

**INTERGENERATIONAL SOLIDARITY AND THE PROVISION OF
SUPPORT AND CARE TO OLDER PERSONS**

VOLUME 1

BY



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**INTERGENERATIONAL SOLIDARITY AND THE PROVISION OF
SUPPORT AND CARE TO OLDER PERSONS**

BY

ETHEL DENISE MALHERBE

KEYWORDS

Intergenerational solidarity

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Care and support services

Community-based care

Family

Constitution



ABSTRACT

INTERGENERATIONAL SOLIDARITY AND THE PROVISION OF SUPPORT AND CARE TO OLDER PERSONS

Ethel Denise Malherbe

Doctor Legum (LLD) thesis, Faculty of Law, University of the Western Cape

This thesis deals with a very important issue in South African society, i.e. the provision of financial and non-cash support to older persons.

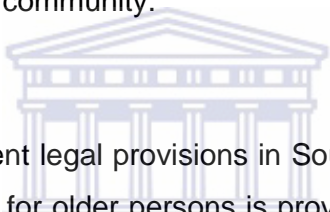
Older persons in South Africa can be described as a sizeable but vulnerable group requiring specific protection. Section 27 of the South African Constitution of 1996 obliges the state to take reasonable legislative and other measures within available resources to progressively realise the right of access to social security. Hence, the steps taken by the state to promote older persons' right of access to social security and to protect their right to dignity need to be evaluated.

The legislative framework for the provision of financial and non-cash support to older persons currently is fragmented into various statutes dealing with retirement income, state grants to older persons and care and support services for older persons. Therefore, the current legislation lacks an integrated approach to the provision of support and care to older persons, as well as a central principle on which to base future legislation concerning older persons. One such principle that could potentially be adopted is intergenerational solidarity, which can be described as the solidarity

between the active working-age population, as one generation, from which benefits flow to older persons as the other.

This thesis evaluates whether intergenerational solidarity should form the basis of South African legislation on the provision of retirement income and the provision of care and support to older persons, and if so, whether it in fact does. If the answer to the latter is in the negative, the thesis further examines whether the current process to reform the retirement income system and related legislation in South Africa would be a suitable platform to introduce the concept of intergenerational solidarity to legislation concerning older persons.

A second theme of this thesis will be the question to which extent the duty to take care of and support older persons rests with the state, with the older person's family, or, to a lesser extent, with the community.



First, an overview of the current legal provisions in South Africa regarding retirement income and care and support for older persons is provided. The focus then shifts to those aspects of South African legislation and policy on social security for older persons that may affect intergenerational solidarity directly or indirectly. The role of families and communities in providing care and support to older persons is also discussed. International standards relevant to older persons and their rights are examined to determine the extent to which intergenerational solidarity plays a role in international law. A comparative overview of legislation concerning older persons is undertaken to determine whether it is in fact possible to incorporate intergenerational solidarity in legislation.

It is argued that although intergenerational solidarity currently only has a limited role, it is the most appropriate basis for legislation relating to older persons and that the current reforms of the social security system offer the ideal opportunity to incorporate intergenerational solidarity in South African legislation.

DECLARATION

I declare that *Intergenerational solidarity and the provision of support and care to older persons* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Ethel Denise Malherbe

23 November 2009

Signed



PREFACE

The idea of writing a doctoral thesis on social security law as pertaining to older persons was born in 1999 during a visit to the University of Antwerp in order to participate in a research project funded by the Flemish Government and the National Research Foundation. I therefore gratefully acknowledge the assistance and support provided by Professors Yves Jorens, E Vance Kalula, Marius Olivier and Josse van Steenberge.

Although a thorough list of all the authors that have guided me in my thinking would require repetition of my bibliography, I would like to mention the series of books on social security law edited by Professors Marius Olivier, Nicola Smit and E Vance Kalula.

I wish to thank the following people at UWC for their support and assistance:

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Finally, my son, Christian, for having to compete with the thesis for my attention and for his assistance with proofreading.

KITTY MALHERBE

23 November 2009

LIST OF ABBREVIATIONS AND ACRONYMS

| | |
|--------|---|
| AARP | American Association of Retired Persons |
| AC | Appeal Court |
| AD | Appellate Division |
| All ER | All England Law Reports |
| All SA | All South Africa Law Reports |
| ANC | African National Congress |
| AsgiSA | Accelerated and Shared Growth Initiative for South Africa |
| ASSA | Actuarial Society of South Africa |
| BIG | Basic Income Grant |
| BCLR | Butterworths Constitutional Law Reports |
| BPLR | Butterworths Pension Law Reports |
| BSP | Basic State Pension (UK) |
| CC | Constitutional Court |
| CCMA | Commission for Conciliation, Mediation and Arbitration |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| COSATU | Congress of South African Trade Unions |
| CSS | Central Statistics Service |
| D&CLD | Durban & Coastal Local Division |
| DSD | Department of Social Development |
| DWP | Department of Works and Pensions (UK) |
| EC | Eastern Cape |
| ERISA | Employee Retirement Income Security Act (USA) |
| FPI | Financial Planning Institute of Southern Africa |
| FSA | Financial Services Authority (UK) |
| FSB | Financial Services Board |
| GBP | British Pound |
| GEAR | Growth, Employment and Redistribution |
| GG | Government Gazette |
| GSRF | Government Sponsored Retirement Fund |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICROP | Integrated Community Registrations Outreach Programme |
| ILJ | Industrial Law Journal |
| ILO | International Labour Organisation |
| ISSA | International Social Security Association |
| ISSR | International Social Security Review |
| JOL | Judgments Online |
| LDD | Law, Democracy and Development |
| NGO | Non-governmental organisation |
| NSF | National Savings Fund |
| NPSS | National Pension Savings Scheme (UK) |
| OASDI | Old age, survivors' and disability insurance (USA) |

| | |
|---------|--|
| OECD | Organisation of Economic Co-operation and Development |
| OPA | Older Persons Act |
| PADA | Personal Accounts Delivery Authority (UK) |
| PAJA | Promotion of Administrative Justice Act |
| PAYG | Pay-as-you-go |
| PBGC | Pension Benefit Guaranty Corporation (USA) |
| PBS | <i>Pensión básica solidaria</i> (Chile) |
| PER | Potchefstroom Electronic Law Journal |
| PFA | Pension Funds Adjudicator |
| PLA | Pension Lawyers' Association |
| PPF | Pension Protection Fund (UK) |
| PMG | Parliamentary Monitoring Group |
| PPM | Premium Pension Agency (Sweden) |
| QLFS | Quarterly Labour Force Survey |
| RDP | Reconstruction and Development Programme |
| tPR | The Pension Regulator (UK) |
| S2P | State Second Pension (UK) |
| SAA | Social Assistance Act |
| SADC | South African Development Community |
| SAHRC | South African Human Rights Commission |
| SAJHR | South African Journal on Human Rights |
| SALB | South African Labour Bulletin |
| SALJ | South African Law Journal |
| SARS | South African Revenue Service |
| SASSA | South African Social Security Agency |
| SCA | Supreme Court of Appeal |
| SIU | Special Investigation Unit |
| SOCPEN | Social Pension System |
| SSA | Social Security Administration (USA) |
| SSI | Supplemental Security Income (USA) |
| TAC | Treatment Action Campaign |
| TSP | Thrift Savings Plan |
| UDHR | Universal Declaration of Human Rights |
| UIF | Unemployment Insurance Fund |
| UK | United Kingdom |
| UN | United Nations |
| UNCESCR | United Nations Committee on Economic, Social and Cultural Rights |
| U.S.C. | United States Code |

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CHAPTER 1

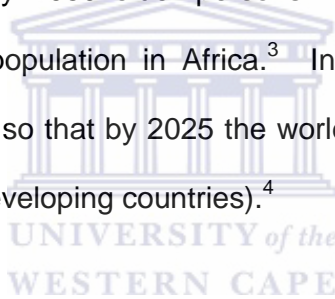
INTRODUCTION

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1.1 INTRODUCTION

One of the most significant global phenomena of the late 20th century has been the ageing of the population, also referred to as the “graying” of the population. This demographic transition has continued during the first decade of the 21st century, and is illustrated by statistics stating that the portion of the global population aged 60 and over will more than triple by 2050.¹ It is estimated that four fifths of the world’s older population will be living in the less developed countries by 2050.² The fastest growth of the older population is found in Africa and it is estimated that by 2050 older persons will constitute an “increasingly significant share” of the population in Africa.³ In addition, the very old (80+) population is growing fast, so that by 2025 the world’s very old will number about 155 million (88 million in developing countries).⁴



Despite the slightly lower projected growth rate of the older population in South Africa, attributed to the high mortality rate due to the HIV/AIDS pandemic,⁵ the South African population is gradually ageing.⁶

¹ From 600 million in 2000 to nearly 2 billion in 2050 (Ben-Israel and Ben-Israel “Senior citizens: Social dignity, status and the right to representative freedom of organization” (2002) 141 (3) *International Labour Review* 253).

² UN Department of Economic and Social Affairs, Population Division (2002) *World Population Ageing 1950-2050* 13.

