

# A CUSTOMARY INSURANCE LAW?

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## Abstract

This paper will explore risk-spreading practices in the so-called popular economy in South Africa. Concepts like ‘insurance’, ‘insurance law’ and ‘customary law’ will be interrogated, with the analysis falling on traditional and more modern informal responses to risk, as well as more formal responses resulting from the increased penetration of private insurance in the democratic era. This contribution aims to address concerns expressed about both informal and formal risk-spreading practices, to argue towards a conclusion that a pluralistic notion of ‘insurance’ should not necessarily be sacrificed in service of corporate profit aims. Value remains in customary insurance law, and these cultural responses may provide evidence of a broader contract value system to be used in the service of developing the South African laws of contract and insurance. At the very least, this value system should inform concepts like ‘consumer insurance law’ and should be foregrounded in developing a notion of micro-insurance. South Africa has the potential to be a world leader in the field of customary insurance law, as the failings of a comparable system — funeral insurance in Australia — demonstrate.

*Keywords:* insurance; legal pluralism; popular economy; micro-insurance; indigenous persons; South Africa; Australia.

## I INTRODUCTION

This article forms part of a broader inquiry into what is African about contracting in South Africa.<sup>1</sup> The South African Constitution recognises two equal, but distinct, sources of law: one, the common law, which

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<sup>1</sup> See, further, Hutchison, ‘Decolonising South African contract law: an argument for synthesis’ in Siliquini-Cinelli & Hutchison (eds), *The Constitutional Dimension of Contract Law: A Comparative Analysis* (Springer 2017) 151.

governs formal sector contracts in South Africa; the other, customary law, which is a separate, constitutionally recognised, source of law and applies ‘when ... applicable’.<sup>2</sup> Chanock has described these (from a historical perspective) as comprising the ‘common law A’ and ‘common law B’ of South African law respectively.<sup>3</sup> He notes that during the formative period of South African law in the first part of the twentieth century, each had its own set of legislation and courts, which built up two parallel branches of the law, namely one for the ruling white population and the other for the (disenfranchised) indigenous African population.<sup>4</sup> Today, in the democratic era, all law is subject to a supreme Constitution and, as a result, there is only one system of law in South Africa.<sup>5</sup> Due to s 211(3) of the Constitution, however, the common law and customary law remain (to a certain extent) parallel — although now equal — partners in a legally plural framework of law.<sup>6</sup>

Insurance, as provided by private insurance companies in South Africa, has usually been thought of as an example of a so-called specific contract in this country, governed by the common law of contract (including some insurance contract-specific terms implied by law),<sup>7</sup> and a few sector-specific pieces of legislation.<sup>8</sup> There are, of course, other recognised forms of insurance outside the domain of private insurance companies, particularly certain compulsory forms of social insurance, such as those funded by workers in formal employment for the contingency

<sup>2</sup> See ss 8, 39(2), 173 and 211(3) of the Constitution of the Republic of South Africa, 1996. On the division of spheres of application between common and customary law, see Du Bois (ed), *Wille’s Principles of South African Law* 9 ed (Juta 2007) chaps 2, 4 and 5; Himonga & Nhlapo (eds), *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (OUP 2014) part 1, especially chap 5.

<sup>3</sup> Chanock, *The Making of South African Legal Culture 1902–1936* (CUP 2001) parts III & IV.

<sup>4</sup> *Idem* 243–244.

<sup>5</sup> *Pharmaceutical Manufacturers Association of SA & another: in re ex parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) para 44; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA 490 (CC) para 22.

<sup>6</sup> On the respective roles of the common and customary law as sources of law, see, for example, *Alexkor Ltd & another v The Richtersveld Community & others* 2004 (5) SA 460 (CC) para 51; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 23.

<sup>7</sup> An authoritative common-law definition by Lee & Honore 2ed (Butterworths 1978) (*SA Law of Obligations*, 149 para 586) of the contract of insurance was confirmed in *Lake & others v Reinsurance Corporation Ltd & others* 1967 (3) 124 (W) at 127A: ‘[Insurance is a] contract between an insurer ... and an insured ... whereby the insurer undertakes in return for the payment of a price or premium to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest.’ Compare, generally, Reinecke et al, *South African Insurance Law* (LexisNexis 2013); Davis, Gordon & Getz: *The South African Law of Insurance* 4 ed (Juta 1993).

<sup>8</sup> See, especially, Long-term Insurance Act 52 of 1998; Short-term Insurance Act 53 of 1998; and Financial Advisory and Intermediary Services Act 37 of 2002.

of losing their employment or being otherwise unable to work.<sup>9</sup> There is even a link to the concept of social assistance here, whereby the government provides a variety of grants to certain classes of the population who meet a means test.<sup>10</sup> (Although social assistance is not strictly speaking insurance, it provides a safety mechanism for vulnerable members of society.)<sup>11</sup> This study would like to cast the net a little wider, however, to study not only formal-sector insurance, but also informal forms of insurance. This article therefore combines elements of both aspects of risk management to explore the concept of 'insurance' in a broad sense within a sector that economic anthropologists have labelled the 'popular economy'.<sup>12</sup> The intention is to uncover insurance behaviour and 'law', as practised by communities at roots level in South Africa.

The title of this article should not be read as suggesting an inquiry strictly into 'common law B' as Chanock would put it (that is, customary law). Rather, the article aims to explore risk-spreading mechanisms in the popular economy as a whole, encompassing both formal and informal means of insurance. The Constitutional Court has told us that the recognised version of customary law is the 'living' customary law.<sup>13</sup> This article takes the view that this living law today is not merely the traditions of a pre-commercial society as reflected in the leading works on customary contract law,<sup>14</sup> but rather a vibrant tradition of modern life and custom, which, for the commercial sector, is best explored by empirical study. This article will henceforth draw on the empirical work of others, particularly those working in economic anthropology and

<sup>9</sup> For an explanation of the 'social insurance' concept and how this relates to social assistance and social security, see Olivier, 'Social security: framework' in Joubert (ed), *LAWSA* vol 13(2) 2 ed (LexisNexis 2012) paras 15–19. See, also, the discussion in Mpedi & Millard, 'Bridging the gap: the role of micro-insurance in a comprehensive social-protection system in South Africa' (2010) 31 *Obiter* 497 at 499.

<sup>10</sup> Olivier, (LexisNexis 2012) paras 10–14; Mpedi & Millard, (2010) 31 *Obiter* 497 at 498–499.

<sup>11</sup> Olivier, (LexisNexis 2012) paras 10–14.

<sup>12</sup> For an introduction to the concept of the 'popular economy', see the various essays collected in the 2012 special issue of the journal *Africa: The Journal of the International African Institute* (hereafter *Africa*) (vol 82(1)), particularly Hull & James, 'Introduction: popular economies in South Africa' (2012) 82 *Africa* 1.

<sup>13</sup> *Alexkor* paras 51–57; *Bhe & others v Magistrate, Khayelitsha, & others* (Commission for Gender Equality as *amicus curiae*); *Shibi v Sithole & others*; *South African Human Rights Commission & another v President of the Republic of South Africa & another* 2005 (1) SA 580 (CC) paras 40–46, 156–157; *Shilubana & others v Nwamitwa* 2009 (2) SA 66 (CC) paras 42–49; *MM v MN & another* 2013 (4) SA 415 (CC) paras 23–25; Himonga & Nhlapo (OUP 2014) 31.

<sup>14</sup> Himonga & Nhlapo, (OUP 2014) chap 10; Bekker, 'Law of contract' in Joubert (ed), *LAWSA* vol 32 'Indigenous Law' 2 ed (LexisNexis 2009) paras 230–243. For a world perspective, see Gordley, 'Contracts in pre-commercial societies and in Western history' in Von Mehren (ed), *International Encyclopedia of Comparative Law* (Mohr Siebeck 1997) VII(1) 2-2–2-19.

economic sociology, to present a broader view of what a new customary law of insurance may entail. Having established this extended concept of 'insurance', the article will then argue for the continued relevance of a pluralistic view of insurance law, which takes into account insurance behaviour,<sup>15</sup> and which acknowledges the continuing relevance of indigenous norms.

