



**REDISTRIBUTIVE JUSTICE: AFFIRMING SECTION 9 OF THE
CONSTITUTION THROUGH THE IMPOSITION OF A WEALTH TAX ON
APARTHEID BENEFICIARIES**

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ABSTRACT

In light of South Africa's scourge of poverty and inequality, this thesis problematises the government's rejection of the Truth and Reconciliation Commission's recommendation that a wealth tax be imposed on apartheid beneficiaries. The wealth tax recommendation was premised on the fact that apartheid-era discriminatory legislation not only deprived victims of apartheid of the opportunity to acquire skills but also forced victims to perform unskilled work at very low wages in all sectors of the economy. Thus, the question that this study seeks to answer is whether the imposition of a wealth tax on apartheid beneficiaries is consistent with the spirit and the purport of section 9(2) of the Constitution and, as a consequence, furthers the achievement of substantive equality. The argument for the imposition of a wealth tax on apartheid beneficiaries is grounded in an understanding of inequality as a structural problem, as well as the application of redistributive justice principles and equality jurisprudence to South Africa's post-apartheid context. The thesis contends that the South African government's rejection of a wealth tax on apartheid beneficiaries has contributed to the exacerbation and perpetuation of inequality. In support of this contention, it is argued that the imposition of a wealth tax on apartheid beneficiaries would not only affirm section 9 of the Constitution but would bolster attempts at dismantling structural inequality.

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I. INTRODUCTION

(a) *Background and research question*

Twenty-seven years after the advent of South Africa's constitutional democracy, the World Bank has not only declared that South Africa is the most unequal society in the world,¹ but that inequality has worsened since apartheid.² These findings tragically echo Arendt's sentiments that —

‘We shall not be able to become reconciled to it, to come to terms with it, as we must with everything that is past Even the famous healing power of time has somehow failed us. On the contrary, this past has managed to grow worse as the years have gone by so that we are sometimes tempted to think: this will never be over as long as we are not all dead.’³

In furtherance of the Truth and Reconciliation Commission's (TRC's) recommendation that ‘urgent consideration be given by [the] government [in] harnessing all available resources in the war against poverty’,⁴ the question that this thesis seeks to answer is whether the imposition of a wealth tax on apartheid beneficiaries is consistent with the spirit and the purport of section 9(2) of the Constitution⁵ and as a consequence affirms the section 9 equality guarantee.

Section 3(2) of the Promotion of National Unity and Reconciliation Act, 1995⁶ (‘TRC Act’) empowered the TRC to investigate or make recommendations concerning any matter that sought to promote or achieve national unity and reconciliation. The TRC recommended, *inter alia*, that a scheme be put in place to enable those who benefited from apartheid policies to contribute towards the alleviation of poverty and inequality occasioned by apartheid's legacy.⁷ It was proposed that the contributions used to establish this scheme be derived by means of the imposition of a wealth tax,⁸

¹ World Bank ‘Overcoming poverty and inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities’, March 2018 at 42, available at <https://openknowledge.worldbank.org/handle/10986/29614> accessed on 26 June 2019.

² *Ibid* at 43.

³ H Arendt ‘Responsibility’ in *Responsibility and Judgement* J Kohn (ed) (2003) 55.

⁴ Truth and Reconciliation Commission of South Africa Report vol 5, 29 October 1998 available at <https://www.justice.gov.za/trc/report/finalreport/Volume5.pdf>, accessed on 26 June 2019 at 308.

⁵ Constitution of the Republic of South Africa, 1996.

⁶ The Promotion of National Unity and Reconciliation Act, 34 of 1995, ‘the TRC Act’.

⁷ Truth and Reconciliation Commission of South Africa Report op cit note 4.

⁸ *Ibid*.

this proposal was vehemently rejected by the South African government⁹ and the business community.¹⁰ This thesis problematises the rejection of the imposition of a wealth tax on apartheid beneficiaries and argues that the imposition is not only consistent with section 9(2) of the Constitution but would bolster attempts at dismantling structural inequality.

(b) Significance of study

Although constitutional law scholars have conducted in-depth analyses of the constitutionality of legislated restitutionary measures,¹¹ the constitutionality of the imposition of a wealth tax on the beneficiaries of apartheid has been covered solely through contentious media debates.¹² Thus, there exists a need to ventilate the topic through the historicising and problematising of the government's decision not to impose a wealth tax on apartheid beneficiaries.

It is important to note that the TRC did not prescribe one or other strategy to alleviate poverty occasioned by the legacy of apartheid, instead, it recommended that consideration be given to the most appropriate ways in which restitution could be provided for those who suffered from the effects of apartheid discrimination *viz* 'racism, gender discrimination, job reservations, the effects of the migrant labour system, inferior wages and inadequate or non-existent social benefits'.¹³

Notwithstanding the existence of restitutionary legislation i.e. the Employment Equity Act, 1998 (EE Act);¹⁴ the Promotion of Equality and Prevention of Unfair Discrimination, 2000 (PEPUDA);¹⁵ the Preferential Procurement Policy Framework Act, 2000 (PPPFA);¹⁶ and the Broad-Based Black Economic Empowerment Act, 2003 (B-BBEE Act),¹⁷ this thesis contends that the government's

⁹ S Terreblanche 'A Wealth Tax for South Africa' (2018) Johannesburg: SCIS, Wits University. SCIS Working Paper Number 1 at 4.

¹⁰ *Ibid* at 5.

¹¹ L Kohn & R Cachalia 'Restitutionary Measures properly understood & the extension of the Quota Ban – Locating SARIPA in the s 9(2) Van Heerden Framework' (2017) *Acta Juridica* 146.

¹² P De Vos 'Where are you going to stand, my fellow white South Africans?', 15 August 2011, available at <https://constitutionallyspeaking.co.za/where-are-you-going-to-stand-my-fellow-white-south-africans/>, accessed 19 March 2019.

¹³ Truth and Reconciliation Commission of South Africa Report op cit note 4 at 318.

¹⁴ Employment Equity Act 55 of 1998, 'the EE Act'.

¹⁵ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 'the PEPUDA'.

¹⁶ Preferential Procurement Policy Framework Act 5 of 2000, 'the PPPFA'.

¹⁷ Broad-Based Black Economic Empowerment Act 53 of 2003, 'B-BBEE Act'.

dismissal of the TRC's wealth tax recommendation constitutes a failure to harness 'all available resources in the war against poverty'¹⁸ and inequality.

(c) Scope and limitations of the study

The thesis focuses on the narrow and academic issue of the constitutionality of a wealth tax when imposed on the beneficiaries of apartheid. This study does not concern itself with the practical mechanisms involved in the introduction of additional wealth taxes in South Africa.¹⁹ Thus, the thesis is distinguishable from the literature put forth by tax law and economics scholars in the Davis Tax Committee's report for the Minister of Finance.²⁰ In addressing the constitutional question, a wealth tax is couched in the context of Terreblanche's evidence at the TRC's institutional hearings *vis-à-vis* the role of business and labour under apartheid.²¹

'Terreblanche argue[d] that [the income derived from the] wealth tax could be used to set up a restitution fund that would contribute to reconciliation, social stability and economic growth, while providing a basis for restitution for those who have been impoverished through apartheid.'²²

It is important to be cognisant of the fact that this thesis does not attribute all of South Africa's socio-economic ills to apartheid. Nor does it argue that a wealth tax is a silver bullet that would resolve the country's scourge of poverty and racialised wealth inequality. The democratic government's ineptitude, the plundering of public funds

¹⁸ Truth and Reconciliation Commission of South Africa Report op cit note 4 at 308. Emphasis added.

¹⁹ Terreblanche op cit note 9 at 19.

²⁰ See Davis Tax Committee 'Report on feasibility of a wealth tax in South Africa for the Minister of Finance' March 2018 available at

<https://www.sataxguide.co.za/wp-content/uploads/2018/05/20180329-Final-DTC-Wealth-Tax-Report-To-Minister.pdf>, accessed on 26 June 2019 at 3. The Davis Tax Committee Report has four objectives that aim to: '[provide] an empirical review of the global literature on wealth taxation; [describe] the current state of wealth inequality in South Africa; [evaluate] the feasibility of increasing the share of wealth taxes in the overall tax mix in South Africa in a way that will achieve the goal of reducing wealth inequality in a way that is economically and administratively efficient and [examine] the potential contribution of wealth taxes to South Africa's revenue streams.' The report emphasised that: 'There are many misconceptions that exist with regard to wealth taxes in South Africa, ... [n]ot only do wealth taxes already exist but there are also tremendous difficulties and unintended consequences that would need to be addressed prior to implementing further wealth taxes.' It is important to note that [a] 'wealth tax is not the only available instrument to address the inequities of income and wealth. Other methods of redress include land reform and programmes on the expenditure side of the fiscal budget such as increased access to quality health and education and the provision of infrastructure as well as effective government leading to growth and employment. Wealth taxes are merely one tool, amongst many, with which to address the pressing problem of inequality.'

²¹ Truth and Reconciliation Commission of South Africa Report op cit note 4 vol 4 at 5. Terreblanche, suggested that persons i.e. apartheid beneficiaries. with net assets of more than R2 million pay an annual wealth tax of 0,5 per cent for between 10 and 20 years, as a way of restoring 'the necessary degree of social justice and social stability'.

²² Ibid.

and its devastating impact on the economic well-being of South Africans is well documented.²³ This thesis adds to the discourse of the ways in which the state entrenches inequality and exacerbates poverty.

(d) Structure of the thesis

This thesis consists of six parts:

This part sets out the context and permutations of the study. In part 2, I argue that the government's focus on national unity at the expense of economic justice has had the unintended consequence of exacerbating inequality in South Africa. I propose that the pursuance of restorative justice aims through the rejection of the imposition of a wealth tax on apartheid beneficiaries has undermined the economic dignity of previously disadvantaged persons. I ground the arguments in Part 2, in an analysis of the legal action instituted by the Khulumani Support Group, in terms of the Alien Tort Claims Act (ATCA) of 1789, against multinational corporations that allegedly aided and abetted crimes committed by the apartheid regime.²⁴

In part 3, I elucidate what constitutes an apartheid beneficiary, and ultimately, I propound an interpretation that is premised on structural inequality rather than an individualistic approach in ascertaining the meaning of 'apartheid beneficiary'. In part 4, I analyse the theoretical foundations of redistributive justice and I apply redistributive justice principles to South Africa's post-apartheid context. I survey equality jurisprudence in Part 5 and apply the imposition of a wealth tax on apartheid beneficiaries to the three-staged enquiry for determining whether a proposed redress measure constitutes a valid redress measure as set out in *Minister of Finance v Van Heerden*,²⁵ subsequent equality jurisprudence and academic commentary.

²³ See *Zuma v Office of the Public Protector* (1447/18) [2020] ZASCA 138 paras 1 & 26. South Africa is a signatory to the United Nations 2004 Convention against Corruption. The Convention defines corruption as 'an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. [It is an] evil phenomenon is found in all countries – big and small, rich, and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a [g]overnment's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.' See also E Drapalova, A Mungiu-Pippidi, B Jo Palifka & Jon Vrushi 'Corruption and the crisis of democracy: The link between corruption and the weakening of democratic institutions' (2019) *Transparency International* 9.

²⁴ C Gowar 'The Alien Tort Claims Act and the South African Apartheid Litigation: Is the End Nigh?' (2012) (1) *Speculum Juris* 59.

²⁵ *Minister of Finance v Van Heerden* 2004 (6) SA121 (CC).

In Part 6, I conclude by asserting that the South African government's rejection of a wealth tax on apartheid beneficiaries has contributed to the exacerbation and perpetuation of inequality.

II. ECONOMIC DIGNITY, ECONOMIC JUSTICE

(a) Apartheid Reparations Legislative Framework

The legal basis for the restoration of the economic dignity of victims of apartheid is contemplated in the preamble²⁶ to the TRC Act which states that the objectives of the TRC are *inter alia* to take ‘measures aimed at the granting of reparation to, ...[the] rehabilitation and...[restoration] of the human and civil dignity of victims of violations of human rights.’²⁷ The TRC was mandated to investigate politically motivated human rights violations that were perpetrated between 1960 and 1994, and its mandate lasted from 1995 to 2002.²⁸ Section 1(1)(xiv) of the TRC Act stipulates that reparation includes ‘any form of compensation, ex gratia payment, restitution, rehabilitation or recognition.’²⁹ Furthermore, section 4(f)(i) of the TRC Act states that the functions of the TRC shall be to achieve its objectives, and to that end, the TRC shall —

‘make recommendations to the President with regard to the policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims.’³⁰

The case of *AZAPO v The President of the Republic of South Africa*,³¹ further emphasises the legal basis for reparation, Mohamed DP amplified sections 3(3)(a),

²⁶ The preamble of the Promotion of National Unity and Reconciliation Act, 34 of 1995 states that the objectives of the TRC Act are to: ‘...provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; [grant] amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; [afford] victims an opportunity to relate the violations they suffered; [take] measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; [report] to the Nation about such violations and victims; [make] recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, comprising a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission.’