³ UN Economic Commission for Africa, African Centre for Gender and Social Development (2007) *The state of older people in Africa – 2007: Regional review and appraisal of the Madrid International Plan of Action on Ageing* 22.

⁴ 560 000 in South Africa (UN Department of Economic and Social Affairs, Population Division “World population prospects: The 2008 revision database” <http://esa.un.org/unpp/p2k0data.asp> accessed 11/04/2009). It is estimated that the global population of very old persons will grow to about 350 million in 2050 (Ben-Israel and Ben-Israel (2002) “Senior citizens: Social dignity, status and the right to representative freedom of organization” 141(3) *International Labour Review* 254).

⁵ UN Economic Commission for Africa, African Centre for Gender and Social Development (2007) *The state of older people in Africa – 2007: Regional review and appraisal of the Madrid International Plan of Action on Ageing* 24.

⁶ Olivier “Old age and retirement” in Olivier et al (eds) (2004) *Introduction to social security* 270.

Providing financial and non-cash support to older persons therefore is also matter of concern in South Africa. Currently, more than two thirds of South Africans who reach retirement age have to rely on the older person's grant⁷ and have no, or hopelessly inadequate, funded pension benefits.⁸

The proper provision for a country's elderly population is an expensive exercise, if one adds the rising cost of medical care and accommodation for the elderly to the volume of expenditure on pensions.

Older persons in South Africa, therefore, can be described as a sizeable but vulnerable group requiring specific protection. Section 27 of the Constitution obliges the state to take reasonable legislative and other measures within available resources to progressively realise the right of access to social security. The steps taken by the state to promote older persons' right to access to social security and to protect their right to dignity⁹ need to be evaluated. This evaluation should not only focus on the payment of pensions, but also on the impact of current law and policy on the care and support provided to older persons.

1.2 INTERGENERATIONAL SOLIDARITY: AN INTRODUCTION

In an ideal world, society would be made up of three generations: children, the working-age generation, and older persons; with all three generations of equal

⁷ A non-contributory social assistance measure targeted at persons aged 60 years and older. See below at 3.3.1.1 for a detailed discussion of the older person's grant.

⁸ National Treasury (2007) *Social security and retirement reform: Second discussion paper* (hereafter "2nd discussion paper") 3.

⁹ S 10 of the Constitution, 1996.

size. The working-age population would raise the children and support the older generation in return for the older generation having raised them when they were children. The children will grow up and become the new working-age population and once again provide for their children and the older generation (who used to be the working-age group). Reciprocal benefits would flow from this arrangement and each generation would be certain that they will receive the support they require at their specific stage of life. The working-age population would, therefore, be prepared to support the older generation who had supported them when they were children, knowing that their children will support them when they become old. There would not be much law required to enforce this reciprocal flow of support and resources. It would just be the way things are done.

Unfortunately this Utopian world where the flow of resources and services occurs willingly does not exist and in reality laws are required to ensure the flow of resources and services between generations, otherwise known as intergenerational solidarity. Intergenerational solidarity can be described as the solidarity between the active working-age population, as one generation, from which benefits flow to older persons as the other.¹⁰ Therefore, most laws relating to retirement income are merely ways to ensure that older persons will receive adequate benefits when they retire, for example, legislation requiring the working-age population to pay taxes that are then used to pay grants to older persons. The primary goal of retirement fund legislation is to safeguard the interests of members so that they will receive the benefits they are entitled to upon

¹⁰ See below at 2.3 for a detailed explanation of the concepts “solidarity” and “intergenerational solidarity”.

retirement.¹¹ More importantly, laws, and particularly legislation, are required to step in when the balance between the generations is disrupted and regulate the flow of resources between the generations.

Factors that affect the balance between the generations include demographic factors such as the ageing of the population, which leads to an imbalance in the generational bargain, as the working-age generation may become relatively small to ensure sufficient benefits for the retired generation. Laws are therefore needed to ensure that the working-age group is not overburdened, while the retired generation can still receive the expected benefits.

Other factors that could impact negatively on intergenerational solidarity are factors that affect the number of the working-age population paying the taxes or contributions needed to make the system work. Factors such as unemployment and the HIV/AIDS pandemic play a major role in reducing the number of the working age group from which resources flow to other generations. Laws are therefore required to ensure that the reduced working-age group is still prepared to, and capable of, providing the benefits and services required by the older population.

All sectors of society may not necessarily support the introduction of legislative measures to prioritise intergenerational solidarity.¹² Older persons have to compete against the benefit expectations of other marginalised groups such as

¹¹ See 3.3.2.1.1 below.

¹² Johnston "The effects of inflation and currency instability on pension schemes in the United Kingdom" in ILO (1977) *Pensions and inflation* 103.

children and people with disabilities, with the result that reforms in social security have only partially focused on older persons.¹³

There is a clear link between social security benefits for older persons and the level of financial assistance to elderly parents expected of adult children. Adequate old-age pensions can contribute more to the financial security and independence of older persons than any other income transfer programme and shift the burden of financial responsibility for elderly parents away from adult children to the social security system.¹⁴ But what if the amounts payable are so low that adult children still find it necessary to assist their elderly parents?

Not only must benefits paid to older persons and provisions to care for older persons compete with provisions to assist families with children,¹⁵ but providing for older persons is a more long-term concern than childcare. With childcare there is always the expectation that the child will grow up and become independent, whereas older persons will most probably become increasingly dependent.¹⁶

All of this would not be such a major concern in developing countries, had the traditional forms of family support not started to break down, leaving the elderly family members, who have always taken support by their family for granted, at

¹³ However, since 1999, which was designated "International Year of the Older Person", there has been an increase in interest in the plight of older persons from both researchers and policy makers.

¹⁴ Hoskins "Combining work and care for the elderly: An overview of the issues" (1993) 132 *International Labour Review* 360.

¹⁵ Families are in a manner of speaking being "squeezed between two generations" as both child care and elder care demands are on the increase (Wisensale "Generational equity and intergenerational policies" (1988) 28 (6) *The Gerontologist* 775). Binney and Estes "The retreat of the state and its transfer of responsibility: the intergenerational war" (1988) 18 (1) *International Journal of Health Services* 85 and 92 refer to the "sandwich generation" made up of middle-aged (mainly) female caregivers whose labour is stretched between their parents and children.

¹⁶ Hoskins "Combining work and care for the elderly: An overview of the issues" (1993) 132 *International Labour Review* 358.

risk. Factors that contribute to the breakdown of traditional family support are: rural-urban migration by younger family members; changing family patterns; and the shift from a mainly agricultural economy to an industrialised one.¹⁷

As older women tend to outlive older men,¹⁸ very old and dependent men can most often depend on the support of their spouses, whereas older women must depend on their children, the state, the community, or in many cases, themselves, for care.¹⁹

The issues mentioned above have a negative impact on intergenerational solidarity. The aim of this thesis is to address these and other problematic issues undermining intergenerational solidarity. Among other points, this research will consider -

- the economic and social implications of demographic trends, focusing on the changing ratios between populations of working-age and older persons, particularly from a comparative point of view;
- the different theories about the distribution of income among generations and the competing needs of different generations; that is, intergenerational solidarity focusing on the reciprocal flow of resources between generations,

¹⁷ Hoskins "Combining work and care for the elderly: An overview of the issues" (1993) 132 *International Labour Review* 351.

¹⁸ Central Statistics (CSS) *Women and men in South Africa* (1998) Fig 30 indicates that women of each population group can expect to live six to seven years longer than their male counterparts. See also Woolard (2003) *Impact of government programmes using administrative data sets: Social assistance grants* 4. Women surviving into old age in greater numbers and for more years than men is a world-wide occurrence (see UN Madrid International Plan of Action on Ageing (2002), para 8).

¹⁹ Hoskins "Combining work and care for the elderly: An overview of the issues" (1993) 132 *International Labour Review* 349. Moody (2000) *Aging: Concepts and controversies* 157 states that "[t]he typical fate is for men to die earlier and for women to survive with chronic diseases".

as opposed to the 'intergenerational equity' view,²⁰ in terms of which public spending on older persons should not outweigh expenditure on the younger generations;

- which of the abovementioned theories is more compatible with the provisions of the South African Bill of Rights applicable to older persons;
- with whom the responsibility lies to ensure an equitable distribution of income between the generations;²¹ and
- International precedents on the role of the state in providing financial and non-cash support to older persons.

1.3 PURPOSES OF SOCIAL SECURITY FOR OLDER PERSONS

Pieters²² describes social security as “the body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings or particular costs”. The lack of earnings or particular costs that people could potentially face are seen as “social risks”.

One part of the risk of old age consists of a person, as a result of old age, not being able to earn his or her own living. It is for this reason that social security, and particularly older person's grants, aim to compensate older persons for loss of income owing to old age. In the same way, occupational pension and provident

²⁰ The 'intergenerational equity' view is briefly described at 2.3 below and analysed at 6.4.4 below.

²¹ A similar framework was followed in the deliberations of the United Nations Committee for Development Planning in drawing up the report *Old-age security in a changing global context* (1998).