Part two of this article explains the use of terminology for the purposes of this contribution and thereby lays the foundation for what is to follow. Part three examines insurance practices outside of the mainstream economy and evaluates the utility of these in the popular economy. Part four describes and evaluates insurance provided by the formal economy to the popular market, with particular emphasis on the types of products commonly purchased and typical problems experienced in this interface. Part five presents a comparative account of the Australian experience of the marketing of funeral insurance to indigenous peoples, thereby presenting an alternative perspective to the narrative set up in parts three and four, and illustrating how South African culture and context give it the potential to be a world leader in the so-called micro-insurance market. Part six concludes with a defence of a pluralistic notion of insurance and insurance law, setting out the case for a living customary law of insurance.

## II CONCEPTS

In the interests of clarity this article will define certain concepts at the outset. These definitions are not necessarily intended in any technical sense, but merely to aid the exposition of the arguments contained herein. The most important of these are described below.

### (a) 'African'

This is more of a caveat than a definition. Africa is a broad and diverse continent, with many different peoples who have vastly differing world views. The author does not intend to generalise here, or to defend a stereotype. There are debates in the legal literature that defend a so-called African worldview, and that could be read as presenting a certain measure of cultural relativism.<sup>16</sup> Ideas such as ubuntu, communitarianism and

<sup>15</sup> The distinction between contract law and contract behaviour is respectively one between the fields of study of lawyers and socio-legal scholars. In the view of the present author, both hold merit in uncovering the best approach to insurance regulation.

<sup>16</sup> Compare (in the context of human rights) the discussion in Wa Mutua, 'The Banjul Charter and the African cultural fingerprint: an evaluation of the language of duties' (1995) 35

humanism are often included in such discussions.<sup>17</sup> This article, written by an outsider to the South African indigenous community, does not intend to voice any opinion on these issues. What this paper will do, is draw on the work of others, particularly social scientists, who have studied the popular economy, both empirically and through the growing secondary literature, to attempt to present a broader aspect of insurance practices in South Africa. This will reveal a construct which speaks to our South African society and economy in a way which is possibly distinct from that found in the home countries of the so-called parent legal systems in Europe, which provided the origins of formal South African insurance law. In such a way, this more inclusive view of insurance ‘law in society’ could be said to be more African, or more accurately, more South African.

*(b) Legal pluralism and customary law*

Himonga and Nhlapo give the following description of legal pluralism:

‘[L]egal pluralism seeks to decentralise state law and draw attention to and understand the multiple legal systems that exist officially and unofficially within a single legal order. ...[L]egal pluralism refers to two or more legal systems or normative orders that may or may not be recognised as strictly legal systems but that nevertheless co-exist. The key is that they should have sufficient authority to direct people’s behaviour and make them feel that they “ought to do something” in accordance with established norms whether explicit or not.’<sup>18</sup>

*Virginia J of International Law* 339; Ibhawoh, ‘Between culture and constitution: evaluating the cultural legitimacy of human rights in the African state’ (2000) 22 *Human Rights Quarterly* 838. See, also, Gyekye, *Tradition and Modernity: Philosophical Reflections on the African Experience* (OUP 1997). The literature on ubuntu in South Africa also refers. See, especially, Mokgoro, ‘Ubuntu and the law in South Africa’ (1998) 4 *Buffalo Human Rights Law Review* 15; Cornell & Muvangua (eds), *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (Fordham University Press 2012); Diedrich (ed), *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (Juta 2011); Keep & Midgley, ‘The emerging role of ubuntu-botho in developing a consensual South African legal culture’ in Bruinsma & Nelken (eds), *Explorations in Legal Cultures* (Elsevier’s-Gravenhage 2007) 29; Himonga, ‘The right to health in an African cultural context: the role of ubuntu in the realization of the right to health with special reference to South Africa’ (2013) 57 *Journal of African Law* 165; Praeg, *A Report on Ubuntu* (University of KwaZulu-Natal Press 2014).

<sup>17</sup> See the sources on ubuntu in the preceding footnote.

<sup>18</sup> Himonga & Nhlapo, (OUP 2014) 45. See, further, Bennett, ‘Comparative law and African customary law’ in Reimann & Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 641 at 666–671; Moore, ‘Law and social change: the semi-autonomous social field as an appropriate subject of study’ (1973) 7 *Law and Society Review* 719; Griffiths, ‘What is legal pluralism?’ (1986) 18 *Journal of Legal Pluralism and Unofficial Law* 1; Merry, ‘Legal pluralism’ (1988) 22 *Law and Society Review* 869.

For present purposes, African customary law, operating as a parallel system of law in South Africa (as set out above), renders the South African legal system a pluralistic one. The Constitutional Court's interpretation that the living customary law is the true version, means that rather than looking for the rules and principles of this source of law in the records of the pre-democratic courts, or in legislation, it must be sought among the living practices of a given community.<sup>19</sup> As such, this presents an alternative concept of 'law' to what is formally recognised as law in the more positivist (or centralist) sources of the common law.<sup>20</sup> This means that an investigation into a customary law of insurance must inquire into the lived practices of the South African indigenous communities. This is the realm of socio-legal studies and some solid work has been done in this field by social scientists. This will be set out in part three below. The net result is that what is described as 'customary insurance law' in this article may not meet a positivist/centralist definition as to what would conventionally constitute law to a lawyer. The nature of this study means that the net has deliberately been cast wider to encompass both insurance practices and behaviour, as well as norms viewed as having the force of law in a given community, if not directly by official state-sanctioned law.

### (c) 'Popular economy'

In the literature produced on South Africa's economy, a distinction has sometimes been drawn between the formal and informal sectors.<sup>21</sup> The theory behind this is that the formal sector encompasses those who are employed in conventional employment and thus earn a salaried livelihood; while the informal sector includes those outside of this realm, who earn a living on their own entrepreneurial wits, typically within South Africa's townships.<sup>22</sup> However, economic anthropologists working on the South African economy have problematised this duality, since wages

<sup>19</sup> See footnote 13 above. Bennett, *Customary Law in South Africa* (Juta 2004) 7 describes the 'official' version of African customary law as existing in the forms of legislation or judicial precedent, typically from the pre-democratic era. Bennett notes the risk of distortion in these sources to serve ulterior social aims. Even academic versions of customary law, often based on the official sources, may be viewed as suspect. This explains the emphasis on the living law in the academic works on customary law of the constitutional era.

<sup>20</sup> Compare the discussion in Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (OUP 1997) chap 4.

<sup>21</sup> For a more detailed analysis of this duality, see the debate between Callebert and Seekings in the 2014 edition of *Africa*: Callebert, "Transcending dual economies: reflections on "popular economies in South Africa"" (2014) 84 *Africa* 119; Seekings, "Taking disadvantage seriously: the "underclass" in post-apartheid South Africa" (2014) 84 *Africa* 135.

<sup>22</sup> See the papers cited in the preceding footnote.

earned in the formal economy often circulate in the informal economy, both through remittances and through the employment of this capital in informal businesses.<sup>23</sup> Instead, these scholars propose the term ‘popular economy’ is used to describe the commercial sector, particularly among those living an urban lifestyle in South Africa’s townships in which a large portion of the indigenous population operates.<sup>24</sup> This is the sector which this article draws on in describing a broader view of insurance practices. The terms ‘formal’ and ‘informal’ are retained, however, to distinguish between traditional modes of insurance which meet the conventional definition of that term (‘formal’) and those methods of risk management which fall outside of this paradigm, some of which can be considered as insurance only in a colloquial sense (‘informal’).

*(d) ‘Insurance’ and ‘insurance law’*

In the light of the above definitions it should by now be clear that the concepts of ‘insurance’ and ‘insurance law’ used in this paper will go beyond the formal definitions set out by the South African courts and legislature. By the term ‘insurance’, this paper merely means to describe the field of risk management, which is apt for the pluralistic concept of insurance found in the popular economy and in traditional African customary-law sources.

### III INFORMAL-SECTOR RISK-SPREADING MECHANISMS

*(a) Risk-spreading mechanisms falling outside of traditional definitions of insurance*

The mechanisms discussed below are described in the secondary literature on African customary law and on the popular economy as having a function of risk management.