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Section 1(1) of the Promotion of National Unity and Reconciliation Act, 34 of 1995.

³⁰ Section 4(f)(i) of the Promotion of National Unity and Reconciliation Act, 34 of 1995.

³¹ See *AZAPO v The President of the Republic of South Africa* 1996 (4) SA 672 (CC). The applicants sought an order declaring section 20(7) of the Promotion of National Unity and Reconciliation Act, 34 of 1995 as unconstitutional. Section 20(7) of the TRC Act provides that a person who has been granted amnesty shall not be criminally or civilly liable in respect of the TRC Act. The court acknowledged that the section limited the applicants' right to 'have justiciable disputes settled by a court of law, or . . . other independent or impartial forum' in terms of s 22 of the interim Constitution. However, in terms of

3(3)(b) and 3(3)(c) of the TRC Act by stating that the TRC consisted of three committees.³² The first committee was the committee on human rights violations which conducted enquiries pertaining to gross violations of human rights,³³ and the second was the committee on reparation and rehabilitation which was given powers to gather information and receive evidence for the purposes of recommending suitable reparations for victims of gross violations of human rights to the president.³⁴

The third, was the committee on amnesty, which was given extensive powers to consider applications for amnesty.³⁵ Sections 27(1) and 27(2) of the TRC Act provide that the recommendations of the committee on reparation and rehabilitation are considered by the president who then makes recommendations to parliament.³⁶ These recommendations are considered by a joint committee of parliament and the decisions of the joint committee, after approval by parliament, are implemented by regulations made by the president.³⁷

(b) TRC wealth tax recommendation

Following the evidence provided by Terreblanche regarding the symbiotic relationship between business, labour, and the apartheid state at the TRC's institutional hearings,³⁸ the TRC gave effect to section 4(f)(i) of the TRC Act by recommending that a scheme be put in place '[that] would enable those who benefited from apartheid policies to contribute towards the alleviation of poverty.'³⁹ While the TRC was careful not to impose a poverty alleviation mechanism on the South African government, the TRC put forth Terreblanche's proposed imposition of a wealth tax

section 33(2) of the interim Constitution, violations of rights are permissible either if sanctioned by the interim Constitution or if justified in terms of section 33(1) of the interim Constitution (the limitations section). The court held that the epilogue ('National Unity and Reconciliation') to the Constitution sanctioned the limitation on the right of access to the court. Didcott J held that: 'Reparation is usually payable by states, and there is no reason to doubt that the postscript envisages our own state shouldering [that] national responsibility'. It, therefore, does not contemplate that the state will go scot-free. Furthermore, Didcott J stated that: 'The Statute does not, it is true, grant any legally enforceable rights in lieu of those lost by claimants whom the amnesties hit. It nevertheless offers some quid pro quo for loss and establishes the machinery for determining alternative redress.' The court ultimately held that section 20(7) of the TRC Act was constitutional. For purposes of this chapter, the legal basis for reparation is pertinent because the constitutionality of section 20(7) of the TRC Act is only limited to persons who have been granted amnesty.

³² Ibid para 5.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Terreblanche op cit note 9 at 3.

³⁹ Truth and Reconciliation Commission of South Africa Report op cit note 4.

(as a means of collecting proceeds for a poverty alleviation scheme that would redress apartheid's legacy of high wealth inequality) for the state's consideration.⁴⁰ The basis for Terreblanche's proposal was that apartheid-era discriminatory legislation not only deprived victims of apartheid of the opportunity to acquire skills but also 'compelled victims to perform dreary, unskilled and humiliating work at very low wages in all the sectors of the economy.'⁴¹ Furthermore, Terreblanche asserted that restrictions on the legal right of victims of apartheid to own property and conduct business resulted in the deprivation of victims' opportunity to accumulate property and develop entrepreneurial and professional capabilities.⁴² It is from this premise that this thesis calls for the imposition of a wealth tax on apartheid beneficiaries as a means not only to affirm section 9 of the Constitution,⁴³ but also to criticise the basis on which the South African government rejected the TRC's wealth tax recommendations.

⁴⁰ Truth and Reconciliation Commission of South Africa Report op cit note 4 vol 4 at 56.

⁴¹ Ibid.

⁴² Ibid.

⁴³ The Constitution supra note 5 at section 9.

(c) Redress Legislation

It could be deduced that the EE Act,⁴⁴ the PEPUDA,⁴⁵ the PPPFA,⁴⁶ and the B-BBEE Act⁴⁷ give effect to the TRC's recommendations notwithstanding the fact that these

⁴⁴ The preamble to Employment Equity Act 55 of 1998 recognises that 'as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws. Therefore, in order to promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation of employment equity to redress the effects of discrimination; achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of the International Labour Organisation'.

⁴⁵ The preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides that 'the consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people; Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes undermining the aspirations of our constitutional democracy; The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish: South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination; Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality; This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences; The PEPUDA endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.'

⁴⁶ See the preamble to the Preferential Procurement Policy Framework Act 5 of 2000, which states that the PPPFA 'gives effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution which states that 'when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. Furthermore, the organs of state or institutions referred are not prohibited from implementing a procurement policy which provides for categories of preference in the allocation of contracts; and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. The PPPFA prescribes the framework within which procurement policies must be implemented'.

⁴⁷ See the preamble to the Broad-Based Black Economic Empowerment Act 53 of 2003 which acknowledges that 'under apartheid race was used to control access to South Africa's productive resources and access to skills; South Africa's economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills; South Africa's economy performs below its potential because of the low level of income earned and generated by the majority of its people; unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race. Furthermore, the BEE Act provides that in order to promote the achievement of the constitutional right to equality, increase broad-based and effective

legislative measures do not explicitly refer to the TRC nor the TRC Act. This is because the suite of redress legislation explicitly refers to the undoing of apartheid's legacy in the context of the national labour market, social inequality, and exclusion of the effective participation of Black people in the mainstream economy.⁴⁸

However, despite the existence of restitutionary legislative interventions, the government's rejection of the TRC-recommended imposition of a wealth tax on apartheid beneficiaries constitutes a failure to '[harness] *all available* resources in the war against poverty' and inequality.⁴⁹ The rejection of a wealth tax on apartheid beneficiaries resulted in there being one less mechanism available for the government to alleviate inequality, this constituted a missed opportunity to make use of *all* the tools it had to dismantle inequality.⁵⁰ The court emphasised the importance of dismantling inequality in the case of *Van Heerden*⁵¹ by stating that —

‘The substantive notion of equality recognises that ... forms of social differentiation and systematic under-privilege...persist. The Constitution enjoins us to *dismantle them and to prevent the creation of new patterns of disadvantage.*’⁵²

(d) The South African government's rejection of a wealth tax on apartheid beneficiaries

On 15 April 2003, during the occasion of the tabling of the TRC report to the national houses of parliament and the South African nation,⁵³ the former president Mbeki

participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution; and [it is necessary to] establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services.’

⁴⁸ Ibid. See also preambles to the Preferential Procurement Policy Framework Act 5 of 2000; the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; Employment Equity Act 55 of 1998.

⁴⁹ Truth and Reconciliation Commission of South Africa Report op cit note 4.

⁵⁰ Ibid.

⁵¹ *Van Heerden* supra note 25.

⁵² Ibid at para 27. Emphasis added.

⁵³ ‘Statement by President Thabo Mbeki to the national houses of parliament and the nation, on the occasion of the tabling of the report of the truth and reconciliation commission: Cape Town’, 15 April 2003 available at, <https://static.pmg.org.za/docs/2003/appendices/030610presrec.htm>, accessed on 15 November 2019 ‘Statement by president Mbeki.’

made a statement rejecting the TRC's proposal of a once-off wealth tax on corporations (and by extension anyone) that benefited from the apartheid state.⁵⁴ He stated that —

‘[The government] imposed a heavy burden particularly on the millions who had been the victims of ... oppression to let bygones be bygones. [It] said to them — do not covet the material wealth of those who benefited from your oppression and exploitation, even as you remain poor I am certain that we are all at one that the pursuit of national unity, the well-being of all South African citizens and peace, require reconciliation among the people of South Africa and the reconstruction of our society.’⁵⁵

The rationale behind the government's rejection of the imposition of a wealth tax on apartheid beneficiaries was that it was ‘contrary to the pursuit of a non-racial society in which all South Africans would be inspired by a common patriotism’.⁵⁶ The government proposed that *all South Africans* (including corporate citizens) *co-operatively and voluntarily* make contributions to the reparations fund.⁵⁷ The proposal was meant to encourage South Africans to learn to work together in responding to the legacy of apartheid.⁵⁸

Notwithstanding the government's noble unification objective, the request that all South Africans contribute to the reparations fund was regrettably aligned with formal equality.⁵⁹ Formal equality assumes that a just legal order provided all persons with equal rights and that all persons can participate in the economy on an equal footing.⁶⁰

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*,⁶¹ Sachs J held that ‘equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. [Equality] does not presuppose the elimination or suppression of difference.’⁶² Much like the government's request that all South Africans co-operatively and voluntarily make contributions to the reparations

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid

⁵⁷ Ibid. Emphasis added.

⁵⁸ Ibid.

⁵⁹ T Deane & R Brijmohanlall ‘The Constitutional Court's approach to equality’ (2003) *Codicillus* 92.

⁶⁰ Ibid at 94.

⁶¹ *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice* (1999) 1 SA 6 (CC).

⁶² Ibid para 132.

fund, formal equality ignores actual social and economic disparities between individuals and groups in society.⁶³

The Constitutional Court unambiguously held that equality must be interpreted in a ‘substantive’ and not a ‘formal’ manner.⁶⁴ This is because different treatment between groups is not necessarily a violation of the right to equality.⁶⁵ Rather, it is an intrinsic part of the constitutional objective of achieving true substantive equality.⁶⁶ The court emphasised that —

‘[I]n a country such as South Africa, persons belonging to certain categories ... suffered considerable unfair discrimination in the past Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and *unless remedied, may continue for a substantial time and even indefinitely.*’⁶⁷

(e) The Khulumani Support Group’s apartheid reparations litigation

In 2002, the Khulumani Support Group instituted legal action against twenty-three banks and corporations in the United States federal court that conducted business in South Africa during apartheid.⁶⁸ The Khulumani Support Group represents victims of apartheid-era human rights abuses who are aggrieved by large-scale nation-building and unification processes.⁶⁹ It is the only national membership organisation of identified victims and survivors of apartheid human rights violations in South Africa.⁷⁰

The organisation was established in 1995 with the objective of ensuring that victim re-empowerment rested in the hands of victims and survivors.⁷¹ The purpose of the organisation is to allow victims to be progressively transformed into victors.⁷² The group emphasises that ‘while expressions of regret [for apartheid human rights violations] are appreciated ... they are no longer sufficient. *There must be movement beyond apologies to accountability and reparations.*’⁷³ It is for this reason that the

⁶³ Ibid para 64.

⁶⁴ Ibid para 61.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid para 60. Emphasis added.

⁶⁸ C Gowa op cit note 24 at 59.

⁶⁹ N Bohler-Muller ‘Reparations for Apartheid-Era Human Rights Abuses: The Ongoing Struggle of Khulumani Support Group’ 2013(1) *Speculum Juris* 5.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ ‘Remembering the Sharpeville & Langa Massacres: 21 March 2020 – a reflection on how much more has to be attended to’, 16 March 2020, available at, <https://khulumani.net/reparations/remembering->

Khulumani Support Group sought to empower its members through litigation in the United States.⁷⁴ The Khulumani Support Group's reparations strategy was crafted in the context of victims and economic beneficiaries, rather than between victims and political perpetrators. The South African government stressed that it was not and would not be a party to such litigation.⁷⁵ Mbeki highlighted that the South African government considered it unacceptable that matters that were central to the future of South Africa were adjudicated in foreign courts which bore no responsibility for the well-being of South Africa and the observance of the promotion of national reconciliation as contained in the South African Constitution.⁷⁶ Furthermore, the government had concerns that the apartheid reparations litigation would discourage foreign investment in South Africa.⁷⁷ Although the South African government recognised the right of citizens to institute legal action, it emphasised that its strategy was 'informed by the desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership in order to reconstruct and develop South African society.'⁷⁸ Mbeki stated that the government would pay R30 000 each to more than 19 000 victims of apartheid as identified by the TRC (it is important to note that the payment total of R571,5 million was far below the R3 billion recommended by the TRC).⁷⁹ The arguments advanced by the South African government were not supported by the TRC commissioners.⁸⁰ The chairperson of the TRC, Tutu, submitted an amicus brief to the Second Circuit Court of Appeals stating that —

'[t]here was absolutely nothing in the TRC process, its goals or the pursuit of the overarching goal of reconciliation, linked with truth that would be impeded

sharpeville-langa-massacres-much-more-reflection/2020/03/16/, accessed on 13 January 2021. *The Khulumani Support Group* advocates for 'truth, healing, and redress for those damaged through our apartheid history, and for the advance of the ongoing struggle to create a democratic, non-racial and just society.' The Group has also 'reaffirmed the need for measures for accountability and democratic practice, measures that are enshrined in Khulumani's constitution for providing space and visibility for the voices of members rooted in Khulumani member groups across all of South Africa's provinces, so that their demands drive the organisation's campaigns, positions and activities; and for a more responsive advocacy support in response to new and emerging challenges and conditions.' Emphasis added.

