides that administrative action 'does not include a decision to institute or continue a prosecution'.[75] This is so because of the fact that the prosecutor's decision whether or not to allow the complainant to make representations is made in the context of the decision to institute a prosecution.

The Constitutional Court 'endorse[d] the High Court's observation that the magistrate of the trial court could have exercised some degree of judicial maturity, civility and empathy to allow Mr Wickham latitude to express his feelings at having lost his son, provided this could have been done without infringing upon the rights of' the accused.[76] This means that, unlike in the case of making representations to the prosecutor, where the complainant has a right, he or she does not have a right to make submissions before the trial court to enable the court to decide whether or not the sentence agreed upon between the accused and the prosecutor is just. Nonetheless, this conclusion will hopefully encourage trial courts to give such victims an opportunity to make submissions on the impact the offence had on them before the court could decide whether or not the sentence agreed upon between the accused and prosecution is just.

It should be recalled that the conclusion of the plea and sentence agreement between the accused and the prosecutor is not the end of the story: a court still has to be satisfied, inter alia, that the sentence agreed upon is just. The fact that courts would have the final say on the question of whether or not a plea and sentence agreement should be accepted was highlighted in the National Assembly debates on section 105A. There it was submitted that

> [i]ndeed, the courts would have the final say because they would have to accept the plea or sentencing agreement. If the court does not accept it, for whatever reasons, it does not matter whether one is talking about possession of a few grams of cocaine or dagga, or about murder, then there is no agreement. The case proceeds as though there has never been an agreement at all.[77]

It is against that background that section 105A(7)–(9) provides for the procedure that has to be followed should the court be of the view that the sentence agreed upon between the accused and the prosecutor is unjust.[78] The Supreme Court of Appeal held that the

75 For a discussion of this provision see, for example, *Booysen v Acting National Director of Public Prosecutions & Others* [2014] 2 All SA 391 (KZD), 2014 (9) BCLR 1064 (KZD), 2014 (2) SACR 556 (KZD) paras 12 and 24; *S v April* 2014 (1) SACR 183 (NCK) paras 6 and 7; and *National Director of Public Prosecutions & Others v Freedom Under Law* 2014 (4) SA 298 (SCA), 2014 (2) SACR 107 (SCA), [2014] 4 All SA 147 (SCA).

76 *Wickham* (n 44) para 34.

77 Debates of the National Assembly (Hansard), Third Session–Second Parliament, 9 October–16 November 2001 (2 November 2001) (submission by Minister for Justice and Constitutional Development) 7474.

78 The subsections provide that '(7)(*a*) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement. (*b*) For purposes of paragraph (*a*), the court—(i) may—(*aa*) direct relevant questions, including questions about the previous convictions

procedure under section 105A(7)–(9) is peremptory.[79] In *S v Yengeni*[80] the High Court held that

> [i]t should be underlined that a plea-bargaining agreement in terms of s 105A of the Criminal Procedure Act … is expressly subject to the court's prior finding that the agreement is just, which decision is made by the court independently of the parties to such agreement.[81]

Under section 105A(7)(*b*)(i)(*bb*), the court, in determining whether or not the sentence agreed upon between the prosecutor and the accused is just, may 'hear evidence, including evidence or a statement by or on behalf of the accused or the complainant.' On the basis of section 105A(7)(*b*)(i)(*bb*), the court could admit a victim impact report in deciding whether or not the sentence is just. It should be recalled that a plea and sentence agreement is applicable to all offences including rape, murder and robbery. This issue was emphasised during the debates in the National Assembly on section 105A.[82] On the question of victim impact reports, in one case where a minor was raped, the High Court held that '[d]epending on the circumstances of the case, it may also be necessary that victim impact reports be prepared in respect of the family members of the victims.'[83] South African courts have admitted victim impact reports in cases such as rape[84] and the manufacture of child pornography.[85] Victim impact reports could also enable the court to conclude that the impact the offence had on the victim is not as serious as suggested by the prosecutor.[86] However, as the Constitutional Court held, victim participation in sentencing proceedings should 'be done without infringing upon the rights' of the accused.[87] In determining whether or not the sentence agreed upon

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of the accused, to the prosecutor and the accused; and (*bb*) hear evidence, including evidence or a statement by or on behalf of the accused or the complainant; (8) If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement. (9)(*a*) If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just. (*b*) Upon being informed of the sentence which the court considers just, the prosecutor and the accused may—(i) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or (ii) withdraw from the agreement. (*c*) If the prosecutor and the accused abide by the agreement as contemplated in paragraph (*b*)(i), the court shall convict the accused of the offence charged and impose the sentence which it considers just.'

79 *S v DJ* (n 3). See also *S v Solomons* (n 6).

80 *S v Yengeni* (n 1).

81 *Wickham* (n 44) para 25.

82 Debates of the National Assembly (Hansard), Third Session–Second Parliament, 9 October–16 November 2001 (2 November 2001) 7474.

83 *Williams v S* (A118/2015) [2015] ZAWCHC 179 (27 November 2015) para 35.

84 *Mzobanzi v S* (A5572015) [2016] ZAGPPHC 338 (29 April 2016); *Williams v S* (n 83).

85 *Kleinhans v S* (A232/2013) [2014] ZAWCHC 68; 2014 (2) SACR 575 (WCC) (13 May 2014).

86 *Kleinhans* (n 85) para 19.

87 *Wickham* (n 44) para 34.

between the accused and the prosecutor is just, a judicial officer cannot ignore the accused's personal circumstances.[88]

CONCLUSION

Section 105A of the CPA empowers a prosecutor to enter into a plea and sentence agreement with the accused. In entering into such an agreement, the prosecutor is required to give the victim of a crime an opportunity to make representations to him on the content of such an agreement and the issue of compensation. The section does not provide that the accused has a right to make such representations. In *Wickham v Magistrate, Stellenbosch & Others* the Constitutional Court held that a victim of a crime has a right under section 105A to make representations to the prosecutor. It has been argued in this article that although the Constitutional Court's holding is commended for strengthening the victim's participation in the criminal justice system, the court should have explained in detail why it held that the victim had a right to make such representations, given that section 105A does not expressly confer such a right on the victim.

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