²² Pieters (1993) *Introduction into the basic principles of social security* 2.

fund benefits attempt to replace income for people who retire from their occupation due to reaching a particular age.²³

The United Nations Committee for Development Planning²⁴ sees the three main functions of old-age financial security schemes as:

- insurance (pooling savings and risks in an effort to protect those who would otherwise outlive their savings);
- redistribution (transferring income to alleviate poverty among older people);
and
- saving (encouraging people of economically active age to save for their retirement years).

The other “risk” attached to old age is the additional cost involved in becoming older. Social insurance against old age and state grants are, however, not designed to compensate for the special costs incurred by being old. Therefore, in addition to the recognised risk of not being able to earn money due to old age, the costs of the need for assistance and increased medical expenses that arise as a result of ageing, also need to be recognised as a social risk.²⁵ Hence, measures taken to address this additional social risk should also be regarded as social security measures.

²³ Pieters (1993) 48.

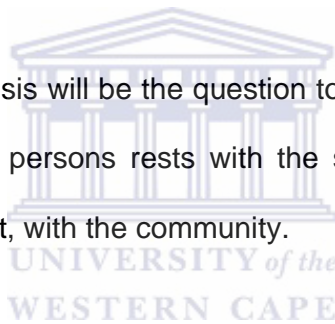
²⁴ UN Committee for Development Planning (1998) *Old-age security in a changing global context* 3.

²⁵ Pieters (1993) *Introduction into the basic principles of social security* 48.

1.4 INTERGENERATIONAL SOLIDARITY AS AN ELEMENT OF LEGISLATION CONCERNING OLDER PERSONS: THE RESEARCH QUESTION

The main research question of this thesis is whether intergenerational solidarity should form the basis of South African legislation on the provision of retirement income and the provision of care and support to older persons, and if so, whether it in fact does. If the answer to the latter is in the negative, the further question is whether the current process to reform the retirement income system and related legislation in South Africa would be a suitable platform to be used to introduce the concept of intergenerational solidarity to legislation concerning older persons.

A second theme of this thesis will be the question to which extent the duty to take care of and support older persons rests with the state, with the older person's family, or, to a lesser extent, with the community.



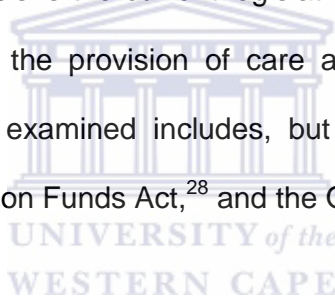
Although the concept of intergenerational solidarity is central to a number of international standards,²⁶ there is a scarcity of literature on the incorporation of intergenerational solidarity into South African legislation concerning older persons. The significance of the current research, therefore, is premised on the fact that South African legislation on older persons currently is at a crossroads. The current retirement income reform process is a valuable opportunity to formally introduce intergenerational solidarity as an element of retirement income legislation and the aim of this thesis is to present convincing arguments for its inclusion.

²⁶ It is also central to a number of international "plans of action" on ageing. See below at 7.2.3.

1.5 METHODOLOGY AND SCOPE OF THESIS

Although ample literature on the financial and personal effects of ageing and on related concepts such as intergenerational solidarity exists in the fields of economics, gerontology and social work, there is a need for increased legal research on this area. The research undertaken for this thesis takes the form of a literature review of current law and government policy on retirement income and the provision of care and support services to older persons. The law is stated as far as possible as at 30 June 2009.

The main focus of this thesis is the current legislative framework for the provision of retirement income and the provision of care and support services to older persons. The legislation examined includes, but is not limited to, the Social Assistance Act,²⁷ the Pension Funds Act,²⁸ and the Older Persons Act.²⁹



As the vast majority of disputes related to social security are considered by administrative tribunals, that are not required to publish their findings, case law on social security-related matters is in short supply. Hence, the discussion of case law in this thesis is limited to judgments related to constitutional interpretation, selected judgments on the interpretation of the legislation examined, and a number of determinations of the Pension Funds Adjudicator.³⁰

In addition, this thesis includes an analysis of the relevant international human rights instruments and international social security standards.

²⁷ Act 13 of 2004, and the regulations i.t.o. the Act.

²⁸ Act 24 of 1956 (as amended), as well as selected practice notices issued with regard to the Act.

²⁹ Act 13 of 2006.

³⁰ Due to length constraints, the case law generally will not be examined extensively.

Four countries – Chile, the United Kingdom, the United States of America and Sweden – were selected for a comparative overview of the issues considered in this thesis. Although a number of other countries could potentially be regarded as candidates for a comparative overview of social security legislation, the abovementioned countries were selected for the following reasons:

First, the discussion documents published with regard to the pension reform process in South Africa recognised the systems in the abovementioned countries as points of reference for South African reforms.³¹ Secondly, each of the countries has features in its social security system and legislation that may (or may not) offer answers to the questions posed in this thesis.

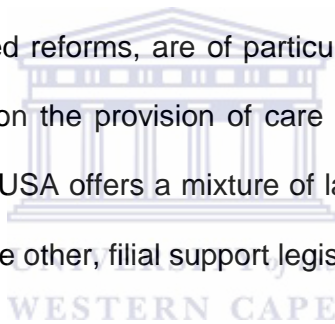
Chile is a good candidate for a comparative overview, as the levels of development and of inequality in Chile and South Africa are comparable. In addition, the pension reforms in Chile in the 1980s that privatised pension fund management and created a “multi-pillar” system have become a point of reference for pension reforms in a number of other countries. The fact that the outcome of the reforms was a system similar in many respects to the current South African occupational fund system, contributes to the value of the Chilean system from a comparative perspective.

The United Kingdom (UK) has a well-established national insurance system that has recently been reformed in order to address the effects of demographic ageing

³¹ See Department of Social Development (2007) *Reform of retirement provisions*; National Treasury (2004) *Retirement fund reform: A discussion paper*; National Treasury (2007) *Social security and retirement reforms: Second discussion paper*.

of the population in the UK. The UK retirement income legislation shares much of the same background as the South African legislation, making it a good candidate for comparison. However, the real value of the UK system from a comparative point of view is found in the interrelatedness of the retirement income system and care and support services.

The “Social Security” system in the United States of America (USA) is one of the largest scale retirement income schemes in the world. The attempts in the USA to address the effects of demographic ageing and the (perceived) imbalance between generations, and views in the USA on intergenerational solidarity reflected in these attempted reforms, are of particular interest for this thesis. As far as the law and policy on the provision of care and support services to older persons is concerned, the USA offers a mixture of large scale public programmes on the one hand and, on the other, filial support legislation.



The Swedish system is interesting from a comparative point of view due to the major role the state plays in the provision of retirement income and of care and support services to older persons.

The reason for the inclusion of the social security systems of these four countries in this thesis is not to find elements that can be directly adopted in South Africa, but rather as part of an indication of the available options.

The multi-disciplinary nature of the provision of social security programmes means that much of the terminology utilised in social security law has its origins in

disciplines such as economics, gerontology and sociology. For this reason, many of the journal articles and reports referred to in this thesis were not authored by legal experts, but are, nonetheless, valuable for the background and context they provide for the law involved.

Finally, the literature review includes recent discussion documents published with regard to the current process to reform the retirement funding system in South Africa. The discussion documents are analysed to determine the current policy stance on intergenerational solidarity.

1.6 STRUCTURE OF THESIS

This thesis consists of eight chapters. Chapter 1 is the introductory chapter. In chapter 2 the terminology and concepts used throughout the thesis are explained. Much of the terminology used in social security law has been adopted from other disciplines, such as economics and social work and, therefore, the terms and the different contexts in which they apply need to be clarified. Particular attention will be given to the concepts of intergenerational solidarity and intergenerational equity, as well as to a description of the different types of retirement funds.

Chapter 3 provides a summary of the current legal provisions in South Africa concerning older persons. The aim of this chapter is to give a broad overview of the current legal position as a context for the analysis in the following chapters, where the provisions outlined in chapter 3 will be examined to determine whether they meet the constitutional demand for legal protection of older persons. In this

context, chapters 4 to 6 will be devoted to identifying and examining the key issues regarding state grants for older persons, occupational pensions and the provision of care and support for older persons.

Chapter 4 deals with intergenerational solidarity as the basis of state policy on the provision of social security to older persons and the extent to which the state has taken steps to promote intergenerational solidarity in South Africa. The first part of the chapter examines the development of the state's policy approach to meeting older persons' financial and care needs and, hence, the level of importance attached to intergenerational solidarity by the state in South Africa. The key issues discussed in chapter 4 were selected in the light of their potential impact on intergenerational solidarity in the context of the state's duty to provide older persons with access to social assistance. With regard to older person's grants,³² the mismanagement of grants could lead to potential beneficiaries not receiving grants, whereas the abuse of grants could potentially lead to resistance from taxpayers against the continued payment of these grants; both with potentially negative consequences for intergenerational solidarity. Although the means test for social grants has been criticised as being unjust and eliminating some people as potential recipients, it has to be evaluated in the context of the financial burden on the State to provide social grants for older persons. Alternatives to the current older person's grant will be discussed. The reasons why so many older persons rely on the State, such as limited access to private insurance and savings and the fact that participation in occupational retirement funds is not compulsory, will also be considered.