⁷⁴ N Bohler-Muller op cit note 69.

⁷⁵ Statement by President Mbeki op cit note 53.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ 'Apartheid victims will get R30 000 pay out' 15 April 2003 <https://www.iol.co.za/news/politics/apartheid-victims-will-get-r30-000-payout-104861>, accessed on 12 December 2019.

⁸⁰ L Knutson 'Aliens, Apartheid and US courts: Is the Right of Apartheid Victims to Claim Reparations from Multinational Corporations at last Recognised? 2010 7(12) *International Journal on Human Rights* 178.

by this litigation. To the contrary, such litigation is entirely consistent with [the] policies and ... findings of the TRC.’⁸¹

(i) *The ATCA*

The Khulumani Support Group sought reparations from multinational corporations in the United States by invoking the ATCA.⁸² The ATCA (also referred to as the Alien Tort Statute) was originally adopted in 1789 as part of the Judiciary Act of 1789.⁸³ The preamble to the ATCA states that ‘[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’⁸⁴

In the matter of *In re South African Apartheid Litigation*,⁸⁵ the plaintiffs who comprised Ntsebeza, Digwajame, and the Khulumani Support Group filed actions that contained allegations that the participation of defendant companies in key industries during the apartheid era encouraged and furthered abuses against Africans through the defendants’ supply of ammunition, technology, oil and loans to the National Party government.⁸⁶ The plaintiffs contended that the defendants’ activities in the apartheid era made them complicit in the commission of human rights violations and that they were entitled to compensatory and punitive damages from the defendants.⁸⁷ Sprizzo J held that the tort of aiding and abetting apartheid did not fall under the ‘narrow and limited class of violations that would be justiciable under

⁸¹ Ibid.

⁸² N Bohler-Muller op cit note 69 at 3. ‘Alien Tort Claims Act’. A tort is any wrongful act not involving a breach of contract for which a civil suit can be brought. See also S Mulligan ‘The Rise and Decline of the Alien Tort Statute’ *Congressional Research Initiative* 1. Mulligan states that ‘The ATS provides federal district courts with jurisdiction to hear cases with four elements: (1) a civil action; (2) by an alien; (3) for a tort; (4) committed in violation of the law of nations or a treaty of the United States. The First Congress enacted the statute against the backdrop of the United States’ struggles as a young nation operating under the Articles of Confederation. During the early years of the Republic, the national government was dependent on state governments to ensure compliance with the nation’s commitments under international law. In some cases, the states ignored the United States’ obligations. For example, states refused to remove legal impediments on British citizens’ efforts to collect pre-Revolutionary War debts as required by the 1783 Treaty of Peace with Great Britain. And when a French diplomat was assaulted on a public street in Philadelphia, the national government was forced to apologize to the French Ambassador and explain that only Pennsylvania officials had authority to prosecute the offender.’

⁸³ C Gowar op cit note 24 at 56.

⁸⁴ Ibid.

⁸⁵ *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 542-46 (S.D.N.Y. 2004).

⁸⁶ Ibid.

⁸⁷ Ibid. See also R. Davis ‘US Corporations can’t be sued for Apartheid, court rules’ available at <https://www.ru.ac.za/perspective/2013archive/uscorporationscantbesuedforapartheidcourtrules.html> accessed on 12 December 2019 ‘[It is important to note that the litigation action instituted by the

the ATCA, consequently the plaintiffs' claims were dismissed in the Southern District Court of New York.⁸⁸

(ii) The Second Circuit Court of Appeals

The plaintiffs appealed Sprizzo's dismissal in the Second Circuit Court of Appeals wherein the court held that the District Court erred in holding that the aiding and abetting violations of customary international law could not provide a basis for ATCA jurisdiction.⁸⁹ Consequently, the Second Circuit Court of Appeals reinstated the plaintiffs' ATCA claims and reasoned that 'a plaintiff may plead a theory of aiding and abetting liability under the ATCA.'⁹⁰ The Second Circuit Court of Appeals did not make a ruling on the merits of the apartheid litigation, instead, the cases were remanded back to the Southern District Court of New York in order for a decision to be made on whether the claims against the defendant companies should succeed.⁹¹

(iii) The Supreme Court

Following the reinstatement of the ATCA claims, the defendant companies petitioned the Supreme Court for a writ of certiorari.⁹² However, given that four of the nine Supreme Court judges had to recuse themselves as a result of conflicts of interest that emanated from their investments in the defendant companies, the Supreme Court lacked the required quorum and had no option but to uphold the decision of the Second Circuit Court of Appeals.⁹³ Consequently, the matter was sent back to the Southern District Court of New York, in order for the pleadings to be addressed and for a

Khulumani Support Group is not] unprecedented ... [t]here has been lobbying the United States of America for the right to hold France's SNCF rail company accountable for its role in transporting Jews to their deaths in the Holocaust The state-owned rail company helped deport 75,000 French Jews to the gas chambers during World War II, even though [it] claimed that it did so under duress.'

⁸⁸ *In re South Africa Apartheid Litigation* supra note 85 at 550.

⁸⁹ *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam) at 260.

⁹⁰ *Ibid.*

⁹¹ *Khulumani* supra note 89 at 264 & 284.

On 1 September 2009 the former Minister of Justice and Constitutional Development, Jeff Radebe, addressed a letter to Scheindlin J with a copy to the Second Circuit Court of Appeals. The letter reversed the South African government's opposition to the litigation under former president Mbeki. The Minister observed that the apartheid litigation no longer involved claims against corporations that merely did business in South Africa during that time and instead limited the claims to those 'based on aiding and abetting very serious crimes, such as torture, [and] extrajudicial killing[s] committed in violation of international law by the apartheid regime.' The Minister also informed the court that '[t]he government of the Republic of South Africa, having considered carefully the judgment of the ... Southern District of New York, is now of the view that this Court is the appropriate forum to hear the remaining claims of aiding and abetting in violation of international law'. The letter indicated that the South African government would be 'willing to offer counsel to the parties in pursuit of a settlement'.

⁹² A writ of certiorari is filed when a losing party requests the Supreme Court to review a decision of a lower court. A writ of certiorari will only be granted by the Supreme Court for compelling reasons.

⁹³ *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) at 11.

the decision to be made on whether the claims against the defendant corporations should succeed on the facts.⁹⁴

(iv) The return to the Southern District Court of New York

On the return to the District Court, Scheindlin J held that the apartheid litigation did not interfere with the TRC process and rejected the defendants' argument that the actions be dismissed on the basis of the doctrine of 'political question'.⁹⁵ The court held that the defendant corporations pointed to no other South African forum that could adjudicate the plaintiffs' claims.⁹⁶ Furthermore, the court held that the plaintiffs could proceed with their claims against five defendant companies as the defendants had exclusive contracts to provide services that assisted in propping up the infrastructure of apartheid, accordingly the plaintiffs amended their complaint and proceeded only against Daimler A.G., Ford Motor Company, General Motors,⁹⁷ IBM,⁹⁸ and Rheinmetall (the action brought against oil companies and banks was abandoned as the court ruled that these organisations provided normal services during the apartheid era).⁹⁹

(v) The return to the Second Circuit Court of Appeals

The five defendants filed an appeal against the Southern District Court of New York's decision that allowed the plaintiffs to proceed with the claims. The Second Circuit Court of Appeals referred to the US Supreme Court's limitation on extraterritorial application of the ATCA as decided in the case of *Kiobel v Royal Dutch Petroleum Co* wherein the court held that '[w]hen a statute gives no clear indication of an extraterritorial application, it has none'.¹⁰⁰ The Second Circuit Court of Appeal held that since the human rights violations committed against the plaintiffs occurred outside the United States, the case had to be dismissed.¹⁰¹ Furthermore, the court of appeals

⁹⁴ *In re South African Apartheid Litigation* supra (n78) at 11-12; and *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

⁹⁵ *In re South African Apartheid Litigation*, 346 F Supp 2d 538, 542 (S.D.N.Y 2003) 549. The political question doctrine seeks to uphold the separation of powers and operates when 'a court declines to hear a case that deals with issues more properly belonging before one of the 'political' branches of government'.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *In re South African Apartheid Litigation*, 624 F. Supp. 2d 336 (S.D.N.Y. 2009) at 56-73.

⁹⁹ *Khumani et al v Barclays et al.* (02-MDL-1499) (S.D.N.Y.) Amended Complaint, United States District Court, 31 October 2008.

¹⁰⁰ *Kiobel v Royal Dutch Petroleum Co* 2013 133 S Ct 1659 (No 10 1491).

¹⁰¹ *Ibid.*

pronounced that the ATCA ‘does not permit claims based on illegal conduct that occurred entirely in the territory of another sovereign.’¹⁰²

(f) The disruption of the state’s reconciliation narrative

Notwithstanding the plaintiffs’ unsuccessful apartheid reparations litigation, the litigation instituted in the USA shows that the pursuit of reconciliation without addressing wealth inequality is an ineffective and unsustainable way of achieving national unity. The government’s disavowal of the apartheid reparations litigation did not deter victims of apartheid from acting contrary to the government’s proposal that all South Africans (including corporate citizens) *co-operatively and voluntarily* make contributions to the reparations fund. Instead, apartheid victims sought reparations from multinational corporations in the USA.

Bohler-Muller defines the apartheid reparations litigation as ‘a [significant] challenge to the South African ‘*state-driven meta-narrative of national unity and reconciliation*’¹⁰³ that does not address the financial well-being of apartheid victims.¹⁰⁴ In addition to that, Bohler-Muller highlights that the Constitutional Court regrettably missed an opportunity to meaningfully address this meta-narrative in the case of *Albutt v Centre for the Study of Violence and Reconciliation*.¹⁰⁵ The *Albutt* case concerned the power of the president to grant pardons to offenders under section 84(2)(j) of the Constitution.¹⁰⁶ The question that came before the court was whether the president was required to afford the victims of political crimes an opportunity to make representations prior to making a decision to pardon offenders who committed such crimes.¹⁰⁷ The special dispensation for pardon was described by former president Mbeki as dealing with the ‘unfinished business’ of the TRC.¹⁰⁸ This ‘unfinished

¹⁰² *Balintulo v Daimler AG* 2013 727 F 3d 174, 192 (2d Cir 2013).

¹⁰³ N Bohler-Muller op cit note 61 at 6.

¹⁰⁴ N Bohler-Muller ‘Against Forgetting: Reconciliation and Reparations after the Truth and Reconciliation Commission (2008) 19(3) Stellenbosch Law Review 466-482; N Bohler-Muller ‘Reparations for Apartheid Human Rights Abuses: The Case of Khulumani’ 2008 Africa Growth Agenda 20 -22; and N Bohler-Muller ‘Apartheid victim group scores symbolic victory against multinationals’ HSRC Review (2012) 10(3). Emphasis added.

¹⁰⁵ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

¹⁰⁶ *Albutt v Centre for the Study of Violence and Reconciliation* supra note 105 para 1.

¹⁰⁷ Ibid.

¹⁰⁸ *Albutt v Centre for the Study of Violence and Reconciliation* supra note 105 para 4.

business' included 'the question of amnesty for South Africans who did not participate in the TRC process for a number of reasons.'¹⁰⁹ Mbeki stated that —

'[a]s a way forward and in the interest of nation-building, national reconciliation and the further enhancement of national cohesion, and in order to make a further break with matters which arise from the conflicts of the past, consideration has therefore been given to the use of the presidential pardon to deal with this 'unfinished business.'¹¹⁰

Furthermore, the former president stated that decisions related to the special dispensation to pardon should —

'be guided by the principles and values which underpin the Constitution, including the principles and objectives of nation-building and national reconciliation; and, uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the TRC, especially as they relate to the amnesty process.'¹¹¹

It is against this backdrop that Ngcobo CJ held that while the executive branch of government had wide discretion in selecting the means to achieve its constitutionally permissible objectives, courts were obliged to examine whether the means selected were rationally related to the constitutional objective that sought to be achieved.¹¹² And if objectively speaking they were not, they fell short of the standard demanded by the Constitution.¹¹³ This was true of the exercise of the power to pardon under section 84(2)(j) of the Constitution.¹¹⁴ In terms of section 83(c) of the Constitution, the president had a duty to promote 'the unity of the nation and that which will advance the Republic', but this power had to be exercised in a manner that allowed public participation as was evident in the TRC process itself.¹¹⁵ Furthermore, the court held that because the TRC emphasised the importance of the participation of victims and perpetrators in the achievement of national reconciliation, such participation would also be required prior to deciding whether to pardon criminals whose offences were politically motivated.¹¹⁶ Consequently, Ngcobo CJ found that there could be no rational distinction between the TRC and the special dispensation so as to justify the presence of victims in the former process but not in the latter.¹¹⁷ The court held that

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ *Albutt v Centre for the Study of Violence and Reconciliation* supra note 105 para 6.