*(i) Mafisa, sisa or nqoma agreements*

This is one of the more traditional forms of risk spreading in South African communities, reported in some of the written accounts of African customary law.<sup>25</sup> Himonga and Nhlapo deal with mafisa, sisa or nqoma transactions (hereafter simply ‘sisa transactions’) in their chap-

<sup>23</sup> Ibid. Compare the findings of Dickerson, ‘Promises of future performance and informal-sector transfers of personal property: the example of anglophone Cameroon’ (2011) *Acta Juridica* 285 at 300.

<sup>24</sup> For an overview, see, generally, Hull & James, (2012) 82 *Africa* 1.

<sup>25</sup> Himonga & Nhlapo, (OUP 2014) 194–195; Bekker, (LexisNexis 2009) para 241.



ter on customary contracts, as does Bekker in the *LAWSA* account.<sup>26</sup> Essentially, in this type of transaction, a community member who owns a large herd of cattle or other livestock entrusts a portion of his herd to a less wealthy member of the community (usually a family member).<sup>27</sup> Ownership of the cattle, as well as any progeny, remains with the benefactor, although the recipient obtains access to milk and other benefits of possession.<sup>28</sup> There is both a social upliftment and a risk-spreading function present in this type of transaction. From the cattle owner's point of view, Bekker describes how a transaction of this kind hedges against the loss of livestock due to disease, by spreading the herd over a broader geographical area.<sup>29</sup> There is also the advantage of access to fresh pasture lands.<sup>30</sup> African customary law, it should be noted, knows no concept of prescription.<sup>31</sup>

Nevertheless, Himonga and Nhlapo add a caution that this may be an example of a distorted, official version of customary law and that this practice may be in the process of dying out.<sup>32</sup> The concept of a traditional, pre-commercial notion of contracting in customary law may also be an incorrect equation between Western concepts of what constitutes a contract (that is, reciprocal legal rights, created by agreement, and often arising out of property ownership), and African notions of what constitutes (for example) a *sisa* transaction, which may be based instead on a sense of duty, arising out of kinship.<sup>33</sup> Bennett discusses the important role given to promises in African customary law, but notes that these typically arise in a family situation, rather than between strangers.<sup>34</sup> In a similar vein, he notes that traditional African dispute resolution is more about mending relationships than enforcing rights created by legal rules.<sup>35</sup> This, he argues, may reflect a society which does not typically resort to the official state sanctions necessary to enforce performance (if these were available at all in pre-commercial times).<sup>36</sup> Hence the description of customary law as processual, rather than

<sup>26</sup> Himonga & Nhlapo, (OUP 2014) 194–195; Bekker, (LexisNexis 2009) para 241.

<sup>27</sup> Himonga & Nhlapo, (OUP 2014) 194; Bekker, (LexisNexis 2009) para 241.

<sup>28</sup> Himonga & Nhlapo, (OUP 2014) 194; Bekker, (LexisNexis 2009) para 241.

<sup>29</sup> Bekker, (LexisNexis 2009) para 241.

<sup>30</sup> Himonga & Nhlapo, (OUP 2014) 194–195.

<sup>31</sup> *Idem* 208–209; Bekker, (LexisNexis 2009) para 243.

<sup>32</sup> Himonga & Nhlapo, (OUP 2014) 195 (citing Mqoke, *Customary Law and the New Millennium* (Lovedale Press 2003) 118).

<sup>33</sup> Bennett, (OUP 2006) 652–656.

<sup>34</sup> *Idem* 655.

<sup>35</sup> *Idem* 657.

<sup>36</sup> *Idem* 657–658.



rules-based.<sup>37</sup> However, Bennett goes on to call for a study of the heterogeneous population of modern South African townships where commercial transactions between African parties are common.<sup>38</sup> There is thus a possibility that idealistic notions of a former version of traditional (perhaps even official) customary contract law may give way in the future to a new living customary law of contract, as practised in the popular economy.

(ii) *Community/self-insurance*

In studies that focus on the economic aspects of the popular economy rather than customary law, a common source of finance — providing both credit and a means to deal with calamitous events — is described as consisting of reciprocal lending among friends, relatives and other community members.<sup>39</sup> Mashigo describes such a network of reciprocal relationships, which provides a source of finance based on community relations.<sup>40</sup> She describes the lending motive here as ‘inter-dependence’, supported by a communal sense of obligation and the expectation of future reciprocity should the parties’ positions reverse.<sup>41</sup> The major collateral provided for such loans is trust, which is facilitated by a high degree of knowledge of the circumstances and financial habits of the debtor party.<sup>42</sup> In this way, the cost of managing the risk of uncertain events is spread among the members of a community, who see value in helping others in need, or feel a cultural sense of duty to do so. This is a very simple form of risk-pooling mechanism, but is a possible source of aid to those unable to provide for themselves.

<sup>37</sup> *Idem* 657. Compare Bennett, (Juta 2004) 26–27, citing Comaroff & Roberts, *Rules and Processes* (University of Chicago Press 1981). See, also, Moore, *Law as Process: An Anthropological Approach* 2 ed (LIT 2000).

<sup>38</sup> Bennett, (OUP 2006) 670–671.

<sup>39</sup> Mashigo, *Extending Credit to the Low-income and Poor Households in South Africa: A System of Principles* (unpublished PhD thesis, University of Johannesburg, 2007) 84–85; Coetzee, *Institutional Change in Rural Financial Markets in South Africa* (unpublished PhD thesis, University of Pretoria, 1997) 50–51. Compare Molefe, *Welfare Provision by Selected Self-Help Organizations — An Exploratory Study* (unpublished PhD thesis, University of the North, 1989) 42–44, who argues (42) that ‘[s]elf-help has been embedded in the traditions of Blacks from time immemorial’.

<sup>40</sup> Mashigo, (2007) 84–85.

<sup>41</sup> *Idem* 84. See, also, Coetzee, (1997) 51.

<sup>42</sup> Mashigo, (2007) 85. See the interesting discussion of trust as collateral in Hart, ‘Kinship, contract, and trust: the economic organization of migrants in an African city slum’ in Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Blackwell 1988) 176. In this anthropological study of trust in business relations in the informal economy of Accra, Ghana, Hart makes the following statement (188): ‘[T]rust is located in the no man’s land between status and contract, the poles of primitive and modern society in evolutionary theory.’

*(iii) Stokvels*

The literature on stokvels (the South African term for a rotating savings and credit association) is extensive, both in this country and in the broader world discourse.<sup>43</sup> Stokvels come in many different forms and varieties. Essentially a form of savings club, members contribute to a common pool on a regular basis and obtain the right to draw from the communal pool according to a pre-determined roster.<sup>44</sup> Studies of this phenomenon describe several different functions of this type of device, from enforced saving for big ticket items (and thereby avoiding interest on instalment sale credit agreements);<sup>45</sup> to saving for funeral expenses (see part III(a)(iv) below);<sup>46</sup> to investment purposes for high contribution stokvels;<sup>47</sup> or as a source of capital to loan funds to third parties at high interest rates.<sup>48</sup> There are also more mundane social functions of these organisations, such as entertainment and friendship.<sup>49</sup> For present purposes, several authors describe an insurance function of such clubs, particularly where members are allowed to draw from the communal pot in a situation of need.<sup>50</sup> Access to savings provides a residual source of surplus funding, which can be used to fund unexpected adverse events.

<sup>43</sup> For useful South African studies of this concept, see Verhoef, 'Informal financial service institutions for survival: African women and stokvels in urban South Africa, 1930–1998' (2001) 2 *Enterprise & Society* 259; James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (Stanford University Press 2014) 118–146; Schulze, 'The origin and legal nature of the stokvel' parts 1 & 2 (1997) 9 *SAMLJ* 18 and 153; Mashigo & Schoeman, 'Stokvels as an instrument and channel to extend credit to poor households in South Africa' (2012) 5 *Journal of Economic and Financial Services* 49. For an international overview, which includes South Africa, see Ardener, 'The comparative study of rotating credit associations' (1964) 94 *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* 201.

<sup>44</sup> See, for example, Verhoef, (2001) 2 *Enterprise & Society* 259 at 263; Schulze, (1997) 9 *SAMLJ* 18 at 21.