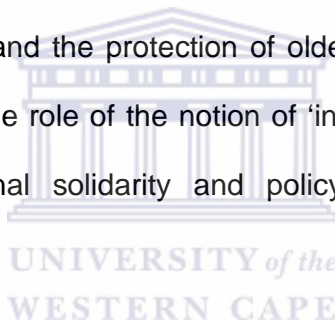
³² The state old age pension. See below at 3.3.1.1 for a detailed discussion of this grant.

Moving on to the individual's responsibility to provide financially for his or her own retirement, the discussion in Chapter 5 will focus on the regulation of the pension industry by the state, to ensure that expected funds will in fact be available on retirement. Intergenerational solidarity does not merely entail creating vehicles for retirement provision, but also measures to ensure that, should an individual take responsibility for providing for his or her retirement, the promised benefits would not have dwindled by the time he or she retires. The issues to be considered in this context are the effect of the voluntary nature of the occupational fund system on individuals' retirement income, the adequacy of measures intended to deal with leakage from the retirement income system, the role of fund governance in securing members' benefits and the effect of inflation on retirement income. Particular attention is given to the plight of persons currently excluded from the occupational retirement fund system, such as workers outside the formal economy, low-income workers and the unemployed. The proposed pension reforms and their potential effect on the distribution of responsibilities between the state, citizens in general and individual insured persons will also be examined. In particular, the impact of fund choices for individuals under the current system, and more importantly, for the proposed reformed retirement system, will be highlighted.

Chapter 6 deals with the duty to provide care and support to older persons, and with the various groups that potentially bear the burden to provide care for older persons. It will be seen that the state's focus on frail older persons shifts the responsibility for taking care of "non-frail" older persons to family members,

welfare organisations and the community.³³ An important issue to explore in this context is whether some form of financial assistance from the state for such caregivers is viable. This research will also study the impact on the active working caregivers of this obligation to care for older family members. Particular attention will be given to the dilemma faced by working women in this regard and the need for legislative intervention to make it possible for women to both work and take care of elderly family members.

Chapter 6 includes an investigation of measures to ensure that older persons are treated with the dignity they deserve, with specific attention to the recognition of the role of older persons and the protection of older persons against abuse and neglect. In this context, the role of the notion of 'intergenerational equity' and its impact on intergenerational solidarity and policy on older persons will be discussed.



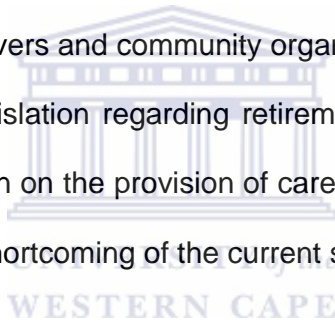
Due attention has to be given to international human rights instruments and social security standards in the design of any new legislation dealing with retirement provision and caring for older persons. Chapter 7 therefore, commences with an examination of the existing international standards and highlights areas where statutory reform is required to bring South African law in line with these standards.

Further, to determine whether solutions to the problems identified in this thesis have been found in other jurisdictions, Chapter 7 will examine the legal protection

³³ In many instances the person providing care for an older person may be an elderly spouse or an older member of the community. The type of solidarity expressed here is intragenerational, i.e. solidarity amongst people of the same generation. The focus of this thesis is on intergenerational solidarity and instances of intragenerational solidarity are not dealt with as a separate topic, but in the contexts where they occur, such as family care and community care.

afforded to older persons in Chile, the UK, the USA and Sweden. In particular, the extent to which the law regulates intergenerational solidarity in the selected countries will be studied to obtain answers to the question of who could, and should, be held legally responsible for the welfare of older persons.

Chapter 8 is the concluding chapter. It is argued that intergenerational solidarity should form the basis of future legislation and policy on older persons. In addition, it is argued that the current law and policy placing the responsibility of the provision of care and support of older persons on their families and communities is not providing sufficient protection to older persons. Hence, increased state assistance to family caregivers and community organisations is required. The lack of coherence between legislation regarding retirement income on the one hand, and on the other, legislation on the provision of care and support to older persons' is highlighted as a major shortcoming of the current system.



CHAPTER 2

THEORETICAL BACKGROUND

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2.1 INTRODUCTION

The multidisciplinary nature of research concerning social security law was explained in Chapter 1. Much of the recognised social security law terminology originated in other disciplines such as economics, sociology and social work, and was subsequently adopted in legislation, in many cases without sufficient explanation of the terms used.

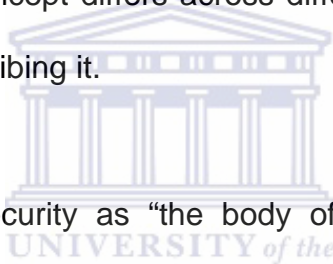
One of the stated aims of this thesis is to examine the potential effect of pension reforms on the distribution of responsibilities between the state, citizens in general and individual employees or fund members. In addition, the provision of assistance with regard to the additional and special costs incurred by ageing is to be scrutinised. Existing social security programmes and social security reforms are based on choices between different fund and funding options, or between different policy choices on the part of the state regarding the provision of social security. The aim of this chapter is to describe the different concepts, options and views, and thereby to facilitate the analysis of these concepts in the subsequent chapters.¹

¹ The various reform options are discussed in more detail in chapters 4 and 5. However, it is important that the related terminology and issues are clearly defined and outlined from the outset, as Blommestein, Hicks and Vanston (1997) *Retirement-income reforms in the context of OECD work on ageing* 14 warn that “public debate on reform is often confused since different issues are being addressed, often without being sufficiently disentangled”.

2.2 SOCIAL INSURANCE AND SOCIAL ASSISTANCE

The legal protection afforded to older persons has traditionally been classified under what is known in South Africa as “social security law”. It is therefore necessary to attempt to give a explanation of “social security”, as well as of its two main branches: social insurance and social assistance. The analysis of these concepts will also serve to illustrate the conceptual framework within which any reforms in providing for older persons must take place.

As “social security” as a concept differs across different countries, the following are merely attempts at describing it.



Pieters perceives social security as “the body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (i.e. income from paid labour) or particular costs”.²

The Organisation for Economic Co-operation and Development (OECD) views social security as -

the provision by public and private institutions of benefits to, and financial contributions targeted at, households and individuals in order to provide support during circumstances which adversely affect their welfare... Such benefits can be cash transfers, or can be direct (in-kind) provision of goods and services. Since only benefits provided by institutions are included, transfers between households – albeit of a social nature – are not.³

² Pieters (1993) *Introduction into the basic principles of social security* 2. This definition features prominently in this thesis because of the express reference to “solidarity”.

³ Adema and Einerhand (1998) *The growing role of private social benefits* 6.

While the International Labour Organisation (ILO) admits that the concept of social security has acquired a wider interpretation in some countries than in others, it describes social security as -

the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, *old age* and death, the provision of medical care, and the provision of subsidies from families with children.⁴ (my emphasis)

In South Africa's White Paper for Social Welfare⁵ social security is described as including -

a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children. The domains of social security are: poverty prevention, poverty alleviation, social compensation and income distribution.⁶

The White Paper for Social Welfare defines social security as -

policies which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and *old age*, by means of contributory and noncontributory schemes for providing for their basic needs. State social assistance (grants) includes the following four categories of benefits: those associated with *old age*, disability, child and family care, and poor relief.⁷ (my emphasis)

The social security system in South Africa is (generally) said to have the following four elements:

- a) Private savings, with people voluntarily saving for contingencies, such as, retirement and chronic diseases;

⁴ ILO (1984) *Introduction to social security* 3.

⁵ GN 1108 in GG 18166 of 8 August 1997 (hereafter "White Paper for Social Welfare (1997)").

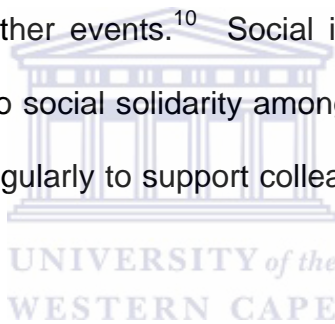
⁶ At 48.

⁷ At 97. For further definitions see Olivier "The concept of social security" in Olivier et al (eds) (2004) *Introduction to social security* 13-32.

- b) Social insurance;
- c) Social assistance;
- d) Social relief, providing short-term assistance to tide people over a particular individual or community crisis.⁸

Of these elements of social security, the two that are currently of the greatest importance to older persons are social insurance and social assistance.⁹

Social insurance is portrayed in the White Paper for Social Welfare as joint contributions by employers and employees to pension or provident funds, or social insurance covering other events.¹⁰ Social insurance as a concept was created to give expression to social solidarity amongst workers – the willingness to contribute to a scheme regularly to support colleagues and workmates in time of need.



The following characteristics are common to social insurance schemes:¹¹

- Social insurance is financed by contributions from employers and employees. The state's involvement is limited to occasional supplementary contributions and the regulation of social insurance schemes.
- Participation in social insurance schemes is as a rule compulsory.¹²

⁸ White Paper for Social Welfare (1997) 48.

⁹ Not many South Africans can afford private retirement savings. Social relief is made available on an ad hoc basis only.