¹¹² *Albutt v Centre for the Study of Violence and Reconciliation* supra note 105 para 50.

¹¹³ Ibid.

¹¹⁴ *Albutt v Centre for the Study of Violence and Reconciliation* supra note 105 para 51.

¹¹⁵ Ibid.

¹¹⁶ *Albutt v Centre for the Study of Violence and Reconciliation* supra note 105 para 61.

¹¹⁷ *Albutt v Centre for the Study of Violence and Reconciliation* supra note 105 para 69.

before the president could grant a pardon, the facts in accordance with criteria set out in the special dispensation must be established, that is, whether the crime was committed with a political motive.¹¹⁸ To so decide, the president was obliged to hear both the applicant and victim(s). Ultimately the court held that victim participation was required to achieve the objective of unity within the ambit of the Constitution.¹¹⁹

Although it can be said that the outcome of the *Albutt* case was just in that the court sanctioned a process of active victim participation in respect of presidential pardons, Bohler-Muller argues that it would have been preferable for Ngcobo CJ to interrogate the institutionalisation of the processes of reconciliation, forgiveness, and healing.¹²⁰ By not reflecting on the complexities of reconciliation, the court missed an opportunity to address Madlingozi's conception of the 'bad apartheid victim' who reminds us of the '[im]possibility of final and complete reconciliation'.¹²¹ According to Madlingozi, 'good apartheid victims' are those who are prepared to accept the moral victory of freedom as sufficient, and 'bad apartheid victims' are those who continue to demand repair and reparations and who challenge the meta-narrative of a reconciled South Africa.¹²² Similarly, Motha warns against the naïve endorsement of national reconciliation projects.¹²³ Motha argues that the 'time' of reconciliation is marked and delineated by the possibility of producing a 'political community' that re-inscribes the political under 'one-law',¹²⁴ which in turn subordinates anything other than that law in the name of 'civilisation'.¹²⁵ Motha thus understands reconciliation as a form of domination that endorses conventional narratives of nation-building.¹²⁶ Regrettably, the court's failure to address the intricacies of reconciliation in *Albutt* aligns with the state's oversimplified conception of unity that evades (at the expense of apartheid

¹¹⁸ *Albutt v Centre for the Study of Violence and Reconciliation* supra note 105 para 70.

¹¹⁹ *Albutt v Centre for the Study of Violence and Reconciliation* supra note 105 para 61.

¹²⁰ N Bohler-Muller op cit note 69 at 17.

¹²¹ T Madlingozi 'Good Victims, Bad Victims: Apartheid Beneficiaries, Victims and the Struggle for Social Justice' in W. Le Roux and K Van Marle (eds) *Law, Memory and Apartheid: Ten Years after AZAPO v President of South Africa*. (2007) at 107–126.

¹²² N Bohler-Muller op cit note 69 at 11.

¹²³ S Motha 'Reconciliation as Domination' in S Veitch (ed.) *Law and the Politics of Reconciliation* (2007) 69–91.

¹²⁴ *Ibid* at 69.

¹²⁵ *Ibid*.

¹²⁶ *Ibid* at 88.

victims) redistributive mechanisms such as the imposition of a wealth tax on apartheid beneficiaries.

(g) Conclusion: The undermining of the economic dignity of victims of apartheid

The government misconstrued the TRC's choice of a restorative justice process¹²⁷ in that its pursuit of national unity and reconciliation was at the cost of the economic dignity of apartheid victims, this is evidenced by Mbeki's statement on the tabling of the TRC report on 15 April 2003 where he declared the following: 'let bygones be bygones ... do not covet the material wealth of those who benefited from your oppression and exploitation, *even as you remain poor.*'¹²⁸

Mbeki's statement is inconsistent with the TRC's recommendation that '*reconciliation without cost and pain is cheap, shallow and must be spurned.*'¹²⁹ It is clear from the TRC recommendations that the reconciliation that was envisaged prioritised reparations for the harm caused by apartheid. The government's inordinate focus on national unity (*inter alia* through the rejection of a wealth tax imposition on apartheid beneficiaries) has by Mbeki's own admission entrenched apartheid's legacy of poverty and inequality and has resulted in 'the time of neo-apartheid.'¹³⁰ The time of neo-apartheid' suggests that '[the conditions of] *colonialism and apartheid have survived the so-called transition from apartheid to post-apartheid in that impoverished*

¹²⁷ See the Department of Justice and Constitutional Development of South Africa's 'Restorative Justice the road to healing' it defines restorative justice as 'an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation. Restorative Justice sees crime as an act against the victim and shifts the focus to repairing the harm that has been committed against the victim and community. It believes that the offender also needs assistance and seeks to identify what needs to change to prevent future re-offending.' Available at <https://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf>, accessed on 12 December 2019

¹²⁸ 'Statement by President Mbeki op cit note 53. Emphasis added.

¹²⁹ Truth and Reconciliation Commission of South Africa Report op cit note 4 at 307. Emphasis added.

¹³⁰ T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123. Emphasis added.

*black people remain ensnared in a zone of stasis.*¹³¹ Essentially, the ‘end of apartheid’ has not changed the living conditions of millions of South Africans.¹³²

Notwithstanding the fact that the government’s decision to reject the TRC’s wealth tax recommendation was made during South Africa’s democratic era, any policy that concedes that its implementation shall result in apartheid victims remaining poor is in effect a ‘new apartheid’.

¹³¹ Ibid at 125.

¹³² M Roberts ‘The Ending of Apartheid: Shifting Inequalities in South Africa’ (1994) *Geography*, Volume. 79 (1) 53. Roberts states that ‘apartheid is claimed by many to be over. The ideology has been largely abandoned. The apartheid legislation [has been] repealed. Yet the political, economic, and social structures, constructed during the four decades of apartheid, remain. Inequalities associated with apartheid are shifting, with new inequalities emerging. The ending of apartheid is experienced differently by different groups leading to different perceptions of the current situation. For many, the ‘ending of apartheid’ has shifted nothing.’

III. WHAT CONSTITUTES AN APARTHEID BENEFICIARY?

*‘South Africa is interesting, not just because of the drastic political and social changes that have taken place since 1994, but also because of how much has remained essentially the same, especially in the economy.’*¹³³ — Tikam Sall

*‘[Is it the end] of Apartheid in South Africa? Not in Economic Terms. Political liberation has yet to translate into material gains for... [Black people]. As one woman said, “I’ve gone from a shack to a shack.”’*¹³⁴ — Peter Goodman

a) The systematic and systemic nature of Apartheid

Article 7 of the Rome Statute of the International Criminal Court¹³⁵ defines apartheid as a crime against humanity,¹³⁶ which is ‘committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups with the intention of maintaining that regime’.

In the South African context, apartheid was a system that concentrated economic, social, and political power in the hands of the White minority.¹³⁷

According to the apartheid system of social stratification, White citizens had the highest status, followed in descending order by Indians, Coloureds, and Africans.¹³⁸

¹³³ T Sall ‘The Rainbow Myth: Dreaming of a Post-racial South African Society’ (2018) *Institute for Global Dialogue* at 5.

¹³⁴ P Goodman ‘Is it the end of apartheid in South Africa’, available at <https://www.nytimes.com/2017/10/24/business/south-africa-economy-apartheid.html> accessed on 15 June 2020.

¹³⁵ Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544.

¹³⁶ J Dugard ‘Convention on the suppression and punishment of the crime of apartheid.’ (2008) United Nations Audio-visual Library of International Law 2. ‘There were no prosecutions of the leaders or agents of the apartheid regime for crimes of apartheid. Instead, the TRC was established with the task of achieving reconciliation and supervising the granting of amnesty to those who had committed serious violations of human rights during the apartheid era.’

¹³⁷ M Strauss ‘A historical exposition of spatial injustice and segregated urban settlement in South Africa’ (2019) 25 (2) *Fundamina* 141.

¹³⁸ E Landis ‘South African Apartheid Legislation I: Fundamental Structure’ (1961) *The Yale Law Journal* 71(1) at 2.

Baasskap (‘boss-ship’ or, in more familiar terms, ‘white domination’ or ‘white supremacy’) or, in its most generous expression, ‘Christian guardianship’ was the basis for the apartheid government’s policy towards those who were not of European descent. The preservation of ‘White’, ‘Western’, or ‘Christian’ civilization against what the apartheid regime deemed to be ‘numberless savage black hordes’ remains the underlying premise of the apartheid government’s policy, as well as the most successful basis for electioneering. Race was defined by a physical appearance by the Population Registration Act 30 of 1950 which required citizens to be identified and registered from birth as belonging to one of four distinct racial groups: White, Coloured, Bantu (Black African), and Other. It was one of the ‘pillars’ of Apartheid. When the law was implemented, citizens were issued identity documents, and race was reflected by the individual's Identity Number. The Population Registration Act 30 of 1950 was typified

Apartheid depended on systemic violence for its maintenance and enforcement which included extra-judicial murder, torture, inhuman treatment, and arbitrary arrest of members of a racial group; deliberate imposition on a racial group of living conditions calculated to cause its physical destruction; measures that divide the population along racial lines by the creation of separate residential areas for racial groups; and the persecution of persons opposed to apartheid.¹³⁹ A distinguishing feature of apartheid from other forms of segregation and racial prejudice was the systematic way in which the National Party, which came into power in 1948, formalised it through the law.¹⁴⁰ Dugard's reflection on the nature of apartheid laws emphasised that —

‘[A] legal system that excludes 70 per cent of its population from the franchise, ... excludes 70 per cent of its population from owning land in 87 per cent of the country, ... arbitrarily deprives 8 million people of their nationality, ... has forcibly relocated many millions of people on account of their race, ... formally executes some 160 persons per year, ... authorises repression in the name of national security and that permits international aggression, [is] ... a grossly abnormal one.’¹⁴¹

by humiliating tests which determined race through perceived linguistic and/or physical characteristics. The wording was imprecise, but it was applied with great enthusiasm: A White person was defined as ‘one who is in appearance obviously white — and not generally accepted as Coloured — or who is generally accepted as White — and is not obviously Non-White, provided that a person shall not be classified as a White person if one of his natural parents has been classified as a Coloured person or a ‘Bantu’. A Bantu person was defined as a person who is, or is generally accepted as, a member of any aboriginal race or tribe of Africa.’ A Coloured person was defined as ‘a person who is not a White person or a Bantu.’

¹³⁹ Article 2 of the Convention on the Suppression and Punishment of the Crime of Apartheid International Convention on the Suppression and Punishment of the Crime of Apartheid G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243, entered into force July 18, 1976 (‘The Apartheid Convention’) lists the practices of racial segregation and discrimination as practised in southern Africa. The Apartheid Convention has its roots in the opposition of the United Nations to the discriminatory racial policies of the South African Government — which lasted from 1948 to 1990. Apartheid was annually condemned by the General Assembly as contrary to Articles 55 and 56 of the Charter of the United Nations from 1952 until 1990, and was regularly condemned by the Security Council after 1960. In 1966, the General Assembly labelled apartheid as a crime against humanity (resolution 2202 A (XXI) of 16 December 1966) and in 1984 the Security Council endorsed this determination (resolution 556 (1984) of 23 October 1984). The Apartheid Convention was the ultimate step in the condemnation of apartheid as it not only declared that apartheid was unlawful because it violated the Charter of the United Nations, but in addition, it declared apartheid to be criminal. The Apartheid Convention was adopted by the General Assembly on 30 November 1973, with 91 votes in favour, four against (Portugal, South Africa, the United Kingdom, and the United States), and 26 abstentions. It came into force on 18 July 1976.

¹⁴⁰ M Strauss op cit 137 at 154.

¹⁴¹ H Klug ‘Law under and after Apartheid: Abel's Sociolegal Analysis’ (2000) *Law & Social Inquiry*, 25(2) at 660.