<sup>45</sup> James, (Stanford University Press 2015) 123.

<sup>46</sup> Verhoef, (2001) 2 *Enterprise & Society* 259 at 266–269; Schulze, (1997) 9 *SAMLJ* 18 at 27–29; Thomson & Posel, 'The management of risk by burial societies in South Africa' (2002) 2 *SA Actuarial J* 83.

<sup>47</sup> Schulze, (1997) 9 *SAMLJ* 18 at 25–26; James (Stanford University Press 2015) 142–143; Kibuuka, *Informal Finance for the Middle and High Income Individuals in South Africa: A Case Study of High Budget 'Stokvels' in Pretoria* (unpublished MSc thesis, University of Pretoria, 2006).

<sup>48</sup> So-called 'accumulated savings and credit associations'. See James, (Stanford University Press 2015) 143. Compare the facts of *Mndi v Malgas* 2006 (2) SA 182 (E).

<sup>49</sup> See, for example, Verhoef, (2001) 2 *Enterprise & Society* 259 at 273–274; Schulze, (1997) 9 *SAMLJ* 18 at 23–24.

<sup>50</sup> Schulze, (1997) 9 *SAMLJ* 18 at 18–19; Verhoef, (2001) 2 *Enterprise & Society* 259 at 277.

*(iv) Burial societies*

This concept is related to the *stokvel* idea, in that it is a club through which contributions are made on a regular basis to a communal pool of resources.<sup>51</sup> Again, there are several different varieties of burial societies, depending on the rules (or even the written constitution) of such a group.<sup>52</sup> In some societies members would contribute goods or labour towards a funeral in return for which they had the cover and support of the society.<sup>53</sup> The deceased in this case might be a family member or relative of a member, or even the member herself.<sup>54</sup> In other types of burial societies, a member might obtain a payment of money intended to help finance such a funeral.<sup>55</sup> Thomson and Posel discuss the practices surrounding such societies, many of which would observe fairly sophisticated financial practices, such as keeping detailed financial records and investing communal resources in a formal bank account.<sup>56</sup> Some societies also ongoing have relationships with undertakers or funeral service providers.<sup>57</sup>

There are cultural features of such societies remarked upon in the literature, such as that members might wear a uniform, or have detailed rules about attendance and meeting procedures.<sup>58</sup> Although formed for a sombre purpose, there are also traces of the social or entertainment value of these societies in the literature.<sup>59</sup> From an insurance point of view, these organisations provide informal cover for a very common type of adverse event, circumventing some of the need for private funeral insurance.

*(v) Funeral parlours*

A recent empirical study of funeral parlours in South Africa found that many such businesses are providing a form of funeral insurance within indigenous communities.<sup>60</sup> With current high mortality rates, funeral parlours appear to be a profitable source of business in the popular

<sup>51</sup> For a detailed analysis, see Thomson & Posel, (2002) 2 *SA Actuarial J* 83. See, also, the empirical study of Molefe, (1989).

<sup>52</sup> Thomson & Posel, (2002) 2 *SA Actuarial J* 83 at 84–88.

<sup>53</sup> *Idem* 86–87.

<sup>54</sup> *Idem* 86.

<sup>55</sup> *Idem* 86–87.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Idem* 94–104.

<sup>59</sup> *Idem* 99–101.

<sup>60</sup> Smith & De Vos, 'The business of death: informal insurance by funeral undertakers in South Africa', (2012) available at <https://www.utwente.nl/igs/research/conferences/2012/microinsurance/Full%20papers%20and%20presentations/Full%20papers%204d/Smith%20>

economy. The study suggests that a funeral parlour would often offer a funeral policy to its customers as part of its commercial operations.<sup>61</sup> Some of these policies are underwritten by private insurers, providing a link to the formal economy, but others are not.<sup>62</sup> Indeed, in some cases, the funeral parlour acts as an insurance intermediary, while in others the parlour itself is the insurer.<sup>63</sup> Where funeral parlours act as insurance intermediaries, they present a reliable interface with African communities for private insurers. However, the involvement of such formal-sector companies immediately brings a certain amount of administrative red tape and compliance issues, since the formal-sector regulatory regime then applies.<sup>64</sup> The study found that a significant proportion of funeral parlours actually avoided these issues by simply providing their own insurance policies without an underwriter, while of those that were underwritten, only a very small percentage were verified as financial service providers.<sup>65</sup> This, of course, raises prudential and consumer protection flags — as the study concluded<sup>66</sup> — but provides a source of financing at roots level for communities remote from, or distrustful of, the formal sector.

*(b) Evaluation of informal insurance mechanisms*

The literature is mixed in its evaluation of the above informal forms of insurance. Empirical studies point towards accessibility being a key advantage of this sector: community members are able to deal with creditors and finance providers who are known to them and who are available to deal with them in the geographical location of their community.<sup>67</sup> There is less red tape in accessing payment should an event occur and less problems with avoidance by insurance providers on

and%20M%20de%20Vos%20paper%20\_Business%20of%20death\_Research%20Conference%20on%20MI\_30%2003%202012.pdf, accessed on 28 June 2016.

<sup>61</sup> Idem 2.

<sup>62</sup> Idem 8–10.

<sup>63</sup> Idem 8.

<sup>64</sup> Idem 8–10. Compare the story of ‘Shumikazi’ related in Bähre, ‘The Janus face of insurance in South Africa: from costs to risk, from networks to bureaucracies’ (2012) 82 *Africa* 150 at 158–159, discussed in footnote 92 and the associated text below.

<sup>65</sup> Smith & De Vos, ‘The business of death’ 8–10.

<sup>66</sup> Idem 15.

<sup>67</sup> Mashigo, (2007) 72–76, discussing credit, rather than insurance, describes, from the point of view of the popular-economy sector, the problems relating to the formal financial sector. She explains how the informal sector addresses these at 103–106. Smith & De Vos, ‘The business of death’ 13–14 point to the additional advantage of employment opportunities created by informal funeral parlours. Schulze, (1997) 9 *SAMLJ* 18 at 18–20 speaks of the exclusion of the popular-economy sector from formal financial products and services in the pre-democratic era.

technical grounds.<sup>68</sup> A key feature of this sector is trust and community relations, whereby problems facing private insurers, such as adverse selection and moral hazard, are reduced, since the character and habits of insured parties are known to the service providers.<sup>69</sup> These institutions and mechanisms provide a method for looking after members of one's kin or community to the extent that there is a sense of duty toward the well-being of community members, such as with reciprocal loans from friends and relatives, or in some savings clubs and burial societies. These are positive and laudable developments and reflect cultural responses to the problem of risk management.

However, problems with informal insurance mechanisms are also reported. These issues are intrinsically related to the nature of the medium in question. Typical concerns might be fraudulent management of the communal savings by members of savings clubs or burial societies.<sup>70</sup> Similarly, the lack of penetration of formal law and the expense of formal legal procedures make it difficult to enforce payment by recalcitrant debtors in a situation where mere trust is the collateral.<sup>71</sup> Peer pressure and impairment of one's community reputation are reported as the key sanctions for non-payment of debts due, but this only works in a close-knit community, which may not always be the case in some of South Africa's larger townships.<sup>72</sup> On the more formal end of the informal spectrum, funeral parlours present a useful interface between private insurers and the community, but in the absence of effective government monitoring, many funeral parlours avoid prudential and compliance regulations, thereby presenting a risk to consumers.<sup>73</sup> Similarly, the risk of fraudulent behaviour or insolvency of such operators presents further problems for their customer base.<sup>74</sup>

The positive thus has to be balanced with the negative in evaluating this sector. Anecdotal evidence from certain empirical studies reflects that the indigenous community sees value in these forms of insurance,<sup>75</sup>

<sup>68</sup> See the discussion in Bähre, (2012) 82 *Africa* 150.

<sup>69</sup> Trust, reciprocity and inter-dependence feature large in Mashigo's account of the informal credit sector (see (2007) chap 4). See, also (for a comparative perspective from Cameroon), the empirical study on informal-sector traders by Dickerson, (2011) *Acta Juridica* 285 at 297–298, who describes the role of trust and knowledge of trading partners in informal commerce and the link here to enforcement of contracts in this sector.