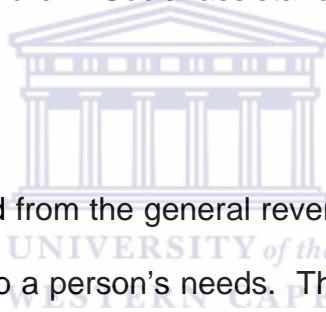
¹⁰ White Paper for Social Welfare (1997) 48.

¹¹ ILO (1984) *Introduction to social security* 4. See also Pieters (1993) *Introduction into the basic principles of social security* 5; Moore et al "The concept of social security" in Olivier et al (eds) (1999) *Social security law – general principles* 13-15.

¹² South African occupational retirement schemes being an exception to this rule, as participation in a retirement scheme is presently not compulsory. See below at 5.5 for the problems created by the voluntary nature of South African retirement funds.

- Contributions are accumulated in special funds out of which benefits are paid.
- Surplus funds not needed to pay current benefits are invested to earn further income.
- No means test is applied to determine a person's right to benefit.
- Contribution and benefit rates are often linked to the employee's earnings.

The White Paper describes social assistance as non-contributory and income-tested benefits provided by the state to groups who are unable to provide for their own minimum needs, such as people with disabilities, older persons, unsupported parents and children. Social assistance to older persons is paid out as an older person's grant.¹³



Social assistance is financed from the general revenue of the state with statutory scales of benefits adjusted to a person's needs. The goal of social assistance is to serve as a guard against deprivation¹⁴ and is paid out only to those who are perceived to be in need of assistance.¹⁵

The ILO has set out the following as the principal elements of social assistance:¹⁶

- The state meets the whole cost of the programme;
- Benefits are paid out in prescribed categories of need;
- A means test, which will take a person's other income and resources into account, is applied to assess need;

¹³ White Paper for Social Welfare (1997) 48; s 10 of the Social Assistance Act 13 of 2004.

¹⁴ Olivier et al (eds) (1999) *Social security law – general principles* 15.

¹⁵ Pieters (1993) *Introduction into the basic principles of social security* 6.

¹⁶ ILO (1984) *Introduction to social security* 5.

- Grants are not related to previous earnings, but are designed to bring a person's income up to a predetermined minimum.

In South Africa the grants paid by the state¹⁷ are social assistance measures, whereas the occupational retirement schemes¹⁸ and some of the private vehicles for retirement saving¹⁹ can be classified as social insurance. In addition, the state provides means-tested benefits in kind, such as, health care and social services to those in need.²⁰

2.3 SOLIDARITY AND NEO-LIBERALISM

As was stated in Chapter 1, one of the objectives of this research is to determine with whom the responsibility to provide and care for older persons rests. Of particular importance is the issue of the level of state involvement: whether the state should have the ultimate responsibility for the needy elderly or whether the state should only assist individuals in providing for their own old age,²¹ as well as supporting other groups that voluntarily assist older persons. The choice between these two rather different perspectives on the role of the state will underlie any future social planning in South Africa.

¹⁷ See 3.3.1 below.

¹⁸ See 3.3.2 below for an overview of the legislation regulating occupational retirement schemes.

¹⁹ See 3.3.3 below.

²⁰ The statutory provision for care and support services is discussed at 3.3.4.5 below and health care for older persons at 6.3.4 below.

²¹ Whether through occupational retirement funds or commercial retirement savings vehicles.

Social security programmes, i.e. social insurance and assistance, are usually based on the principle of solidarity,²² meaning, the shared responsibility of those who contribute, towards each other and towards those who benefit.²³ The significance of solidarity for successful social security programmes is described as follows by the ILO:²⁴

That social security should extend protection to the whole community is a truism. That its protection should be uniform for each section of the community is simple social justice. And that the whole community should stand together, non-national residents equally with national residents, to provide this protection is an expression of the solidarity which underlies the whole concept.

Solidarity can be likened to the *ubuntu* principle²⁵ in that the principle of caring for each other's well-being is promoted and a spirit of mutual support fostered. Like the concept of solidarity, *ubuntu* acknowledges both the rights and the responsibilities of every person in promoting individual and societal well-being.²⁶

Solidarity needs to be reinforced by public policy and, as Iyer remarks, "extension of social security to the underprivileged sectors of the population could not take place without the necessary political commitment to social solidarity".²⁷

²² With the exception of fully-funded retirement funding schemes where an individual's retirement benefits are based on investment returns on contributions made by, or on behalf of, him or her.

²³ Liffmann et al "Scope of application" in Olivier et al (eds) (1999) *Social security law – general principles* 50.

²⁴ ILO (1984) *Introduction to social security* 11.

²⁵ The concept of *ubuntu* is derived from the Zulu maxim *umuntu ngumuntu ngabantu*, which means that "a person is a person through other persons" and as a philosophy focuses on "people's allegiances and relations with each other" (Ulwazi "Ubuntu" <http://wiki.ulwazi.org/index.php5?title=Ubuntu> (accessed 10/11/2009).

²⁶ White Paper for Social Welfare (1997) 17.

²⁷ Iyer (1993) 132 *International Labour Review* 198.

Two types of solidarity can be distinguished:

- Intragenerational solidarity, which is solidarity practiced within the same generation, for example, between the unemployed and employed of that generation; and
- Intergenerational solidarity, which is solidarity between different generations, for example, between the active working population and either older persons or children.²⁸

The focus of this research is on the intergenerational solidarity between the active working population (contributors and taxpayers) and older persons. At the root of intergenerational solidarity rests a long-term contract between the active working population and those who are too old to work.²⁹

Intergenerational solidarity implies that the younger, more active sectors of the population are prepared to meet the pension claims of the older generation. It is based on an understanding that, if the active working population chooses to dismantle social programmes for older persons, it would be dismantling social protection for itself. Intergenerational solidarity also entails that the present generation of pension beneficiaries should be prepared to abstain from unnecessary claims that would impose an unreasonable burden on the generations to come.³⁰

²⁸ Pieters (1993) *Introduction into the basic principles of social security* 28.

²⁹ Iyer (1993) "Pension reform in developing countries" *International Labour Review* (132) 187.

³⁰ Pieters (1993) *Introduction into the basic principles of social security* 29.

On the other side of the spectrum are those who believe that there should be the minimum interference by the state and civil society in an individual's social and economic circumstances. Some of the main principles that they rely on are:

- Markets are to be liberated from government involvement and should be open to international trade and investment;
- Cutting public expenditure for social services and reducing the safety-net for the poor;
- Reduction of government regulation of the economy;
- Privatisation, with emphasis on the advantages of service delivery by the private sector compared with that by the state; and
- Moving from the concept of “community” to “individual responsibility”.³¹

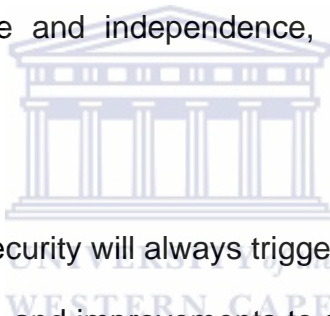
Those who hold this view, which been labeled ‘neo-liberalism’,³² therefore see the provision of health and social care as the responsibility of the individual. Instead of being dependent on the state, people should be free to make choices about social benefits.³³

³¹ Martinez and Garcia (1996) “What is Neoliberalism? A brief definition for activists” <http://www.corpwatch.org/article.php?id=376> (accessed 30/09/2008). They criticise ‘neo-liberalism’ for “pressuring the poorest people in a society to find solutions to their lack of health care, education and social security all by themselves – then blaming them, if they fail, as ‘lazy’”.

³² ‘Neo-liberalism’ has evolved into a semi-political label currently used by critics of a variety of economic policies. It does not necessarily reflect the original meaning of the term as used by Alexander Rustow in the 1930s to warn against excessive market regulation, as proposed by supporters of the national socialist regime. See Hartwich “Neoliberalism’s early history” http://www.cis.org.au/temp/OP114_extract.html (accessed 22/10/2009) for a description of the origins of ‘neo-liberalism’.

³³ Hill (1993) *Understanding social policy* 205. ‘Neo-liberalism’ has been under attack from activists criticising the aggressive global free-market capitalism, privatisation and retrenchment of the welfare state that go together with neo-liberalism and blaming it for the fact that the rich grow richer and the poor grow poorer. Financial institutions, such as, the World Bank and the IMF, have been singled out for criticism as they are perceived as imposing neo-liberal policies on poorer countries. See Livingstone “Resisting neo-liberalism” <http://www.llb.labournet.org.uk/1997/october/int3.html> (accessed 02/07/2009); Martinez and Garcia (1996) “What is Neoliberalism? A brief definition for activists” <http://www.corpwatch.org/article.php?id=376> (accessed 30/09/2008).

Increasingly, governments are turning towards the 'neo-liberal' approach that "it is better to teach a person how to catch a fish than to feed him a fish". According to this approach, the role of the state in the provision of social welfare should ideally be limited to setting the framework for service delivery, monitoring the standards of delivery and providing some funding support but not directly delivering the services. The actual delivery of services is seen as the task of the market, the community and the family, who will take up the slack created by less government involvement. The government should through national policies and practices foster self-reliance and independence, rather than provide welfare services.³⁴



Any plans to reform social security will always trigger the age old debate between those demanding extensions and improvements to social security and those who are reluctant to finance additional social security schemes.³⁵ The latter have a propensity to view older persons as societal burdens, who divert much-needed resources away from other age groups.³⁶ This brings an additional aspect of the debate on intergenerational solidarity, "intergenerational equity", to the fore.