Dugard's sentiment on the grotesque nature of apartheid laws aligns with the Constitutional Court's analysis of apartheid's legacy in *Van Heerden*.¹⁴² The court remarked that —

'The tremendous indignity and political oppression that characterised ... apartheid was coupled with the systemic entrenchment of economic disadvantage for millions of [Black] South Africans. The vast majority of this country's wealth remained then and remains still, as a consequence of the entrenched disadvantage, in the hands of a [White] minority. Sprawling and over-crowded informal townships inhabited by poor and jobless [Black] people without property to call their own and without many of the basic amenities necessary for a dignified human existence sit beside most affluent neighbourhoods with people who have access to the best schools, the best jobs and the best opportunities.'¹⁴³

b) The categorisation of apartheid laws

Apartheid laws can be categorised into two distinct classes, namely 'grand apartheid' and 'petty apartheid'.¹⁴⁴ 'Grand apartheid' refers to the creation of racialised reserves and the forceful movement of citizens to those lands.¹⁴⁵ Meanwhile, 'petty apartheid' refers to the segregation of public amenities along racial lines.¹⁴⁶ Apartheid legislation was aimed at ensuring racial separation in all aspects of social life for purposes of controlling and limiting the economic activity of those who were classified as non-White under the regime.¹⁴⁷ The purpose of the exegesis of apartheid laws is to underscore its pervasiveness and inescapability in past South African society.

i) Apartheid legislative framework

The Constitutional Court examined the adverse economic impact of apartheid's oppressive laws in *Tongoane v National Minister for Agriculture and Land Affairs*,¹⁴⁸

¹⁴² *Van Heerden* supra note 25.

¹⁴³ *Ibid* para 73.

¹⁴⁴ S Msimang 'All Is Not Forgiven: South Africa and the Scars of Apartheid' (2018) *Foreign Affairs* 97(1) at 29.

¹⁴⁵ *Ibid*

¹⁴⁶ *Ibid*.

¹⁴⁷ *Van Heerden* supra note 25.

¹⁴⁸ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 (6) SA 214 (CC). The facts of the matter are as follows: The applicants sought confirmation (in the Constitutional Court) of the declaration of invalidity made by the North Gauteng High Court, in respect of various provisions of the Communal Land Rights Act 11 of 2004 (CLARA). The purpose of CLARA is to meet the constitutional obligations of Parliament to enact legislation that provides legally secure tenure or comparable redress to people or communities whose tenure of land is legally insecure as a result of the racist policies of

where the court accepted the magnitude of the economic problems created by apartheid legislation and practices,¹⁴⁹ Ngcobo CJ stated that the core problem created by apartheid geography was that millions of Black African people were forced into labour reserves that were impoverished, overcrowded, and distant from employment opportunities.¹⁵⁰

The key legislation that institutionalised the apartheid system included, but was not limited to, the Population Registration Act,¹⁵¹ which required citizens to be identified and registered (from birth) into one of the four distinct racial categories.¹⁵²

The Population Registration Act was critical in buttressing the apartheid system, race was reflected in a person's identity number which led to the creation of a national register in which every inhabitant's race was recorded under the Act.¹⁵³

The national register contained a comprehensive database in which the racial identity of all citizens could be verified against information regarding access to work, social services, accommodation, tax, and marital status.¹⁵⁴ The purpose of the register was to ensure that the facets of everyday life hinged on a person's racial identity;¹⁵⁵

apartheid. In addition to the declaration, they sought leave to appeal against the High Court's refusal to declare CLARA invalid for failure to enact it in accordance with the correct procedure. Furthermore, the applicants applied for direct access to challenging the validity of CLARA on the basis that Parliament failed to comply with its constitutional obligations to facilitate public involvement in the legislative process. CLARA was enacted in accordance with section 75 of the Constitution; the procedure for '[B]ills not affecting the provinces.' The applicants argued that the enactment in accordance with this procedure was incorrect and invalid. They argued that CLARA was incorrectly classified or 'tagged' as a section 75 Bill, rather than a section 76 Bill, as a result of Parliament adopting the incorrect 'tagging' test. After analysing the provisions of CLARA Ngcobo CJ held that the inescapable conclusion is that various provisions of CLARA substantially affect indigenous law and traditional leadership – areas of concurrent national and provincial competence. He concluded that Parliament followed an incorrect procedure in enacting CLARA. CLARA was declared unconstitutional and invalid because it was inconsistent with the procedures set out in section 76 of the Constitution. In order to put the issues presented to the Court in context, Ngcobo CJ conducted provided an overview of the legislative scheme which brought about South Africa's colonial and apartheid geography which facilitated land dispossession of African people, the resultant insecure land tenure for the majority of our country, and the history of land occupation by the four applicant communities.

¹⁴⁹ Ibid para 124.

¹⁵⁰ Ibid.

¹⁵¹ Population Registration Act 30 of 1950.

¹⁵² 'Whites', 'Coloureds', 'Indians' and 'Africans'. See D Posel 'What's in a name? Racial categorisations under apartheid and their afterlife' (2001) *Transformation: Critical Perspectives on Southern Africa* at 51.

¹⁵³ Ibid at 54.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

The Group Areas Act,¹⁵⁶ which controlled the movements of the population,¹⁵⁷ led to forced removals and created physical separation between races,¹⁵⁸ the purpose of this Act was to exclude Black people from living in developed areas, which were restricted to White people.¹⁵⁹ The Suppression of Communism Act,¹⁶⁰ which declared the Communist Party of South Africa to be an unlawful organisation,¹⁶¹ also made provision for the declaring of other organizations promoting communistic activities as unlawful.¹⁶² The Act was phrased in such a way that anyone who opposed government policy could be deemed a communist.¹⁶³ The Bantu Building Workers Act¹⁶⁴ allowed Black people to be trained as artisans in the building trade (this was previously reserved for White people only).¹⁶⁵ However, Black people had to work within an area designated for them.¹⁶⁶ The Act made it a criminal offence for a Black person to perform any skilled work in urban areas except in those sections designated for Black occupation.¹⁶⁷ The Prevention of Illegal Squatting Act¹⁶⁸ gave the Minister of Native Affairs the power to remove Black people from public or privately owned land and to establish resettlement camps to house displaced Black people;¹⁶⁹ The Natives Laws Amendment Act¹⁷⁰ narrowed the definition of the category of Black people who had the right of permanent residence in towns.¹⁷¹ Permanent residency was limited to Black people who'd been born in a town and had lived there continuously for at least 15 years, or who had been employed there continuously for not less than 15 years, or who had worked continuously for the same employer for not less than 10 years.¹⁷²

¹⁵⁶ Group Areas Act 41 of 1950.

¹⁵⁷ L Cochrane and W Chellan 'The Group Areas Act affected us all: Apartheid and Socio-Religious Change in the Cape Town Muslim Community, South Africa', *Oral History Forum* (2017), Religious Individuals and Collective Identities: Special Issue on Oral History and Religion at 8.

¹⁵⁸ Ibid

¹⁵⁹ Ibid.

¹⁶⁰ Suppression of Communism Act 44 of 1950.

¹⁶¹ 'Apartheid Legislation in South Africa', available at <https://scnc.ukzn.ac.za/doc/hist/apartheid%20legislation%20in%20south%20africa.htm>, accessed on 13 January 2020.

¹⁶² 'Apartheid Legislation in South Africa' op cit note 161.

¹⁶³ Ibid.

¹⁶⁴ Bantu Building Workers Act 27 of 1951.

¹⁶⁵ 'Apartheid Legislation in South Africa' op cit note 161.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Prevention of Illegal Squatting Act No 52 of 1951.

¹⁶⁹ 'Apartheid Legislation in South Africa' op cit note 161.

¹⁷⁰ Natives Laws Amendment Act 54 of 1952.

¹⁷¹ 'Apartheid Legislation in South Africa' op cit note 161.

¹⁷² Ibid.

The Natives (Abolition of Passes and Co-ordination of Documents) Act,¹⁷³ commonly known as the Pass Laws,¹⁷⁴ forced Black people to carry identification with them at all times.¹⁷⁵ A pass included a photograph, details of place of origin, employment record, tax payments, and encounters with the police.¹⁷⁶ It was a criminal offence to be unable to produce a pass when required to do so by the police.¹⁷⁷ No Black person could leave a rural area for an urban one without a permit from the local authorities.¹⁷⁸ On arrival in an urban area a permit to seek work had to be obtained within 72 hours. The Native Labour (Settlement of Disputes) Act¹⁷⁹ prohibited strike action by Black people.¹⁸⁰ The Bantu Education Act¹⁸¹ established a Black Education Department in the Department of Native Affairs which would compile a curriculum that suited the ‘nature of Black people’.¹⁸²

The author of the legislation, Verwoerd (then Minister of Native Affairs, later Prime Minister), stated that its purpose was to prevent Africans from receiving an education that would lead them to aspire to positions they would not be allowed to hold in society.¹⁸³ Instead, Africans were to receive an education designed to provide them with skills to serve their own people in the homelands or to work in labouring jobs under White people.¹⁸⁴ The Reservation of Separate Amenities Act¹⁸⁵ forced segregation in all public amenities, public buildings, and public transport with the aim of eliminating contact between White people and people of other races.¹⁸⁶ The Act stated that facilities provided for different races need not be equal.¹⁸⁷ The Natives (Prohibition of Interdicts) Act¹⁸⁸ denied Black people the option of appealing to the courts against forced removals;¹⁸⁹ and The Bantu Homelands Citizens Act¹⁹⁰

¹⁷³ Natives (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952.

¹⁷⁴ ‘Apartheid Legislation in South Africa’ op cit note 161.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Native Labour (Settlement of Disputes) Act 48 of 1953.

¹⁸⁰ ‘Apartheid Legislation in South Africa’ op cit note 161.

¹⁸¹ Bantu Education Act No 47 of 1953.

¹⁸² ‘Apartheid Legislation in South Africa’ op cit note 161.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Reservation of Separate Amenities Act 49 of 1953.

¹⁸⁶ ‘Apartheid Legislation in South Africa’ op cit note 161.

¹⁸⁷ Ibid.

¹⁸⁸ Natives (Prohibition of Interdicts) Act 64 of 1956.

¹⁸⁹ ‘Apartheid Legislation in South Africa’ op cit note 161.

¹⁹⁰ Bantu Homelands Citizens Act 26 of 1970.

compelled all Black people to become a citizen of the homeland that responded to their ethnic group, regardless of whether they have ever lived there or not, and removed their South African citizenship.¹⁹¹ Various segregation laws were passed before the National Party governed in 1948.¹⁹² The most significant laws were the Natives Land Act¹⁹³ and the Natives (Urban Areas) Act.¹⁹⁴ The former made it unlawful for Black people to purchase or lease land from White people except in reserves; this restricted black occupancy to less than eight per cent of South Africa's land.¹⁹⁵ The latter laid the foundations for residential segregation in urban areas.¹⁹⁶

The exposition of apartheid legislation underscores the racialised nature of past wealth inequality in South Africa. Moreover, the Constitutional Court's jurisprudence is unambiguous in its appreciation of the impact that apartheid laws policies had and continue to have on the economic well-being of South Africans.

ii) *The Constitutional Court's interpretation and analysis of apartheid legislation*

Jafta J shed light on the classes of people that were unfairly advantaged and disadvantaged by the apartheid system in the case of *Duncanmec (Pty) Limited v Gaylard*¹⁹⁷ by remarking that —

'racism and discrimination were the hallmarks of the policy of apartheid ... [Apartheid] policy rested on the false notion and belief that the white race was superior and that the other races were inferior. Consequently, [B]lack people were denied their dignity and other fundamental rights. The institutionalisation of racism brought intolerable suffering, hurt and humiliation to them.'¹⁹⁸

The Constitutional Court went on to quote *Brink v Kitshoff*¹⁹⁹ and emphasised that —

'The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90 per cent of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them;

¹⁹¹ 'Apartheid Legislation in South Africa' op cit note 161.

¹⁹² Ibid.

¹⁹³ Natives Land Act 27 of 1913.

¹⁹⁴ Natives (Urban Areas) Act 21 of 1923.

¹⁹⁵ 'Apartheid Legislation in South Africa' op cit note 161.

¹⁹⁶ Ibid.

¹⁹⁷ *Duncanmec (Pty) Limited v Gaylard* 2018 (6) SA 335 (CC).

¹⁹⁸ *Duncanmec (Pty) Limited v Gaylard* supra note 196 para 3.

¹⁹⁹ *Brink v Kitshoff* 1996 (4) SA 197 (CC).

civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. *The deep scars of this appalling programme are still visible in our society.*²⁰⁰

c) *Structural inequality*

Wealth inequality is an economic problem that plagues the entire world.²⁰¹ What makes South Africa unique is that owing to its legacy of apartheid wealth inequality runs along racial lines.²⁰² In 2020, the Department of Statistics South Africa reported that the South African labour market is heavily racialised.²⁰³ Not only do Black Africans have the worst employment outcomes, but they also earned the lowest wages when employed.²⁰⁴

White people, in contrast, earn substantially higher wages than all the other population groups.²⁰⁵ To put things into perspective, the mean real earnings between 2011 and 2015 amongst employed Black Africans was R6 899 (real earnings) per month.²⁰⁶ For Coloured people and Indian people, the corresponding figures are R9 339 and R14 235 per month, respectively.²⁰⁷ Amongst White people, it was R24 646 per month, or more than three times as high as it was amongst Africans.²⁰⁸ The earnings of South Africa's population groups mirror apartheid's system of social stratification. The average earnings of each racial group do not mean that wealthy Black people or impoverished White South Africans do not exist. However, the statistics show that there is the existence of what the Aspen Institute defines as structural racism and inequality.²⁰⁹ The institute describes structural racism as the —

‘dimensions of our history and culture that have allowed privileges associated with ‘whiteness’ and disadvantages associated with ‘colour’ to endure and

²⁰⁰ *Brink v Kitshoff* supra note 198 para 40. Emphasis added.