<sup>70</sup> See, for example, Thomson & Posel, (2002) 2 *SA Actuarial J* 83 at 88–94.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Idem* 109–111.

<sup>73</sup> Compare the conclusions of Smith & De Vos, 'The business of death' 14–16.

<sup>74</sup> *Ibid.*

<sup>75</sup> Compare the findings of Thomson & Posel, (2002) 2 *SA Actuarial J* 83 at 123; see, also, James, (Stanford University Press 2015) 122–125 on the prevalence and utility of burial societies and savings clubs respectively.

which are possibly better suited to meet the needs of the population they serve. For instance, the technicalities of the law of insurance around issues such as disclosure and misrepresentation, timely payment of premiums, avoidance of claims and dispute resolution procedures are avoided through the accessibility and informality of most of the above responses. The concomitant risk, however, arises around issues like potential simultaneous claims and the lack of re-insurance; as well as a lack of proper actuarial assessment of risk.<sup>76</sup> These are some of the key advantages offered by private insurers.

In this regard, it would appear that private insurers have indeed turned their attention to the popular-economy market, a trend which is of course profit driven, rather than altruistically motivated.<sup>77</sup> The government seems to support this initiative, as we shall see with the developing law surrounding the so-called micro-insurance phenomenon.<sup>78</sup> This private-sector intervention will be described and evaluated in the following section.

#### IV FORMAL INSURANCE MECHANISMS

##### *(a) Selected examples of formal insurance mechanisms*

The examples below are intended as a non-exhaustive list of the most prevalent forms of formal insurance in the popular economy.

##### *(i) Funeral insurance from private insurance companies*

By far the most prevalent private insurance product in the popular-economy sector is funeral insurance.<sup>79</sup> Indigenous African communities place a high premium on a decent burial, which is usually accompanied by a large wake.<sup>80</sup> Sometimes there are also costs due to having to repatriate a corpse to an ancestral land.<sup>81</sup> The expenses involved in paying service providers and hosting a large gathering of family and community members can have a crippling effect on a low-income

<sup>76</sup> These risks are highlighted in Smith & De Vos, 'The business of death' and Thomson & Posel, (2002) 2 *SA Actuarial J* 83 at 104–116.

<sup>77</sup> Compare the argument of Bähre, (2012) 82 *Africa* 150.

<sup>78</sup> See below in part IV(a)(iv).

<sup>79</sup> Compare the findings of Bähre, (2012) 82 *Africa* 150 at 151. Compare, also, the discussion in Nienaber & Preiss, 'Funeral insurance: a perception from the office of the ombudsman for long-term insurance' (2006) 18 *SAMLJ* 291 at 291–292.

<sup>80</sup> Compare Schulze, (1997) 9 *SAMLJ* 18 at 27; Verhoef, (2001) 2 *Enterprise & Society* 259 at 267.

<sup>81</sup> Verhoef, (2001) 2 *Enterprise & Society* 259 at 267; Thomson & Posel (2002) 2 *SA Actuarial J* 83 at 108.

family.<sup>82</sup> As a result, funeral insurance is the key insurance product in demand in the popular economy.

Studies reveal that the financial sector has targeted the popular economy for the sale of different types of financial products — not just insurance, but also credit facilities and investment products.<sup>83</sup> This move is profit driven, since there is a desire to access the ‘money under the mattress’.<sup>84</sup> Nevertheless, the results of increase in cover provided to this market by private insurers appear to be mixed. In an empirical study of insurance in the popular economy published in 2012, Bähre reported anecdotal evidence of insured parties who had struggled to interface with private insurers when making claims following an adverse event, or when disputing an insurer’s avoidance of all or part of their claim.<sup>85</sup> From the insurer’s perspective access to communities is a problem that requires culturally appropriate solutions. Bähre describes how insurance companies use community members as brokers, unfortunately often with financial and personal repercussions for those intermediaries themselves.<sup>86</sup> Thus insurance products are peddled by church goers to members of their congregation, or to other networks of friends and acquaintances in the community.<sup>87</sup> Due to the fact that these are only intermediaries, however, problems of access and dispute resolution arise when the insurer’s head office refuses to pay out on a claim when an event occurs.<sup>88</sup>

An alternative method used by insurers is to use community groups as intermediaries.<sup>89</sup> As Bähre notes, it is not uncommon to provide insurance cover on a group basis, but when insured parties are not formally employed, less conventional groups are utilised.<sup>90</sup> This results in intermediation by burial societies, clubs, funeral parlours (as per part III(a)(v) above), and church congregations (particularly the Zion

<sup>82</sup> Schulze, (1997) 9 *SAMLJ* 18 at 27; Verhoef, (2001) 2 *Enterprise & Society* 259 at 267.

<sup>83</sup> See, for example, Bähre, (2012) 82 *Africa* 150 at 150–152; Hull & James, (2012) 82 *Africa* 1 at 4.

<sup>84</sup> This phrase is borrowed from Mpedi & Millard, (2010) 31 *Obiter* 497 at 509.

<sup>85</sup> Bähre, (2012) 82 *Africa* 150 at 160–163.

<sup>86</sup> *Idem* 152–156. Bähre discusses the case of ‘Bantu’, who was locked into a long-term brokering contract by an insurer, but found that his commission was far lower than his expectations, meaning that he had difficulties in meeting his own business outlays. There were also costs involved through his community membership, where other members expected him to be better resourced than he was, leading to further outlays in an effort to keep up appearances.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Idem* 160.

<sup>89</sup> *Idem* 156–157.

<sup>90</sup> *Idem* 157.



Christian Church (ZCC)).<sup>91</sup> This creates fewer personal complications than using individual brokers (for those community members who would otherwise act in this capacity) and has worked particularly well with the ZCC. However, issues such as the necessity to comply with regulations surrounding financial intermediation and inequality of bargaining power still remain.<sup>92</sup>

Nevertheless, some consumer complaints do manage to find a voice within the formal sector. Indeed, the website for the ombud for the long-term insurance industry contains details of many complaints with which it has dealt and a high proportion of these deal with funeral insurance.<sup>93</sup> Nienaber and Preiss report that during their tenures as ombud and deputy ombud respectively, about fifteen per cent of all complaints that they had received were based on funeral insurance.<sup>94</sup> In an article from 2006, they reflect on the problems in resolving this kind of complaint with insurers, who are often technically within their rights to avoid claims.<sup>95</sup> This evidence points toward expectations of the popular-economy market not being in line with common insurance practices, and an asymmetry of information about the products which are being sold to community members. Consumer protection is thus clearly a key problem in this sector.<sup>96</sup> While compliance with prudential regulations and actuarial risk-assessment methods ensure that private insurers remain in a position to pay out on claims and that correct premiums are charged for cover provided, the intricacies of formal insurance law and inaccessibility of distant companies make these products problematic for the popular-economy market.

A final point on funeral insurance is its widespread availability. Given the demand for this product, it is marketed extensively using cell-phone messaging and other forms of advertising. Indeed, a funeral-insurance

<sup>91</sup> *Ibid.*

<sup>92</sup> *Idem* 157–159. The problems with this interface are illustrated by a narrative related to Bähre by one ‘Shumikazi’, the proprietor of a funeral parlour selling funeral cover. When the underwriting insurer implemented unilateral changes to contractual terms, this caused knock-on problems for Shumikazi in dealing with her clientele, who were all members of her own community.

<sup>93</sup> The website of the ombud for long-term insurance can be found at <http://www.ombud.co.za>, accessed on 27 June 2016. For the prevalence of funeral insurance complaints, see Nienaber & Preiss, (2006) 18 *SAMLJ* 291 at 292.

<sup>94</sup> Nienaber & Preiss, (2006) 18 *SAMLJ* 291 at 292.

<sup>95</sup> *Ibid.*: this article describes common complaints lodged against long-term insurers providing funeral cover and, in some cases, how the office of the ombud resolved these.