³⁴ De Vaus and Qu "Intergenerational family transfers: Dimensions of inequality" (1998) 50 *Family Matters* 27 <http://www.aifs.gov.au/institute/pubs/fm/fm50dd.pdf> (accessed 10/07/2009).

³⁵ E.g. employers and taxpayers (see Moore et al "The concept of social security" in Olivier et al (eds) (1999) *Social security law – general principles* 14).

³⁶ The group responsible for this shift in attitude towards individual responsibility consists of those who have been financially successful and, therefore, believe that they would fare better investing in their own accounts and do not see the need to take part in any collective agreement (Munnell (2000) *Achieving social goals: the case for defined benefit versus defined contribution plans* 7).

Discussions of intergenerational equity focus on four major issues:

- The fairness of the allocation of resources between children and older persons;
- Concern over large national deficits created in order to make provision for older persons;
- The competition among age groups for health care resources; and
- The fairness of expecting younger generations to finance retirement benefits.³⁷

Social security policy in South Africa has incorporated certain neo-liberal features. According to the White Paper for Social Welfare,³⁸ the state cannot accept sole responsibility for meeting basic socio-economic needs, and civil society will have to meet some of the social service needs. Families are regarded as the basic unit of society and are required to carry some of the burden of providing social support.³⁹ Social welfare programmes are to be designed so as to enhance people's independence,⁴⁰ and state assistance is to be reserved for those unable to support themselves and their dependents.⁴¹

This approach that includes elements of both solidarity and neo-liberalism is present in current South African social security legislation. In reality social security in South Africa is currently restricted to limited solidarity within particular

³⁷ Wisensale "World population ageing: the coming intergenerational equity debate" 1997 (2/3) Bulletin on Ageing <http://www.un.org/esa/socdev/ageb97231.htm> (accessed 2007/09/10). See below at 6.4.4 for further discussion of the debate on intergenerational equity.

³⁸ White Paper for Social Welfare (1997) 19.

³⁹ At 20.

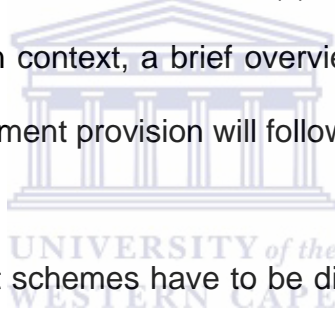
⁴⁰ At 17.

⁴¹ At 16. See also s 27(1)(c) of the Constitution, 1996.

programmes and there currently exists no coordinated system wherein solidarity plays an integral role.⁴²

2.4 NATIONAL RETIREMENT SCHEMES AND PRIVATE AND OCCUPATIONAL PENSIONS

When looking at the levels at which provision for retirement funding is usually made, three diverse levels appear: national or public retirement schemes, occupational retirement schemes and private retirement schemes. As a key focus of this study is to establish which form(s) of retirement provision is/are suitable in the South African context, a brief overview of what is included under each of these levels of retirement provision will follow.



National or public retirement schemes have to be distinguished from state social welfare. The latter is in the form of social grants for older persons, and can be described as social assistance to the elderly. Public retirement schemes, although they are run by the state, are intended as a type of social insurance and are, therefore, targeted at the working population only.

National retirement schemes as a rule cover all the workers in a country, although there are some exceptions. In many countries the scope of application

⁴² See below in Chapter 3 where the fragmented legislative framework for the provision of financial and non-cash support to older persons is discussed.

of national retirement schemes is limited to formal sector employees.⁴³ Membership of such national schemes is often compulsory.

The basic objectives of a national system of protection to provide for the income needs of old age are:

- Protecting the population against poverty in old age;
- Providing an income to replace the earnings lost due to retirement;
- Adjusting retirement income to take account of inflation;
- Encouraging the development of additional voluntary provisions for retirement income;⁴⁴
- Through universal coverage, ensuring that employees' retirement protection will follow them when they change jobs;⁴⁵ and
- Pooling risks that all workers share, such as market downturns.⁴⁶

In countries with public retirement schemes, the two main categories of retirement provision are public and private retirement schemes.⁴⁷ In certain countries, such as South Africa, there may as yet be no national retirement scheme for all workers, and the government's role in providing occupational pensions is limited to civil servants only. This means that in these countries all

⁴³ Ogunrobi et al "Old age" in Olivier et al (eds) (1999) *Social security law – general principles* 116. Workers in the informal economy are therefore excluded. See below at 5.6.1 for the meaning of the term "informal economy" and proposed measures to extend the scope of retirement funding schemes to workers in the informal economy.

⁴⁴ Iyer "Pension reform in developing countries" (1993) 132 *International Labour Review* 200.

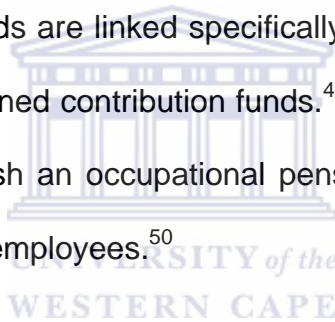
⁴⁵ Horlick "The relationship between public and private pension schemes: an introductory overview" in ISSA (1987) *Conjugating public and private: the case of pensions* 18.

⁴⁶ Leone "Stick with public pensions" (1997) 76 (4) *Foreign Affairs* 49.

⁴⁷ Adema and Einerhand (1998) *The growing role of private social benefits* 7 categorise social benefits as public when the relevant financial flows are controlled by government, including benefits provided by governments to government employees. They regard all other social benefits not provided by governments as private benefits. On the other hand, Hemming (1998) *Should public pensions be funded?* 4 regards "public pensions" as social insurance pensions, excluding pensions for civil servants.

retirement vehicles can be regarded as “private” as opposed to public schemes. This has led to the situation that what is regarded as two separate categories in South Africa, viz occupational retirement funds and private retirement savings vehicles, are in the international context bracketed together as “private”. This distinction between what is regarded as “private” in South Africa and elsewhere,⁴⁸ is of particular importance when international sources are used as references in the debate on whether public or private schemes are the way of the future for retirement provision.

Occupational retirement funds are linked specifically to employment, and can be either defined benefit or defined contribution funds.⁴⁹ It is usually employers that take the decision to establish an occupational pension scheme, as a rule as a benefit to attract and retain employees.⁵⁰



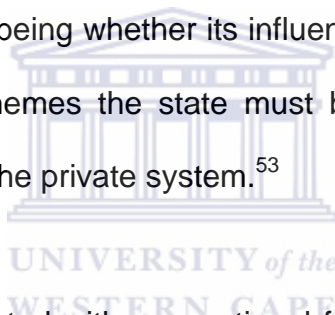
⁴⁸ The meaning attached to “private pensions” differs within the context of each country, leading to a diversity of terminology, e.g. what is known as an “occupational retirement fund” in South Africa, can be called a “complementary pension”, “parastate benefit” or “company old-age provision” in another jurisdiction. See Horlick “The relationship between public and private pension schemes: an introductory overview” in ISSA (1987) *Conjugating public and private: the case of pensions* 15; Tamburi and Mouton “The uncertain frontier between private and public pension schemes” in ISSA (1987) *Conjugating public and private: the case of pensions* 29 and 31.

⁴⁹ See below at 2.6 for the distinction between these two types of funds.

⁵⁰ Adema and Einerhand (1998) *The growing role of private social benefits* 11; Iyer “Pension reform in developing countries” (1993) 132 *International Labour Review* 192; Tamburi and Mouton (1987) “The uncertain frontier between private and public pension schemes” in ISSA (1987) *Conjugating public and private: the case of pensions* 30.

Occupational retirement funds are usually contributory funds to which both the employer and employees contribute. The member's contribution is usually deducted from his or her salary.⁵¹

There is limited state involvement in occupational retirement funds. This commonly takes the form of the regulation of the retirement fund industry and the provision of a complaints procedure for aggrieved members and ex-members of retirement funds.⁵² For this reason it has been argued that there are no purely "private" systems, and that the government will always play a role in retirement schemes, the only question being whether its influence is direct or indirect. Even with regard to "private" schemes the state must be the overall regulator and guarantor of the integrity of the private system.⁵³



The benefits usually associated with occupational funds are retirement benefits, although additional benefits, such as, withdrawal benefits, death benefits (usually payable to the dependants of the beneficiary) and insured benefits (additional benefits that can be purchased for fund members, with a portion of the contributions, through an insurance company) may also be payable.⁵⁴ The

⁵¹ Sephton (1990) *A guide to pension and provident funds: Legal and policy considerations* ix; Department of Social Development (2007) *Reform of retirement provisions* 56.

⁵² South African occupational retirement funds are discussed below at 3.3.2.