²⁰¹ T Piketty *Capital and Ideology* (2020) at 25.

²⁰² ‘How unequal is South Africa?’ (2020) available at <http://www.statssa.gov.za/?p=12930>, accessed on 19 March 2020. See also World Bank ‘Overcoming poverty and inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities’, March 2018 at 42, available at <https://openknowledge.worldbank.org/handle/10986/29614> The report states that ‘Black South Africans consistently exhibit the highest poverty rates. In 2015, 47 percent of the households headed by Black South Africans were poor. This was very high compared to 23 per cent for those in households headed by a person of mixed race (coloured), a little more than one percent for the population in households headed by an Indian/Asian South African, and less than one per cent among those in households headed by white South Africans.’

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*

²⁰⁹ ‘Structural Racism and Community Building’ (2004) available at https://www.aspeninstitute.org/wpcontent/uploads/files/content/docs/rcc/aspen_structural_racism2.pdf, accessed on 19 March 2019 at 11.

adapt over time. Structural racism is not something that a few people or institutions choose to practice. *Instead, it has been a feature of the social, economic and political systems in which we all exist.*²¹⁰

In other words, one is a beneficiary of apartheid by virtue of the structure within which one exists. The Constitutional Court's conception of structural inequality aligns with the Aspen Institute's analysis of structural racism. In *Prinsloo v Van der Linde*²¹¹ the court stated that —

'Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of *structured and vast inequality* is still with us despite the arrival of the new constitutional order. It is the [Black] majority, and not the [White] minority, which has suffered from this legal separateness and disadvantage.'²¹²

d) Conclusion

Apartheid's strategy was to categorise people and attach consequences to those categories.²¹³ No relevance was attached to the circumstances of individuals. Advantages or disadvantages were metered out according to one's membership in a racial group.²¹⁴ Therefore, a person or groups of persons were advanced on the basis of membership of a group.²¹⁵ Consequently, it is unnecessary for the state to show that each individual member of a group that was targeted by past unfair discrimination was in fact individually unfairly discriminated against when enacting a measure.²¹⁶

Likewise, in determining that White people and corporations that

²¹⁰ Ibid. Emphasis added.

²¹¹ *Prinsloo v Van der Linde* 1997 (3) SA 1012. The Prinsloo case 'involved a challenge to the constitutionality of section 84 of the Forest Act 122 of 1984, which presumes negligence in certain circumstances. The Act regulates the prevention and control of fires by creating fire control areas where schemes of compulsory fire control are established. Landowners outside of fire control areas are encouraged but not required to embark on fire control measures. In the court a quo, damages were claimed against the applicant for a fire that had started on his land (outside a fire control area) and spread to the first respondent's land. As section 84 of the Act presumed negligence, the applicant was required to disprove such negligence. He challenged the constitutionality of section 84 on the grounds that it violated the right to be presumed innocent (section 25(3)(c)) and the right to equality (section 8) of the interim Constitution. The Court held that section 84 breached neither the right to equality nor the prohibition against unfair discrimination. The differentiation between fires in controlled areas and those in non-controlled areas is not contrary to section 8(1). A rational relationship exists between the means chosen (the differentiation imposed by the presumption of negligence in section 84) and the purpose sought to be achieved by the Act, which is the prevention of veld fires.'

²¹² *Prinsloo v Van der Linde* supra note 211 para 20.

²¹³ *Van Heerden* supra note 25 para 85.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

propped up the infrastructure of apartheid fall under the category of apartheid beneficiaries, it is important to keep in mind that the goal of transformation would be thwarted if individual complainants who are aggrieved by proposed restitutionary measures (such as the imposition of a wealth tax on apartheid beneficiaries) could argue that the measures unfairly discriminate against because they have caused undue harm.²¹⁷

²¹⁷ In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCLR 687 (CC) Ngcobo J stated that – ‘There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. *It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution.*’

IV. THEORETICAL FOUNDATIONS OF REDISTRIBUTIVE JUSTICE

a) *The difference principle*

According to Rawls' difference principle, economic assets should be distributed in such a way that maximises the position of the poorest segment of society.²¹⁸ This means that wealth should be distributed equally, 'except insofar as unequal distribution will give the poorest group more in the long run than they would have under complete equality'.²¹⁹ Any failure to distribute, until the position of the worst-off group is maximised, is itself unjust and a violation of human rights.²²⁰ The rationale behind the difference principle is that the aptitudes that tend to yield wealth in a fair market are inherently arbitrary from a moral perspective.²²¹ Individuals' scarce talents or skills result in higher incomes by way of social circumstances; it is, therefore, unjust to allow for such circumstances to produce unequal rewards, especially if they can be 'corrected' without having to infringe basic liberties or equal opportunities.²²²

b) *South Africa's post-apartheid context*

The end of apartheid did not automatically translate into socio-economic transformation in South Africa.²²³ In *Du Plessis v De Klerk*,²²⁴ Madala J remarked that 'South Africa is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are immeasurable'.²²⁵ In every society, political power must be undergirded by economic stamina and, in the case of South Africa,²²⁶ White people still hold considerable economic power after apartheid.²²⁷ Mogkoro J reflected on economic power in *Du Plessis* and stated that

²¹⁸ S Viljoen 'The South African Redistribution Imperative: Incongruities in Theory and Practice' *Journal of African Law* (2021) 65(3) at 405.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ P Tazanu 'Racial Undertones on Violence and Human Bodies: White Migrants' Online Epistemologies of Insecurity and Discomfort in Post-Apartheid South Africa *International Journal of Critical Diversity Studies* (2019) 2(2) at 9.

²²⁴ *Du Plessis v De Klerk* 1996 (3) SA 850.

²²⁵ *Du Plessis v De Klerk* supra note 224 para 163.

²²⁶ Viljoen op cit note 218.

²²⁷ *Ibid.*

‘The unique and stark reality in South Africa is that decades of injustice associated with apartheid gave rise to gross socio-economic inequalities that persist at every level of our society. The disparities between the beneficiaries of state-imposed racial discrimination and its victims ... will doubtless endure for many years to come.’²²⁸

Apartheid is not the only contributing factor to poverty and inequality in South Africa. The governing power structure in post-apartheid South Africa has opted for neoliberal economic policies,²²⁹ which have led to the mass concentration of wealth at the top, leaving a huge segment of the population in poverty.²³⁰ Furthermore, the government’s leadership has been characterised by ‘persistent appalling levels of inequality, unemployment, deteriorating public services, and infrastructure as well as mismanagement of public funds, political patronage, corruption and the undermining of the independence of public institutions’.²³¹ Corruption, market failures, unemployment, and the fact that the governments in post-apartheid South Africa invest in social services for the majority (unlike the apartheid governments that concentrated state resources on the minority white population), places a huge burden on state resources.²³² The rejection of a wealth tax on apartheid beneficiaries resulted in there being one less mechanism available for the government to alleviate inequality, this rejection constituted a missed opportunity to make use of *all* the resources it had to dismantle inequality. While the government’s reconciliation and unification objectives *vis-à-vis* the rejection of the TRC’s recommendation were noble, it ought to have considered the resultant impact i.e. the worsening of inequality.

Furthermore, the government’s policy stance on the TRC wealth tax recommendation is inconsistent with the PEPUDA,²³³ the preamble to the PEPUDA provides that —

‘although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities remain deeply embedded in social structures, practices and attitudes. The consolidation of democracy *requires the eradication of inequalities especially those that are systemic in nature*, and which were generated in South Africa’s history by colonialism [and] apartheid.’²³⁴

²²⁸ *Du Plessis v De Klerk* supra note 224 para 168.

²²⁹ Tazanu op cit note 223.

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 supra note 46.

²³⁴ The preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 supra note 46. Emphasis added.

c) Conclusion

The redistribution of wealth through a tax would be a step towards the achievement of equality and the alleviation of poverty. The constitutional striving towards the ‘achievement of equality’ implies that ‘the creation of democracy and equal treatment before the law are not enough to foster substantive equality’.²³⁵ Unless the [economic] disparities that currently exist are consciously and systematically obliterated, they will continue to define our society for a long time to come.²³⁶

²³⁵ *Van Heerden* supra note 25 para 73.

²³⁶ *Van Heerden* supra note 25 para 73.

V. THE RIGHT TO EQUALITY

a) *Concepts of equality*

i) *Formal equality*

Equality is a nebulous concept that has confounded philosophers for millennia and has resulted in there being no consensus on its exact meaning.²³⁷ For the purposes of this thesis, a distinction is drawn between the formal and substantive concepts of equality.²³⁸ Formal equality entails that all persons should be accorded the same treatment and that people should not be treated differently because of characteristics such as race or gender.²³⁹ This notion of equality aligns with Aristotle's concept of equality, that similar cases should be treated alike.²⁴⁰ A formal approach to equality therefore only requires equal application of the law without further examination of the particular circumstances or context of the individual or group and, consequently, the content and the potentially discriminatory impact of a law or policy under review.²⁴¹

The former president Mbeki's proposal that *all South Africans* (including corporate citizens) *co-operatively and voluntarily* make contributions to the apartheid reparations fund²⁴² negates the fact that certain groups of the population were excluded from the mainstream economy because of past repressive laws. Fraser states that the abstraction of individuals from their social and cultural context results in them being treated as being in the same position as those in privileged groups.²⁴³ Finley shares Fraser's sentiment and emphasises that formal equality 'marginalizes, disempowers, and renders invisible those who have seemed most unlikely to ever melt into the white male model of homogeneity'.²⁴⁴

Fraser and Finley's analysis is reflected in *King v De Jager*²⁴⁵ wherein Victor AJ held that —

'Unless there is a transformative constitutional approach taken by courts when equality rights are affected, the historical and insidious unequal distribution of wealth in South Africa will continue... A more robust understanding of substantive equality within our constitutional framework is necessary. Public policy is now deeply rooted in the Constitution

²³⁷ A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Journal* 611.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² 'Statement by President Mbeki op cit note 53.

²⁴³ Smith op cit note 237.

²⁴⁴ Ibid.

²⁴⁵ *King v De Jager* 2021 (4) SA 1 (CC).

and its underlying values. This means that substantive equality must be evaluated within the realm of public policy.²⁴⁶

ii) *Substantive equality*

A substantive approach to equality does not presuppose a just social order.²⁴⁷ It requires that economic conditions that have led to inequalities between groups and individuals be considered.²⁴⁸ It accepts that past patterns of discrimination have led to inequalities between groups and individuals and that treating all persons alike will not achieve equality.²⁴⁹ In *Qwelane v South African Human Rights Commission*²⁵⁰ the court held that —

‘[Its] jurisprudence is resolute in that the type of equality underpinning [South Africa’s] constitutional framework is not mere formal equality, but ... substantive equality. [The court went on to state that] [s]ubstantive inequality ‘is often more deeply rooted in social and economic cleavages between groups in society;’ and so, it aims to tackle systemic patterns where the structures, context and impact underpinning the discrimination matters.’²⁵¹

b) *An analysis of section 9*²⁵²

Section 9 of the Constitution does not ‘envisage a passive or purely negative concept of equality’.²⁵³ Section 9(2) of the equality clause incorporates a substantive notion of equality as it recognises the need to provide redress for past disadvantages.²⁵⁴ This section of the Constitution insulates measures adopted to protect or advance people who were disadvantaged by unfair discrimination from attack.²⁵⁵ This is because past

²⁴⁶ *King v De Jager* supra note 245 para 168.

²⁴⁷ T Deane & R Brijmohanlall op cit note 59 at 94.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC).

²⁵¹ *Qwelane v South African Human Rights Commission* supra note 250 para 58.

²⁵² Constitution of the Republic of South Africa, 1996 supra note 5. The equality clause provides that ‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3. National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

²⁵³ *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice* supra note 61 para 16.

²⁵⁴ Smith op cit note 237 at 615.

²⁵⁵ *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC) para 38.

‘unfair discrimination has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely’.²⁵⁶ Section 9(2) intersects with section 7(2) of the Constitution and imposes a positive duty on all organs of state to protect and promote the achievement of equality.²⁵⁷ Thus, equality is protected as a right as well as an underlying value of the Constitution.²⁵⁸ The right gives effect to one of the key overarching goals of the Constitution in that it seeks the transformation of South African society into a more egalitarian future.²⁵⁹

i) *Harksen*²⁶⁰

The Constitutional Court formulated the approach to dealing with cases of alleged unfair discrimination as well as for considering the constitutional validity of restitutionary measures.²⁶¹ *Harksen v Lane*²⁶² laid down the test for determining whether an act or legislative provision is unconstitutional based on inconsistency with the equality clause.²⁶³ First, a determination has to be made about whether or not there is a differentiation between people or categories of people.²⁶⁴ If there is no differentiation then the Act or legislative provision will not fall foul of section 9 of the Constitution.²⁶⁵ If there is a differentiation, the court will ascertain if the differentiation

²⁵⁶ Smith op cit note 237 at 615.