<sup>96</sup> This is despite the existing consumer-protection mechanisms, especially those under the Financial Advisory and Intermediary Services Act 37 of 2002 and its accompanying regulations, and the policy-holder protection measures under the Long-term Insurance Act 52 of 1998.

premium is the one lawful deduction which can be made from a government social grant.<sup>97</sup> Such deduction may amount to up to 10 per cent of the total grant amount, extending the availability of such cover to a broader spectrum of consumers. However, in many instances this entails deducting premiums from a grant which may have to support many extended family members in a climate where such recipients are invariably struggling to make ends meet.<sup>98</sup>

(ii) *Other forms of private insurance*

Bähre's statistics indicate that other insurance products are also purchased in the popular-economy sector, such as credit insurance.<sup>99</sup> He also found other forms of risk-management financial products such as medical-aid cover and pensions.<sup>100</sup> Nonetheless, these other forms of insurance (very broadly conceived) were far less prevalent than funeral cover.<sup>101</sup> Churchill, writing from a global perspective, points toward expectations from those not accustomed to insurance products that one should not have to pay premiums and get nothing in return should no adverse event occur.<sup>102</sup> By contrast, more traditional forms of risk-management practices, such as stokvels, are in some ways more a form of compulsory savings mechanisms than true insurance devices.<sup>103</sup>

(iii) *Compulsory state insurance*

Other forms of insurance prevalent in the popular economy are those forms of state insurance, such as those compulsory for workers who are (or have previously been) in formal employment (as mentioned above).<sup>104</sup> Thus the Unemployment Insurance Fund and various workers' compensation schemes, which are insurance funds set up by statute,

<sup>97</sup> Section 20(4) of the Social Assistance Act 13 of 2004 read with reg 26A.

<sup>98</sup> At the time of writing (June 2016), a so-called grant for older persons amounted to R1 500 per month. A disability grant was also R1 500 per month. Under reg 26A(2), no deduction can be made from any of the various categories of child-care grants.

<sup>99</sup> Bähre, (2012) 82 *Africa* 150 at 151–152. In his empirical study of 110 residents of two Cape Town townships, Bähre found that 63 per cent of respondents had at least one funeral policy; 44 per cent had UIF; 27 per cent had a medical aid; 26 per cent had a pension fund and 24 per cent had a mortgage which included credit insurance.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Churchill, 'What is insurance for the poor?' in Churchill (ed), *Protecting the Poor: A Microinsurance Compendium* (International Labour Office (ILO) 2006) 20.

<sup>103</sup> Churchill, (ILO 2006) 13–14 notes that he is using the term 'insurance' in a narrow sense to exclude 'general risk-prevention and -management techniques', which would differ from parts of the excursus in part III above. The present author feels that a broader picture gives a better perspective of indigenous risk management in South Africa.

<sup>104</sup> See footnote 99 and (generally) Olivier, (LexisNexis 2012) paras 175–180.

provide cover to those who have lost their jobs or been injured at work.<sup>105</sup> For those who drive vehicles, the Road Accident Fund Act provides a form of insurance against losses resulting from motor vehicle accidents.<sup>106</sup>

(iv) *Micro-insurance*

This is a government-backed initiative to spread private insurance cover to the low income market.<sup>107</sup> A 2011 National Treasury policy document envisioned the promulgation of a Micro-insurance Act, or amendment to the existing Long- and Short-term Insurance Acts to establish a micro-insurance framework.<sup>108</sup> The current Insurance Bill is one of the results of this policy and is intended to (inter alia) establish a regulatory framework for micro-insurers to enter the market, such as through a change to the governing licensing rules.<sup>109</sup> The Treasury's intention is to create affordable insurance products appropriate for the target market, while still ensuring consumer protection for those who purchase such products.<sup>110</sup> The policy document speaks of less technical legal requirements regarding disclosure and misrepresentation; a simplification of claims procedures; and generally less compliance-related red tape for this sector.<sup>111</sup> Non-payment of insurance premiums is a problem that requires particular attention and the policy document aims to address the issue of intermittent flow of income, which — when combined with other existing demands on scarce household resources — can lead to irregular payment of premiums.<sup>112</sup> The intention is to provide a means for policies, particularly of the long-term insurance variety, to resume

<sup>105</sup> Unemployment Insurance Contributions Act 4 of 2002; Compensation for Occupational Injuries and Diseases Act 130 of 1993; Occupational Diseases in Mines and Works Act 78 of 1973.

<sup>106</sup> Road Accident Fund Act 56 of 1996.

<sup>107</sup> See Mpedi & Millard, (2010) 31 *Obiter* 497; and the South African National Treasury Policy Document, 'The South African microinsurance regulatory framework' (July 2011), available at <http://www.treasury.gov.za/publications/other/MicroinsuranceRegulatoryFramework/Policy%20Document%20Micro%20Insurance.pdf>, accessed on 24 May 2017.

<sup>108</sup> National Treasury Policy Document (July 2011) 60–61.

<sup>109</sup> Bill B1–2016, available at [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160128b\\_1\\_-\\_2016\\_insurance.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160128b_1_-_2016_insurance.pdf), accessed on 24 May 2017. See the long title for the intention to create a micro-insurance framework which promotes financial inclusion. Licensing is dealt with in chap 4 of the Bill.

<sup>110</sup> *Idem* 1.

<sup>111</sup> *Idem* part 2, particularly 43 and 46. See, further, Mpedi & Millard, (2010) 31 *Obiter* 497; Millard, 'Harnessing the informal economy: some reflections on National Treasury's policy document on the South African microinsurance regulatory framework' (2012) 75 *THRHR* 665.

<sup>112</sup> National Treasury Policy Document (July 2011) 14–15.

following a payment hiatus.<sup>113</sup> Cover will also be capped at certain (fairly low) amounts to demarcate the borders of micro-insurance.<sup>114</sup>

Studies have indicated that such products are already available in South Africa and other parts of the developing world.<sup>115</sup> Micro-insurance products are being sold in innovative ways, such as by using retail outlets as intermediaries.<sup>116</sup> Private insurers are also attempting to tailor their products to the sector in question.<sup>117</sup> Consumer protection, which is under development in the entire insurance sector in South Africa, will hopefully receive special attention when the new micro-insurance statute is promulgated.<sup>118</sup>

### (b) *Evaluation*

More than one commentator has described the nature of private insurers operating in the low income market as ‘Janus-faced’.<sup>119</sup> This two-faced ambiguity captures the different perspectives presented by this phenomenon. Thus, while private insurance offers greater protection for insured parties through adherence to highly regulated prudential and other related requirements, there is also evidence of a lack of fit between formal sector, profit-driven companies and a consumer market whose participants may possibly lack some of the characteristics needed to best take advantage of what private insurance has to offer. Arguably private insurance operates most beneficially among consumers who are characterised by a high level of financial literacy, adequate disposable

<sup>113</sup> Currently s 52 of the Long-term Insurance Act 52 of 1998 allows a grace period of 15 days before cover may lapse. See the National Treasury Policy Document (July 2011) 14–15, although this document does not discuss funeral cover specifically. See, also, Nienaber & Preiss, (2006) 18 *SAMLJ* 291 at 313–314, describing how although most insurers will allow a grace period of 30 days for non-payment of premiums, non-payment for longer periods will result in a loss of cover, leaving the office of the ombud with little scope to help insured parties.

<sup>114</sup> National Treasury Policy Document (July 2011) 8–9.

<sup>115</sup> For a comprehensive South African analysis, see Roux, *Including the Excluded: The Potential of Microinsurance to Provide Low-Income Earners with Access to Financial Products* (unpublished LLM dissertation, University of Johannesburg, 2015).

<sup>116</sup> *Idem* chap 3.

<sup>117</sup> *Ibid.*

<sup>118</sup> This is certainly one of the clear goals of part 2 of the National Treasury Policy Document. See, further, the discussion in Roux, (2015) chaps 2 and 3. The new Financial Sector Regulation Bill (B34–2015) will move South Africa towards a so-called twin peaks model of financial regulation, which will see the establishment of a market conduct authority and market conduct regulations. A text of the Bill is available at [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/b\\_34\\_-\\_2015\\_financial\\_sector\\_regulation.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/b_34_-_2015_financial_sector_regulation.pdf), accessed on 24 May 2017. See chap 4 for the establishment of a market conduct authority and item 106 for the empowering provision under which market standards will be regulated.