⁵³ Ross "Public versus private pensions: dimensions of a world-wide debate" in ISSA (1996) *Protecting retirement incomes: Options for reform* 53. The nature of state supervision and regulation of the "private" pension industry will of course vary from one country to another (Tamburi and Mouton "The uncertain frontier between private and public pension schemes" in ISSA (1987) *Conjugating public and private: the case of pensions* 38). See also Adema and Eiderhand (1998) *The growing role of private social benefits* 7-8.

⁵⁴ In this thesis all references to "benefits" in the context of occupational retirement funds are meant to indicate retirement benefits, unless the contrary is indicated.

employees or retired employees of the organisation for which the fund was set up are the members of the fund.⁵⁵ Hence, the main purpose of a retirement fund is to provide a form of benefit for its members on retirement or to their dependants when the members die. Other types of benefits may only be paid out of fund resources once this primary goal has been satisfied.⁵⁶

A number of relative advantages and disadvantages of occupational retirement funds as opposed to public schemes have been identified.⁵⁷ The advantages of occupational retirement funds are:

- They are flexible and can be adapted to the special needs of employees in a specific sector or geographic area.
- Members of occupational retirement funds usually have some input in investment policy.
- The element of competition amongst occupational funds could lead to improved benefits.
- Occupational funds are deemed to be less exposed to demographic risks than national schemes as they usually only deal with specific groups or sectors of employment. This factor makes occupational fund membership attractive for people who might be pessimistic about the state's ability to meet its future pension liabilities.⁵⁸

⁵⁵ Sephton (1990) *A guide to pension and provident funds* 1.

⁵⁶ See definitions of "pension fund" and "provident fund" in s 1 Income Tax Act 58 of 1962.

⁵⁷ Ogunronbi et al "Old age" in Olivier et al (eds) (1999) *Social security law –general principles* 117-119.

⁵⁸ See Palmer "Public and private pensions and saving in Sweden" in ISSA (1987) *Conjugating public and private: the case of pensions* 252-253.

The relative disadvantages of occupational retirement schemes are:

- As each fund has to bear its own administrative costs and there is no cross-subsidisation of such costs, as is the case with national schemes, administrative expenditure is higher than for public schemes.⁵⁹
- Having a fund for a particular sector of the workforce reduces national solidarity amongst workers, with more emphasis on sectoral solidarity.
- Indexation methods may vary across different funds.⁶⁰
- In a public state-run scheme there is more built-in protection against discriminatory provisions and inadequate benefits. The regulatory framework under which occupational retirement funds operate is not always capable of eliminating serious abuses of fiduciary responsibilities.⁶¹
- One of the major disadvantages of occupational retirement funds is the general lack of transferability and portability of retirement provisions should members have to withdraw from funds before retirement.⁶²

Private provision for retirement funding is usually the only alternative available to self-employed persons and those employees who are not covered by occupational retirement schemes. The lower the level of benefits offered by other types of schemes, the greater the likelihood that those that can afford it will opt for private retirement vehicles. For this reason private retirement funding is by its nature voluntary. Examples of private retirement funding options are

⁵⁹ See Willmore (1999) *Public versus private provision of pensions* 6.

⁶⁰ Ogunronbi et al "Old age" in Olivier et al (eds) (1999) *Social security law – general principles* 118. "Indexation" refers to the process of adjusting retirement benefits after their award in order to keep up with inflation.

⁶¹ See Tanzi "The fiscal dimensions of public pension systems" in ISSA (1996) *Protecting retirement incomes: Options for reform* 28. See also below at 3.3.2 for the regulation of occupational retirement funds and at 5.7 for issues related to fund governance in South Africa.

⁶² Ogunronbi et al "Old age" in Olivier et al (eds) (1999) *Social security law – general principles* 119.

retirement annuity funds, deferred compensation schemes, unit trusts and insurance policies.⁶³

The line between public and “private” retirement systems is becoming increasingly blurred as both types offer a broad range of options, leading Tamburi and Mouton⁶⁴ to question whether the “traditional criteria used to distinguish between the two types and the conventional terminology have not been rendered somewhat obsolete by a rapidly changing system”.

Public and private systems are also not completely independent of each other as the magnitude of the one can affect the other. The more comprehensive the public system, the less need there will be for private coverage, but the converse is also true, in that the absence of an efficient public scheme will cause more individuals to take up private retirement provision.⁶⁵

Midway between public retirement schemes and private and occupational pension funds is the integrated system in which the benefit paid out by the private fund is the difference between a basic amount and the state benefit. This system ensures that beneficiaries do not receive less in retirement benefits than the specified gross amount.

⁶³ See below at 3.3.3.

⁶⁴ Tamburi and Mouton “The uncertain frontier between private and public pension schemes” in ISSA (1987) *Conjugating public and private: the case of pensions* 40.

⁶⁵ Adema and Einerhand (1998) *The growing role of private social benefits* 24.

An example of such an integrated (also called “pillared” or “tiered”) approach is one whereby a combination of systems could exist together, for instance, a public basic pension for all employees, together with earnings-related occupational retirement schemes, topped up with private retirement savings.⁶⁶

In an integrated system the contributions to, and benefits from, occupational retirement schemes usually apply to that portion of earnings above the ceiling for the public scheme. It therefore holds the advantage for employers that it reins in pension costs, as part of the pension liabilities is carried by the public scheme.⁶⁷



2.5 PENSION FUNDS AND PROVIDENT FUNDS

The existing trend in the South African retirement system has for some time been a movement towards providing lump sums at retirement and a conversion from pension funds to provident funds.⁶⁸ Although most provident funds are also defined contribution funds,⁶⁹ the difference between a pension and a provident fund does not depend on whether it is a defined contribution or defined benefit fund. The misconception that all provident funds are necessarily defined contribution funds, and that all pension funds are, therefore, necessarily defined benefit funds, is one of the reasons why many employees opt to become

⁶⁶ Horlick “The relationship between public and private pension schemes: an introductory overview” in ISSA (1987) *Conjugating public and private: the case of pensions* 23. See below at 7.3.2 for an analysis of the World Bank’s “multi-pillared” approach to retirement funding.

⁶⁷ Cooper “Actuarial techniques and funding of pension plans in a period of inflation” in ILO (1997) *Pensions and inflation* 71-72.

⁶⁸ See Smith Committee (1995) *Report of the Committee on Strategy and Policy Review of Retirement Provision in South Africa* (hereafter “Smith Committee Report (1995)”) 45.

⁶⁹ See below at 2.6 for the distinction between defined contribution and defined benefit funds.

members of provident funds. Another misconception leading to a preference for provident funds is that pension and provident funds are fundamentally different types of schemes.⁷⁰

Due to the abovementioned incorrect assumptions regarding the distinction between pension and provident funds, it is necessary to outline the actual differences between pension and provident funds, as well as their relative advantages and disadvantages.

Pension funds are retirement funds established for the purpose of providing annuities⁷¹ for employees on their retirement from employment. A pension fund in South Africa is a fund where the member is entitled to a maximum of one-third of the retirement benefit as a lump sum cash payment, with the balance paid out as a life-long pension.⁷² Hence, the main advantage of a pension fund is the periodic payments that are made throughout the retired life of the member, even if the pensioner outlives the average lifespan on the basis of which the pension is calculated.⁷³

⁷⁰ Smith Committee Report (1995) 25.

⁷¹ See below at fn 73.

⁷² Definition of a "pension fund" in s 1 of the Income Tax Act 58 of 1962 (see below at 3.3.2.1.2); Smith Committee Report (1995) 25; Olivier "Old age and retirement provision" in Olivier et al (eds) *Introduction to social security* (2004) 285.

⁷³ The pension fund is obliged by the Income Tax Act 58 of 1962 to make provision for the payment of annuities when members retire (see below at 3.3.2.1.2). Based on the amount of money left over once the lump sum payment is made, an actuarial assumption is made as to the expected return if that sum of money is invested safely. The other factor that is considered in calculating the amount payable as annuity is the average life expectancy of the retired person according to standard mortality tables. The annuity payable would therefore be "the amount which, paid every month, will reduce the capital sum plus the expected investment return to zero over the expected lifespan of the pensioner" (Sephton (1990) *A guide to pension and provident*

Pension fund members are assured of a secure flow of income and are, therefore, freed from post-retirement investment gambles.⁷⁴

In the case of a provident fund the member may receive the full amount of the retirement benefit as a lump sum.⁷⁵

Pensioners therefore exist only in the context of pension funds. Once the lump sum has been paid out to the beneficiary of a provident fund, he or she is sometimes referred to as a “retiree”, although there is normally no contact between the provident fund and retiree after retirement.⁷⁶

The payment of the lump sum retirement benefit is one of the perceived advantages of a provident fund, as it allows the beneficiary greater flexibility in deciding how he or she is to invest (or spend) it.⁷⁷ The lump sum pay-out may also be perceived to have other advantages for the less well-to-do older person. A lump sum benefit may be utilised to purchase a house to be occupied by the beneficiary. In that case the lump sum benefit is not regarded as income in the

funds 10). The term “pension” as used in this thesis therefore refers to all periodical payments. State grants and pension fund benefits are all “pensions”.

⁷⁴Iyer “Pension reform in developing countries” (1993) 132 *International Labour Review* 191.