²⁵⁷ D Bilchitz and L Du Toit ‘Assessing the Performance of South Africa’s Constitution Chapter 3. Fundamental rights in South Africa’s Constitution’ 2018 *International Institute for Democracy and Electoral Assistance* at 2.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ *Harksen v Lane* 1998 (1) SA 300. The court had to decide on the constitutionality validity of section 21 of the Insolvency Act 24 of 1936. Jeanette Harksen’s husband’s estate (whom she married out of the community of property) had been sequestrated during the period of operation of the Interim Constitution. Her property was also attached by the Master of the Cape of Good Hope Provincial High Court under the provision of section 21(1) of the Insolvency Act (i.e. as being part of her husband’s insolvent estate). She contended that section 21 of the Insolvency Act violated the right to equality before the law and the right not to be unfairly discriminated against as protected by the Constitution and, secondly, that the attachment infringed on the right not to have one’s property expropriated without compensation in terms of section 28(3) of the Interim Constitution. With regard to the right to equality, the court held that although section 21 differentiated between the solvent spouse and other persons who had dealings with the insolvent, section 21 had a rational and legitimate purpose — namely to prevent an insolvent potentially defrauding creditors by hiding assets in the solvent spouse’s estate. Thus, section 21 of the Insolvency Act did not amount to an infringement of the right to equal protection before the law.

²⁶¹ D Bilchitz and L Du Toit op cit note 257.

²⁶² *Harksen v Lane* supra note 257.

²⁶³ D Bilchitz and L Du Toit op cit note 257 at 5.

²⁶⁴ Smith op cit note 237 at 616.

²⁶⁵ Ibid.

has a rational connection to a legitimate governmental objective.²⁶⁶ If there is no rational objective, the legislative provision or Act will be declared unconstitutional.²⁶⁷ Even if there is a rational connection, the court will then ask if the differentiation amounts to discrimination.²⁶⁸ The next phase of the *Harksen* test requires a two-stage analysis.²⁶⁹ First, does the differentiation amount to discrimination? If the differentiation is based on one of the specified grounds listed in section 9(3), discrimination will be established.²⁷⁰ If it is not on a specified ground, then discrimination will depend upon whether, objectively, the ground is based on characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.²⁷¹ Second, if the differentiation amounts to unfair discrimination?²⁷² If the differentiation is based on one of the specified grounds listed in section 9(3), unfairness will be presumed.²⁷³ If the differentiation is on an unspecified ground, unfairness will have to be established by the aggrieved party.²⁷⁴ The test of unfairness focuses primarily on the impact of the discrimination on the complainant.²⁷⁵ If at the end of this stage of enquiry the differentiation is found not to be unfair, then there will be no violation of section 9(2).²⁷⁶ If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitations clause contained in section 36 of the Constitution.²⁷⁷

A plain reading of the equality clause reveals that there seem to be conflicting interests between the provisions prohibiting unfair discrimination i.e. sections 9(3) and 9(4) and the provision authorising measures to promote the achievement of equality in section 9(2).²⁷⁸ This is because the implementation of a measure that is aimed at the advancement of a class of person who had previously been disadvantaged would inevitably mean that members of a previously advantaged

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Smith op cit note 237 at 17.

²⁷⁵ Smith op cit note 237 at 17.

²⁷⁶ Smith op cit note 237 at 17.

²⁷⁷ Ibid.

²⁷⁸ D Bilchitz and L Du Toit op cit note 257 at 5.

group will be excluded on the basis of the ‘prohibited’ grounds.²⁷⁹ However, it is important to note the principles laid down in *Van Heerden*,²⁸⁰ wherein the Constitutional Court held that ‘the prohibition against unfair discrimination and the provision authorising restitutionary measures should not be read as opposing one another since both aspects are necessary for the fulfilment of the equality right.’²⁸¹ Furthermore, in *South African Police Services v Solidarity obo Barnard*²⁸² the court held that ‘measures meeting the requirements of 9(2) cannot be unfair discrimination under section 9(3) to section 9(5) of the Constitution’.²⁸³

ii) *Van Heerden*²⁸⁴

The salient facts of *Van Heerden*²⁸⁵ are as follows: Van Heerden served as a member of the National Party in the old apartheid parliament.²⁸⁶ He returned to office (for the same political party) at the beginning of the constitutional democracy.²⁸⁷ Like many parliamentarians whose term straddled the apartheid and democratic era parliaments, he was a member of both the Political Office-Bearers Pension Fund and the Closed Pension Fund.²⁸⁸ The rules of the Closed Pension Fund stipulated different categories of members; the differing categorisations resulted in there being varying employer contributions.²⁸⁹ Van Heerden contended that he was unfairly discriminated against as the varying employer contributions improperly disfavoured him (and other parliamentarians in his position) in comparison to the democratically elected parliamentarians. In response to Van Heerden’s contention, the Constitutional Court applied a three-pronged test to determine if the restitutionary measure in question passed constitutional muster.²⁹⁰ The court held the following: first, the

²⁷⁹ Ibid.

²⁸⁰ *Minister of Finance v Van Heerden* supra note 25 para 30.

²⁸¹ Ibid.

²⁸² *South African Police Services v Solidarity obo Barnard* 2014 (6) SA 123 (CC). The appeal to the Constitutional Court pertained to ‘whether the decision of the National Commissioner of the South African Police Service (SAPS) not to promote Ms Barnard to the position of superintendent in the SAPS National Evaluation Service (NES), constitutes unfair discrimination on grounds of race in contravention of section 9 of the Constitution and section 6 of the Employment Equity Act 55 of 1998.

²⁸³ *South African Police Services v Solidarity obo Barnard* supra note 282 para 37.

²⁸⁴ *Minister of Finance v Van Heerden* supra note 25.

²⁸⁵ Ibid.

²⁸⁶ *Minister of Finance v Van Heerden* supra note 25 para 3.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ *Minister of Finance v Van Heerden* supra note 25 para 10.

²⁹⁰ *Minister of Finance v Van Heerden* supra note 25 para 37.

measure must be targeted at persons who have been disadvantaged by unfair discrimination.²⁹¹ Second, the measure must be designed to protect or advance such persons.²⁹² Third, the measure must promote the achievement of equality.²⁹³ Moseneke J wrote for the majority and found that legislative and other measures that properly fall within the requirements of section 9(2) are not presumptively unfair.²⁹⁴ Furthermore, he held that remedial measures are not a derogation from, but a substantive and composite part of section 9 and the Constitution as a whole.²⁹⁵ Consequently, the differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination was warranted provided that the measures were shown to conform to the internal test set by section 9(2).²⁹⁶ The court went on to state that if a restitutionary measure, even based on any of the grounds of discrimination listed in section 9(3), passes muster under section 9(2), it cannot be presumed to be unfairly discriminatory.²⁹⁷ Therefore, the Closed Pension Fund was found to be a constitutionally valid restitutionary measure.²⁹⁸ This is because it was directed at achieving equality between apartheid era and democratically elected parliamentarians, the overwhelming majority of whom were disadvantaged by past unfair discrimination and exclusion.²⁹⁹

c) The constitutional validity of the imposition of a wealth tax on apartheid beneficiaries

i) Background

Before deciding on whether the TRC's wealth tax recommendation passes constitutional muster, it is important to revisit the context from which it arises. The preamble³⁰⁰ to the TRC Act provides that the objectives of the TRC were *inter alia* to take 'measures aimed at the granting of reparation to, [the] rehabilitation and [restoration] of the human and civil dignity of victims of violations of human

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ *Minister of Finance v Van Heerden* supra note 25 para 32.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ *Minister of Finance v Van Heerden* supra note 25 para 32.

²⁹⁸ *Minister of Finance v Van Heerden* supra note 25 para 38.

²⁹⁹ Ibid.

³⁰⁰ The preamble of the Promotion of National Unity and Reconciliation Act, 34 of 1995 supra note 26.

rights'.³⁰¹ Furthermore, section 4(f)(i) of the TRC Act states that the functions of the TRC shall be to achieve its objectives, and to that end, the TRC shall —

‘make recommendations to the President with regard to the policy which should be followed or measures which should be taken with regard to the granting of reparation to victims or the taking of other measures aimed at rehabilitating and restoring the human and civil dignity of victims.’

Terreblanche recommended that a wealth tax be imposed on apartheid beneficiaries during the TRC’s institutional hearings on the role of business and labour under apartheid. Terreblanche³⁰² argued that —

‘[the income derived from the] wealth tax could be used to set up a restitution fund that would contribute to reconciliation, social stability and economic growth, while providing a basis for restitution for those who have been impoverished through apartheid.’³⁰³

Terreblanche’s argument was adopted by the TRC and was recommended to former president Mbeki. The government rejected the imposition of a wealth tax on apartheid beneficiaries and held the view that it was ‘contrary to the pursuit of a non-racial society in which all South Africans would be inspired by a common patriotism’.³⁰⁴ The government proposed that *all South Africans* (including corporate citizens) *co-operatively and voluntarily* make contributions to the reparations fund.³⁰⁵ The proposal was meant to encourage the unification of South Africans in responding to the legacy of apartheid.³⁰⁶

ii) Stage 1: Does the proposed redress measure target persons or categories of persons who have been disadvantaged by unfair discrimination?

Stage 1 of the enquiry necessitates that the proposed redress measure favour a group or category designated in section 9(2) of the Constitution.³⁰⁷ The beneficiaries must be shown to be disadvantaged by unfair discrimination.³⁰⁸ The TRC recommended that ‘[the income derived from the] wealth tax could be used to set up a restitution fund *for*

³⁰¹ Ibid.

³⁰² Truth and Reconciliation Commission of South Africa Report op cit note 4 vol 4 at 56.

³⁰³ Ibid.

³⁰⁴ Statement by President Mbeki op cit note 53.

³⁰⁵ Ibid. Emphasis added.

³⁰⁶ Ibid.

³⁰⁷ *Minister of Finance v Van Heerden* supra note 25 para 38.

³⁰⁸ Ibid.

*those who have been impoverished through apartheid.*³⁰⁹ ‘Those who have been impoverished through apartheid’ fall within the ambit of persons who have been disadvantaged by unfair discrimination. In ascertaining who has been impoverished through apartheid Ngcobo CJ provides guidance in *Tongoane v National Minister for Agriculture and Land Affairs*³¹⁰ by stating that the core problem created by apartheid geography was that millions of African people were forced into labour reserves that were impoverished, overcrowded, and distant from employment opportunities.³¹¹ It is important to note that Moseneke J went on to state that in the context of section 9(2)’s redress measure, the legal efficacy of such measure should be judged by whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion.³¹² He quoted Gonthier J in *Thibaudeau v Canada*³¹³ and held that ‘[t]he fact that [a redress measure] may create a disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial’.³¹⁴ It is important to note that for the purposes of this thesis each stage of the three-pronged enquiry departs from the premise that structural racism and inequality currently exist in South Africa. In other words —

‘the positions and discourses of privilege and dominance that stem from an ideology of white superiority and hegemony are still pervasive in the South African society ... racism affects all black South Africans (to some degree or another) regardless of their economic status and social and political power and material success.’³¹⁵

‘Structural racism is not something that a few people or institutions choose to practice. Instead, it is a feature of the social, economic and political systems in which we all exist.’³¹⁶ De Vos notes that ‘it would be difficult, for the time being, to conceive of any restitutionary programme that targets Black South Africans that would not meet’ stage 1 of the enquiry.³¹⁷ This is because ‘corrective measures are not only aimed at addressing economic disadvantage but also the ongoing effects of racism and racial

³⁰⁹ Truth and Reconciliation Commission of South Africa Report op cit note 4 vol 4 at 56.

³¹⁰ *Tongoane v National Minister for Agriculture and Land Affairs* supra note 148.

³¹¹ Ibid para 124.

³¹² *Minister of Finance v Van Heerden* supra note 25 para 39.

³¹³ *Thibaudeau v Canada* 29 CRR (2d) 1 (SCC).

³¹⁴ *Minister of Finance v Van Heerden* supra note 25 para 39.

³¹⁵ P De Vos ‘The past is unpredictable: Race, redress and remembrance in the South African Constitution’ (2012) *SALJ* 73 at 90.

³¹⁶ ‘Structural Racism and Community Building’ op cit 210.