<sup>119</sup> Churchill, (ILO 2006) 15–16; Bähre, (2012) 82 *Africa* 150 at 152. Janus was the Roman god of gates and doors, usually depicted with two faces and one body.

income and knowledge of their consumer rights. Conversely, the popular-economy market is characterised by irregular income, lack of experience of private insurers and their products as well as a lack of knowledge of technical insurance law. The remoteness and inaccessibility of an insurer's head office often presents further problems when submitting claims or challenging a repudiation. Anecdotal evidence presented through Bähre's empirical study, or as reflected in Nienaber and Preiss's 2006 paper and in complaints on the website of the ombud for long-term insurance, suggests that the extension of private insurance to the popular-economy sector has not been without problems.

The new micro-insurance regime is intended to address these problems in South Africa, particularly with regard to consumer protection; there is certainly scope herein for South Africa to improve on the negative issues highlighted above in part IV(a). If the new micro-insurance regime can improve this situation, then potentially the short-comings of the informal sector (identified above in part III(b)) can be overcome through a new kind of private insurance specifically adapted to the popular-economy market. It may well be, however, that the lack of fit between the popular-economy sector and private financial institutions, identified by Mashigo in her study of micro-credit, continues.<sup>120</sup> In an insurance context this may be precisely because private insurers are profit driven, rather than grass-roots community organisations. Regardless of the success of micro-insurance in South Africa, burial societies, stokvels and other forms of community savings and risk-management clubs are likely to remain, simply because they fill a demand. Thus the cultural aspect of the popular-economy insurance market remains a highly important one.

In the next part, this article turns to a comparative case study of the marketing of formal-sector funeral insurance products to indigenous peoples in Australia. This is intended to illustrate that the cultural (or customary) elements of the Australian indigenous insurance market show a marked degree of similarity to that in South Africa, while formal-sector insurance law similarly lags behind the needs of the target market in Australia.

## V COMPARATIVE CASE STUDY: FUNERAL INSURANCE IN AUSTRALIA

Australia is better described as a developed rather than a developing economy, and displays characteristics of being a state with an advanced

<sup>120</sup> Mashigo, (2007) 75–76.

welfare system as well as a lack of the abject poverty which characterises much of South Africa.<sup>121</sup> Nevertheless, there are certain overlaps between the respective positions of the Australian and South African indigenous populations, with regard to both under-development — due to past discriminatory practices at the hands of a white ruling elite — as well as a strong legacy of customs and customary law.<sup>122</sup>

It is an interesting cultural parallel between these two indigenous populations to observe that a culturally appropriate funeral is also a priority for most Australian indigenous peoples, and that this is similarly a potentially calamitous expense, which needs to be carefully provided for.<sup>123</sup> Vines describes the following features of a culturally appropriate indigenous funeral (with reference to the training manual of a leading Australian provider of indigenous funeral cover):<sup>124</sup>

- a burial, as opposed to a cremation;
- coffin painting, as a cultural rite of passage into the afterlife, to be done by a professional artist;
- transport of the body back to the ancestral homelands if the deceased died in a different location;
- the funeral service itself, to be attended by the full extended family, sometimes amounting to a few hundred people;
- a smoking ceremony, performed in the house of the deceased by an elder of the community for a fee;
- a wailing ceremony for the extended family after the funeral service, which may last three to five days;

<sup>121</sup> For a description of Australia as a rich country with income statistics, see Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2014) 174, 177–178. For an historical account of Australia as a welfare state, see Castles, ‘Needs-based strategies of social protection in Australia and New Zealand’ in Esping-Andersen (ed), *Welfare States in Transition: National Adaptations in Global Economies* (Sage Publications 1996) 88.

<sup>122</sup> On indigenous Australian law, see Vines, *Law and Justice in Australia: Foundations of the Legal System* 3 ed (OUP 2013). Chapters 6 and 10 of this work deal in particular with past discriminatory practices against the indigenous population in Australia. For a comparative discussion of indigenous law comparing the Australian position with the South African one, see Harris, ‘Indigenous law in South Africa — lessons for Australia?’ (1998) 5 *James Cook University LR* 70.

<sup>123</sup> Vines, ‘The New South Wales project on the inheritance needs of Aboriginal people: solving the problems by making culturally appropriate wills’ (2012) 16 *Australian Indigenous LR* 18 at 23–24; Vines, *Aboriginal Wills Handbook: A Practical Guide to Making Culturally Appropriate Wills for Aboriginal People* 2 ed (NSW Trustee & Guardian 2015); Australian Securities and Investments Commission (ASIC), ‘Paying for funerals’, available at <https://www.moneysmart.gov.au/media/131954/paying-for-funerals.pdf>, accessed on 28 June 2016.

<sup>124</sup> Vines, (2012) 16 *Australian Indigenous LR* 18 at 24. This same manual was cited by the court in *Australian Securities and Investments Commission v Aboriginal Community Benefit Fund Pty Ltd* [2004] FCA 178 para 17.

- a returning home service, should the funeral be conducted in a remote location before return of the body to the ancestral lands; and
- a second wake one year after the death for extended family members who choose to reattend.

The net result of this is that a culturally appropriate funeral can cost between A\$4 000 and A\$15 000.<sup>125</sup> This is a considerable expense and far exceeds the typical cost of a non-indigenous funeral.<sup>126</sup> The result is that private insurers have targeted the indigenous market for the sale of funeral insurance.<sup>127</sup> Indeed, one of the major providers of such insurance, the Aboriginal Community Benefit Fund (the Fund) has been involved in a series of disputes with the Australian Securities and Investments Commission (ASIC),<sup>128</sup> particularly with regard to exploitative marketing practices.<sup>129</sup> In 2004, the latest in this series of disputes reached the Federal Court of Australia, where ASIC challenged the Fund's door-to-door marketing practices, which were found to be in breach of certain of the financial services provisions under the Corporations Acts 2001 (Cth).<sup>130</sup> In a return hearing, however, the Federal Court declined to impose a severe sanction on the Benefit Fund, due (inter alia) to the risk of impact on its financial standing, which could have had a knock-on effect on existing policy-holders.<sup>131</sup>

Today ASIC provides a useful and consumer-friendly guide to planning for funeral expenses on its MoneySmart consumer website.<sup>132</sup> This document, titled 'Paying for funerals', seeks to warn indigenous and low-income readers against the pitfalls of funeral-insurance products. The

<sup>125</sup> ASIC, 'Paying for funerals' 2.

<sup>126</sup> The list of culturally appropriate requirements above should demonstrate why this is so.

<sup>127</sup> Vines, (2012) 16 *Australian Indigenous LR* 18 at 23–24; Vines, (NSW Trustee & Guardian 2015) 20–21.

<sup>128</sup> ASIC is the market conduct regulator in the Australian financial regulatory system. See, generally, Pearson, 'Making prudence: consumer credit and twin peaks, a comparison of Australia and South Africa' (2016) 27 *Journal of Banking and Finance Law and Practice* 223.

<sup>129</sup> See *ASIC v Aboriginal Community Benefit Fund* (footnote 124). The litigation history of the Aboriginal Community Benefit Fund is set out in paras 7–12 of this judgment. Essentially, the Fund was set up in 1992. Within one year, the NSW Department of Consumer Affairs obtained an injunction against the Fund's marketing practices in the Supreme Court of NSW. After a corporate reshuffle, the injunction was vacated in 1994. In 1999, however, ASIC commenced fresh proceedings against the Fund, which resulted in a consent order requiring the Fund to change its marketing practices. In the 2004 hearing, the Fund's marketing practices were found, once again, to breach the Corporations Act of 2001 and its associated regulations.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Australian Securities and Investments Commission v Aboriginal Community Benefit Fund Pty Ltd* [2004] FCA 963 paras 13–18.