³¹⁷ P De Vos op cit note 315 at 90-91.

discrimination'.³¹⁸ Therefore, any restitutionary measure that overwhelmingly benefits Black people would comply with stage 1 of the enquiry. It follows that using the proceeds of a wealth tax that is imposed on apartheid beneficiaries (for purposes of setting up a restitutionary fund that would benefit those who have been impoverished by apartheid) meets the requirement of the first stage of the three-pronged enquiry.

iii) *Stage 2: Is the proposed redress measure designed to protect or advance those disadvantaged by unfair discrimination?*

Notwithstanding the fact that the future is difficult to predict, the proposed redress measure must be reasonably capable of attaining a desired future outcome.³¹⁹ If the redress measure is 'arbitrary, capricious or displays a naked preference it cannot be said to be designed to achieve a constitutionally authorised end'.³²⁰ Furthermore, if it is clear that the proposed redress measure is not reasonably likely to achieve the advancement or benefit the interests of those who have been disadvantaged by unfair discrimination, it would not constitute a measure that is contemplated by section 9(2) of the Constitution.³²¹ The TRC recommended that the proceeds derived from the imposed wealth tax be used to '*set up a ... fund that would contribute to reconciliation, social stability and economic growth, while providing a basis for restitution*' for those who have been impoverished through apartheid.³²² In *Public Servants Association v South Africa v Minister of Justice*³²³ Swart J held that '[t]he measures must be designed to achieve something. This denotes ... a causal connection between the designed measures and the objectives'.³²⁴ The measure in question seeks to *achieve* the establishment of restitution fund that would contribute to reconciliation, social stability and economic growth, while providing a basis for restitution'.³²⁵ The proceeds derived from the imposition of a wealth tax on apartheid beneficiaries would constitute the income of the fund. De Vos explains 'that it is not necessary ... to show that the proposed redress measure is a 'necessity' or that it is

³¹⁸ Ibid.

³¹⁹ *Minister of Finance v Van Heerden* supra note 25 para 41.

³²⁰ Ibid.

³²¹ Ibid.

³²² Truth and Reconciliation Commission of South Africa Report op cit note 4 vol 4 at 56.

³²³ *Public Servants Association v South Africa v Minister of Justice* 1997 (3) SA 925 (T).

³²⁴ *Public Servants Association v South Africa v Minister of Justice* supra note 42.

³²⁵ Truth and Reconciliation Commission of South Africa Report op cit note 4 vol 4 at 56.

necessary to disfavour one group [of persons] in order to uplift another'.³²⁶ 'Moreover, given the historical self-consciousness of the Constitutional Court's interpretation, a valid purpose of a [redress measure] would include the purpose of addressing the effects of past racial discrimination'.³²⁷ There is no evidence of arbitrariness, capriciousness, or the display of a naked preference in the context of a wealth tax. Consequently, the proposed redress measure meets the requirement of the second stage of the three-pronged enquiry as the reparations fund aims to provide 'the basis for restitution that would contribute to reconciliation, social stability and economic growth, while providing a basis for restitution for those who have been impoverished through apartheid'.³²⁸

iv) Stage 3: Will the proposed measure promote the achievement of equality in the long term?

Kohn and Cachalia explain that the third stage of the three-pronged enquiry is the most complex requirement for a proposed restitutionary measure to meet.³²⁹ This is because this stage of the three-pronged test entails that a court will have to make a value judgment that is cognisant of all the circumstances related to the redress measure and the country's history of apartheid.³³⁰ Race-based corrective measures often place a direct or indirect burden on apartheid beneficiaries but the mere fact that the measures do so does not automatically render them inconsistent with section 9 of the Constitution.³³¹ In the context of the TRC's recommendation, the imposition of a wealth tax on apartheid beneficiaries (for purposes of setting up a reparations fund that would contribute to the reconciliation, social stability, and economic growth of those who have been impoverished through apartheid)³³² would not invalidate the redress measure. This is because we exist in a society that is embattled with racialised wealth inequality. It bears repeating that as recently as February 2020 the Department of Statistics South Africa reported that not only do Africans have the worst employment outcomes, but they also earn the lowest wages when employed.³³³

³²⁶ P De Vos op cit note 315 at 92.

³²⁷ Ibid.

³²⁸ Truth and Reconciliation Commission of South Africa Report op cit note 4 vol 4 at 56.

³²⁹ L Kohn & R Cachalia op cit note 11 at 168.

³³⁰ P De Vos op cit note 315 at 93.

³³¹ P De Vos op cit note 315 at 92.

³³² Truth and Reconciliation Commission of South Africa Report op cit note 4 vol 4 at 56.

³³³ 'How unequal is South Africa?' <http://www.statssa.gov.za/?p=12930> op cit note 202.

White people, in contrast, earn substantially higher wages than all the other South African population groups³³⁴ and three times more than Africans.

The third Van Heerden stage necessitates that a proposed redress measure must promote the long-term achievement of a ‘non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity’.³³⁵ Moseneke J stated that South Africa is a diverse society that comprises people of different races, different language groups, different religions, and both sexes.³³⁶ This diversity, and our equality as citizens within it, are protected by the Constitution.³³⁷ In addition to honouring the principle of ‘equality within our diversity, a proposed redress measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that the long-term constitutional goal would be threatened.’³³⁸

Moreover, embedded in the Van Heerden three-pronged enquiry is a proportionality analysis of the redress measure,³³⁹ in other words, the proposed redress measure must be weighed up against the adverse consequences experienced by the group excluded from its benefits.³⁴⁰ A judgment call has to be made on whether the proposed redress measure — ‘although potentially [adverse] to the group not benefitting from the measure — nevertheless does not pose a danger to the achievement of the long-term goal of creating a society in which all individuals, regardless of their differences, would be equally respected’.³⁴¹

In the context of the imposition of a wealth tax on apartheid beneficiaries, the negative impact of being taxed would suggest that the equal dignity of apartheid beneficiaries is not respected.³⁴² However, in order to make a determination on the constitutional validity of the proposed redress measure, a closer examination of the

³³⁴ Ibid.

³³⁵ *Minister of Finance v Van Heerden* supra note 25 para 44. See also *SAPS v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 41 wherein the Constitution Court explained the connection between dignity and equality as follows: ‘Our constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. The foremost provision in our equality guarantee is that everyone is equal before the law and is entitled to equal protection and benefit of the law. But, unlike other constitutions, ours was designed to do more than record or confer formal equality.’

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ *Minister of Finance v Van Heerden* supra note 25 para 145.

³⁴⁰ P De Vos op cit note 315 at 93.

³⁴¹ Ibid.

³⁴² Ibid.

mechanics of Terreblanche's wealth tax proposal is required. In 1997 Terreblanche suggested that 'individuals [apartheid beneficiaries] with net assets of more than R2 million must pay an annual wealth tax of 0,5 per cent for between 10 and 20 years, as a way of restoring a necessary degree of social justice and social stability.'³⁴³

Terreblanche's proposed monetary threshold has the implication that the wealth tax would not be imposed on *all* apartheid beneficiaries, even though White people (as a class of persons) were advantaged by the apartheid system,³⁴⁴ notwithstanding the racialised nature of South Africa's wealth inequality,³⁴⁵ one cannot say that impoverished White people do not exist. Thus, the monetary threshold on net assets prevents undue harm and abuse of power exerted over an *entire* category of persons.³⁴⁶ Furthermore, Terreblanche proposes that a wealth tax be imposed for a *limited period of time* i.e. between 10 and 20 years, he is therefore cognisant of the notion of 'shifting inequalities'.³⁴⁷ This means that although section 9(2) is presently interpreted with specific reference to the apartheid past (while taking into account the effects of past and continued unfair racial discrimination and racism),³⁴⁸ Terreblanche recognises that South Africa's social context may change over time,³⁴⁹ thus he limits the taxation period. If the wealth tax was perpetually imposed, it would cause undue harm and would fall foul of section 9(2) of the Constitution.³⁵⁰ Furthermore, the limitation of time implies that the long-term achievement of a 'non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity' is envisaged.³⁵¹

³⁴³ 'Business rejects wealth tax' available at <https://mg.co.za/article/1997-11-12-business-rejects-wealth-tax>, accessed on 25 June 2019.

³⁴⁴ *Minister of Finance v Van Heerden* supra note 25 para 80.

³⁴⁵ P De Vos op cit note 315 at 81.

³⁴⁶ *Minister of Finance v Van Heerden* supra note 25 para 44.

³⁴⁷ P De Vos op cit note 315 at 94. De Vos explains that '[the] substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real-life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.' See also M Roberts 'The Ending of Apartheid: Shifting Inequalities in South Africa' (1994) *Geography*, Volume. 79 (1) 53.

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ *Minister of Finance v Van Heerden* supra note 25 para 44.

³⁵¹ *Minister of Finance v Van Heerden* supra note 25 para 136.

Imposing a wealth tax perpetually would be a concession that the redress measure is capricious³⁵² because it is not moving closer to the goal of dismantling structural racism and inequality. In light of the redress measure exegesis above, this thesis concludes that the imposition of a wealth tax on apartheid beneficiaries (as specifically formulated by Terreblanche) is consistent with section 9(2) of the Constitution.

d) Conclusion

The Constitutional Court's jurisprudence unambiguously endorses race-based redress measures for the purposes of dismantling the consequences of past and continuing structural racism and inequality in South Africa.³⁵³ This is for the purposes of ensuring that the country moves toward an equal and just society.³⁵⁴ However, it is important to note that race-based measures, policies, and laws must be formulated *carefully and critically* so that they do not have the effect of 'perpetuating and [entrenching] the apartheid system's arbitrary stratification of racial categories (and the assumed dominance of whiteness inherent in these categories)'.³⁵⁵ While this thesis concerns itself with the problem of racialised wealth inequality (as a result of the effects of South Africa's past and ongoing racism and discrimination) other factors — in addition to the race of an individual — must be considered when determining if one should be a beneficiary of a redress measure, these factors could include education, socio-economic status, and sexual orientation.³⁵⁶ Thus, redress measures ought to be reformulated as power and privilege shift in our society.³⁵⁷ However, as long as reports from as recent as 2020 indicate that the South African Black-White economic divide is as wide as it was in 1968³⁵⁸, it is untenable for the government to continue to hold onto its 'meta-reconciliation narratives'³⁵⁹ as these results in the inadvertent entrenchment of racialised wealth inequality. It is for this reason that the

³⁵² *Minister of Finance v Van Heerden* supra note 25 para 41.

³⁵³ P De Vos op cit note 315 at 102.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ P De Vos op cit note 87.

³⁵⁷ *Ibid.*

³⁵⁸ H Long & A Van Dam 'The black-white economic gap remains as wide as in 1968' - 4 June 2020 The Washington Post, available at <https://www.washingtonpost.com/business/2020/06/04/economic-divide-black-households/>, accessed on 15 May 2020.

³⁵⁹ N Bohler-Muller op cit note 104.

rejection of a wealth tax on apartheid beneficiaries constitutes a failure to address gross levels of inequality and poverty in South Africa.

VI. CONCLUSION

This thesis has shown that the TRC's recommendation of the imposition of a wealth tax on apartheid beneficiaries meets the requirements of the three-staged enquiry that is used for determining the constitutional validity of a redress measure.³⁶⁰ In addition to satisfying the criteria set out in *Van Heerden*, the wealth tax recommendation aligns with the Constitutional Court's redress jurisprudence that seeks to dismantle poverty and structural inequality. Furthermore, the analysis of the Khulumani Support Group's apartheid reparations litigation has revealed that in the absence of economic justice, the government's naïve insistence on national unity and reconciliation will be disrupted by the citizenry. Moon³⁶¹ explains that —

‘no single version of justice will satisfy multiple and divergent claims. But the fundamental value of the apartheid lawsuit resides, overall, in the way that it challenges the dominant, therapeutic, discourse of reconciliation by addressing the beneficiaries that profited from the racially structured social and political organization of the apartheid state, and the intrinsic web of exploitation and violation that this structure produced. In addition, the claim for material compensation alters fundamentally the discursive image of claimants, transforming them from victims to creditors, such that they are no longer seen to be seeking concessions but seeking what is *rightfully* due to them.’³⁶²

Notwithstanding the existence of legislated restitutionary measures, this thesis has asserted that the government's policy of rejecting the wealth tax recommendation has contributed to the entrenchment, exacerbation, and perpetuation of racialised wealth inequality which has resulted in the presence of an ‘economic apartheid’³⁶³ in South Africa's democratic era. While it is unlikely that a wealth tax will resolve all of South Africa's socio-economic ills, the sheer magnitude of poverty and inequality in the country necessitates that a responsible government uses *all* available resources to dismantle structural inequality and alleviate the economic disenfranchisement of its previously disadvantaged citizens.

³⁶⁰ *Minister of Finance v Van Heerden* supra note 25 para 37.

³⁶¹ C Moon ‘Reconciliation as Therapy and Compensation: A critical Analysis’ in Veitch ed. (2007) 163-184.

³⁶² *Ibid.* Emphasis added.

³⁶³ C Collins *Economic Apartheid in America: A Primer on Economic Inequality & Insecurity* (2000).

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