<sup>132</sup> ASIC, 'Paying for funerals'.



document provides lists of questions to ask of salesmen and financial service providers selling funeral cover.<sup>133</sup> It also advises consumers to think carefully before subscribing to insurance products and to conduct private research by talking to family members or a financial counsellor.<sup>134</sup> This document seems to also recommend ordinary savings accounts, or funeral-specific savings policies, as a method of locking away money from other day-to-day consumption expenditure in order to provide money to pay for a funeral.<sup>135</sup> The reason for this advice is that if a consumer is no longer able to continue contributing to the fund each month, he or she at least retains moneys paid thus far.<sup>136</sup> Similarly, if a large balance accrues over a long period of time, the benefit is not capped at the cost of a funeral, since family members can access the surplus after paying funeral costs.<sup>137</sup> This is indeed a sensible option, particularly in an environment which enjoys a higher degree of penetration of formal-sector financial services among the indigenous population.<sup>138</sup>

Interestingly, the literature does not discuss informal sector insurance as found in South Africa, probably due to a lack of a popular economy in the sense used thus far in this paper.<sup>139</sup> There also does not appear to be a formal regime of micro-insurance in place, although a study by Good Shepherd Microfinance reflects that there is a need for this among low-income Australians.<sup>140</sup> The Good Shepherd study suggests a broad range of micro-insurance products, from household-contents policies, to vehicle insurance, to funeral cover, to life insurance.<sup>141</sup> This lack of an over-arching legislative framework in any of its composite jurisdictions further distinguishes the present Australian situation from that envi-

<sup>133</sup> *Idem* 7, 8, 12 and 15.

<sup>134</sup> *Idem* 9, 12 and 15.

<sup>135</sup> *Idem* 4–9.

<sup>136</sup> *Idem* 4.

<sup>137</sup> *Idem* 16.

<sup>138</sup> Compare the empirical findings of Vines, (2012) 16 *Australian Indigenous LR* 18 at 23.

<sup>139</sup> *Idem* 23–24. Vines (NSW Trustee & Guardian 2015) 20–21 speaks only of formal-sector funeral insurance. It should be noted, however, that there is discussion of a ‘frontier economy’ in Australia, where indigenous and Western commercial norms meet, and which is usually notionally located in the remote areas of Australia. See for discussion: McDonnell & Martin, ‘Indigenous community stores in the “frontier economy”’: some competition and consumer issues’ Discussion Paper 234/2002, Centre for Aboriginal Economic Policy Research, available at [http://caepr.anu.edu.au/sites/default/files/Publications/DP/2002\\_DP234.pdf](http://caepr.anu.edu.au/sites/default/files/Publications/DP/2002_DP234.pdf), accessed on 24 May 2017.

<sup>140</sup> Good Shepherd Microfinance, ‘Insurance for low-income Australians: taking innovative action’ Discussion Paper (2013), available at <http://www.goodshepherdmicrofinance.org.au/sites/default/files/0849%20GOOD%20SHEPHERD%20MICROFINANCE%20REPORT%20FINAL.pdf> accessed on 28 June 2016.

<sup>141</sup> Good Shepherd Microfinance, ‘Insurance for low-income Australians’ 15–16.

sioned in the South African National Treasury Policy Document. In any comparison of national laws, one should consider differences in culture and context between the jurisdictions under study. The most obvious inference to be drawn from the above discrepancy is that there is a political willpower in South Africa to enact a legislative framework to provide insurance to low-income consumers, particularly from the indigenous population, given the fact that the ruling African National Congress operates on a mandate from a largely indigenous and low-income electorate.<sup>142</sup>

The other inference to be drawn is that there is scope here for South Africa to lead the way in promoting culturally appropriate solutions to insurance (and broader financial sector) regulation. However, cultivation of a world-leading, formal-insurance sector need not be at the expense of existing cultural responses in the popular economy. To address the question posed in the title, this article will now, in conclusion, turn to the question as to the possibility of a customary law of insurance in South Africa.

## VI CONCLUSION: A CUSTOMARY LAW OF INSURANCE?

South Africa is blessed with excellent financial services providers and has a dependable system of courts in which the rule of law is enshrined. While the common law of contract is in a state of flux under the auspices of a transformative Constitution and a proactive Constitutional Court,<sup>143</sup> the statutes which form a large part of the law of insurance in South Africa are well established and extensively regulate insurance companies and financial intermediaries.<sup>144</sup> Indeed, when the general Consumer Protection Act was promulgated, insurance contracts were expressly omitted, since it was felt by the legislature that this sector already had adequate consumer protection.<sup>145</sup> The extension of this

<sup>142</sup> Compare the argument of Bennett, (OUP 2006) 663–666 that the treatment of African customary law in the present dispensation reflects an ideological disposition towards this construct, which in turn is a reflection of political power.

<sup>143</sup> From an insurance point of view, see, in particular, *Barkhuizen v Napier* 2007 (5) SA 323 (CC), which was the first in a line of Constitutional Court cases dealing with the common law of contract. There a challenge to a 90 day time-bar clause in a short-term insurance policy was not upheld, but the court did note for present purposes (paras 28, 51 and 56) that a clause in a contract, and the enforcement thereof, had to comply with public policy, which was informed by, inter alia, constitutional rights and values as well as the African customary-law concept of ubuntu.

<sup>144</sup> See, especially, the Long-term Insurance Act 52 of 1998; the Short-term Insurance Act 53 of 1998; and the Financial Advisory and Intermediary Services Act 37 of 2002.

<sup>145</sup> Act 68 of 2008. See Schedule 2, Item 10. For discussion of this provision, see Naudé & Eiselen (eds), *Commentary on the Consumer Protection Act* (Juta 2015).

formal-sector insurance cover and the concomitant law to the popular economy thus has a lot to offer this new demographic, not least of which is increased consumer protection.

The micro-insurance phenomenon is already present in the South African market and the government's desire to create a specific regulatory regime for the low-income demographic is a positive step. Indeed, South Africa's first-world, private-insurance sector and dispute-resolution structures could bring many benefits to the popular-economy sector. The problem of course is fit: anecdotal evidence highlighted above suggests that the existing system is not fully serving the needs of the low-income market for a variety of reasons, from the geographical, to the economic, to the cultural. If South Africa is able to resolve these issues through a new Micro-insurance Act (or some similar intervention), this country has the potential to be a world leader in this field. Indeed, the Australian experience of private insurers exploiting the indigenous market's desire to provide for a culturally appropriate funeral shows that the problem of lack of fit is not unique to South Africa, or even to developing economies. If South Africa can marry its developed sectors with its undeveloped ones, this will help to alleviate poverty through the reduction of the impact of calamitous events.

The description of the manner in which private insurers have entered the popular economy market as Janus-faced,<sup>146</sup> speaks to the issue of 'fit' described above. Although conventional economics most likely motivate commercial activities in the popular economy — and these should not be viewed as being somehow divorced from business realities — the scale and resources of private insurance companies give them an enormously unequal power in dealing with consumers in this market. Thus profit-driven corporations have the potential to exploit consumers, even when interfacing with this sector through community-based intermediary persons or groups. There is evidence to support a claim that a good deal of contracting in the popular economy is based on trust, with knowledge of the habits and circumstances of one's counter party in the transaction serving as collateral. It is submitted that this factor is a key feature of customary contract behaviour, which should be given recognition when developing the living customary law of contracts. Similarly, given that some of the mechanisms which make up this customary contract law have a risk-spreading function, why should a customary-law of insurance not be included in this process? This development would serve two alternative purposes of allowing, on the

<sup>146</sup> See the discussion in part IV(b) above.

one hand, a culturally appropriate synthesis with the formal regime; while, on the other hand, entrenching a parallel popular economy or customary regime in its own right, for those transactions and institutions which continue (in accordance with freedom of contract and freedom of economic activity) to be conducted in a more traditional format.

For those who prefer the protection of formal-sector private insurance practices, micro-insurance is a viable alternative. This regime is intended to regulate (in large part) the same groups of the population who would consider themselves subject to customary law. Why should micro-insurance then not involve a synthesis of customary rules and values into its conventional regulatory structure, as suggested in the preceding paragraph? A culturally appropriate system of micro-insurance law would possibly serve the indigenous market better than the established common law of insurance. The trick will be to affect this in balance with the commercial requirements of insurers and the need for legal certainty.

To achieve appropriate legal development for either of the current popular-economy format, or a more formalised micro-insurance version, the study of living customary contract law and customary insurance practices by conventional contract and insurance lawyers is an imperative.