⁷⁵Asher and Olivier “Retirement and old age” in Olivier et al (eds) (2003) *Social security: a legal analysis* 234; Olivier “Old age and retirement provision” in Olivier et al (eds) (2004) *Introduction to social security* 285.

⁷⁶Downie (1999) *The essentials of retirement fund management in South Africa* chapter 5, para 1.F.

⁷⁷Although, as is argued below, the “flexibility” involved in receiving a lump sum rather than periodical payments in reality only holds an advantage for those beneficiaries who are financially sophisticated enough to invest the lump sum wisely.

hands of the beneficiary (as it would be in the case of a monthly pension payment) and consequently not included in the means test to determine whether the older person would be entitled to an older person's grant.⁷⁸

However, the lump sum benefit may prove to be a disadvantage rather than an advantage. It has been argued that, particularly in developing countries where beneficiaries are on average not as sophisticated regarding the financial markets and the investment of their lump sum payout,⁷⁹ beneficiaries might be tempted to squander their benefits on consumer goods and in the long run be dependent on the state again.⁸⁰ It is, therefore, argued that they would be better off with a pension which can be "rationed" out over the lifespan of the beneficiary.⁸¹

⁷⁸See below at 3.3.1.1.

⁷⁹ See National Treasury (2004) *Retirement fund reform: a discussion paper* (hereafter "Discussion Paper") 34 fn 32. The Treasury Task Team referred to particular assistance that should be provided to "low income workers

- (i) who have little financial education and therefore may purchase inappropriate financial products,
- (ii) who have, in their individual capacity, little negotiating power with financial institutions,
- (iii) who are likely, in their individual capacity, to make investment and other choices that are inappropriate (most likely because they are too conservative) and who would do better to have these decisions made on their behalf by management boards who can access appropriate expertise, and
- (iv) who need the bulking of transactions, such as insurance, to obtain economies of scale and cross-subsidies."

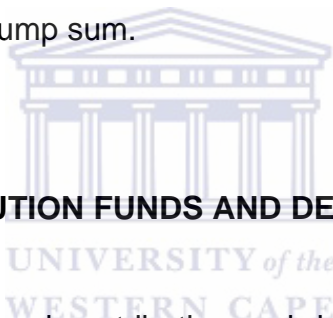
Although the Treasury Task Team's comments on assistance to low income employees were made in the context of the debate whether funds should provide early withdrawal, death and disability benefits as well as retirement benefits, their observations regarding many fund members' (lack of) individual capacity to make prudent investments ring true in the context of lump sum retirement benefits.

⁸⁰ George (2006) *Analysis of South African pension fund conversions* PhD thesis (University of South Africa) 106 and 122; Midgley (1984) *Social security, inequality and the Third World* 95 and 179.

⁸¹Sephton (1990) *A guide to pension and provident funds* 48. The National Treasury (2007) *Social security and retirement reform: second discussion paper* (hereafter "2nd discussion paper") 24 expresses the concern that many people who retire in good health "tend to underestimate their longevity", and that a lump sum benefit does not suffice to produce a sufficient income during retirement for them.

Recipients of lump sum retirement benefits may also be the targets of vendors of unscrupulous schemes, making provident funds a bad choice for financially unsophisticated individuals.⁸²

Pension funds and provident funds in South Africa currently offer different tax concessions. In the case of pension funds a portion of members' contributions is deductible from taxable income, whereas the same does not apply in the case of provident funds.⁸³ This means that the tax benefit for provident funds does not occur at the contribution stage, but rather at retirement when an increased tax-free portion is paid out as a lump sum.



2.6 DEFINED CONTRIBUTION FUNDS AND DEFINED BENEFIT FUNDS

The distinction between defined contribution and defined benefit funds is critical because each scheme gives rise to different legal rights and obligations.⁸⁴ The main difference between these types of funds lies in the manner in which the retirement benefit is determined.⁸⁵

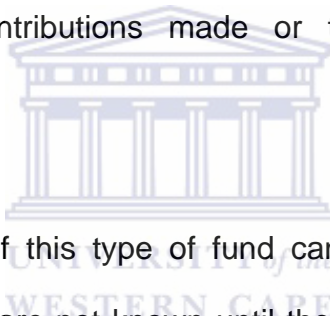
⁸² National Treasury (2004) *Discussion Paper* 36 fn 35.

⁸³ See below at 3.3.2.1.2(b).

⁸⁴ See Klein "Retirement fund investments – international perspective" Pension Lawyers Association Conference 2000 <http://www.icon.co.za/~pla/2000%20PLA%20Conference/Jim%20Klein.htm> (accessed 24/08/2008).

⁸⁵ The South African experience of defined benefit funds has been limited to defined benefit occupational funds. In other countries defined benefit funds usually also include the national pay-as-you-go (PAYG) retirement fund. See above at 2.4 for the distinction between national and occupational funds and below at 5.3.4 (for the choice between PAYG and fully funded systems).

A defined benefit scheme specifies the retirement benefit to be paid in detail,⁸⁶ and leaves the contributions to be determined as required. The payout formula is based on the average annual wage or salary of the member before he or she retires (final earnings) and on the number of years of membership of the fund.⁸⁷ Final earnings may be calculated over the average earnings for the last year, the last three years, or the last five years, before retirement, depending on the fund.⁸⁸ The benefit paid to the retired employee will therefore be a percentage⁸⁹ of final earnings multiplied by the number of years of membership of the fund. The formula used to calculate the guaranteed benefit payable to members applies irrespective of contributions made or the success of the fund's investments.⁹⁰



As the eventual liabilities of this type of fund cannot be known because the earnings near to retirement are not known until the member actually retires, the contributions paid to the fund will therefore have to be adjusted from time to time

⁸⁶ Therefore it is also known as a “fixed benefit”, “final salary” or “promised benefit” fund. See Sephton (1990) *A guide to pension and provident funds* 6; Downie (1999) *The essentials of retirement fund management in South Africa* chapter 1, par 2.C.1(b); *Masingi v Pick ‘n Pay Provident Fund* PFA/305/98/LS 3.

⁸⁷ James “New models for old-age security: experiments, evidence, and unanswered questions” (1998) 13(2) *The World Bank Research Observer* 274; Hemming (1998) *Should public pensions be funded?* 5.

⁸⁸ World Bank (1994) *Averting the Old Age Crisis* 84, Nobles (1993) *Pension, employment and the law* 8; Willmore (1999) *Public versus private provision of pensions* 2; Munnell (2000) *Achieving social goals: the case for defined benefit versus defined contribution plans* 2.

⁸⁹ Called the “accrual” or “pension” factor, or “accrual rate”. The accrual factor is the fraction of salary which a member accrues for every year of service. Although the accrual rate will depend on the rules of the fund, the usual percentage is 2% (Sephton (1990) *A guide to pension and provident funds* 6; Reineck (1999) *A specie of promise and its effect on the pension fund surplus* 7).

⁹⁰ *Adams v African Oxygen Limited Pension Fund and Others* PFA/WE/897/2000/NJ 10; Olivier “Old age and retirement provision” in Olivier et al (eds) (2004) *Introduction to social security* 285; Milburn-Pyle “Surplus – from the FSB’s perspective” http://www.icon.co.za/~pla/con_98/Feedback (accessed 10/03/2008).

to ensure that the fund can meet its obligations. For administrative purposes, the employees' contributions are usually fixed as a percentage of their earnings. The employer's contribution is normally calculated by the fund's actuary at regular intervals, based on the amount required to meet the fund's liabilities after taking members' contributions and investment income into consideration.⁹¹ When the fund is newly established, the employer's contributions will have to compensate for the shortfall when the employee contributions paid are not sufficient to meet promised benefits. If the fund experiences "worse than expected" investment returns or higher costs, it could also be possible that the employer will be required to pay increased contributions once again to ensure that benefit promises will be met, particularly in times when inflation is high and salaries and benefits are rising sharply.⁹² The employer acts as the guarantor of the financial soundness of the retirement scheme,⁹³ and a defined benefit fund, therefore guarantees defined benefits to members.⁹⁴ The funding risk is shifted to the employer (or in the case of a public defined benefit fund, the state).

The fact that the employer's contributions can sometimes mean the difference between benefit promises being met or not, means that the employer's

⁹¹ *Kransdorff v Sentrachim Pension Fund* PFA/GA/3/98JM 8. The employer therefore pays a "balance of cost" contribution that will vary over time depending on factors, such as, salary increases or the success of investment returns on the fund's assets (Milburn-Pyle "Surplus – from the FSB's perspective" http://www.icon.co.za/~pla/con_98/Feedback (accessed 10/03/2008)).

⁹² National Treasury (2004) *Discussion paper* 6; Gouws "The Tek case: aspects of retirement fund surpluses" PLA Conference 1998 http://www.icon.co.za/~pla/con_98/Feedback/PLA%20B%20Gouws%20Surplus.htm (accessed 10/03/2008).

⁹³ *Tek Corporation Provident Fund and Others v Lorentz* 1999 4 SA 884 (SCA) 895, para 17; *Adams v African Oxygen Limited Pension Fund and Others* PFA/WE/897/2000/NJ 10.

⁹⁴ According to the World Bank (1994) *Averting the Old Age Crisis* xxi, the term "defined benefit" implies a guarantee that a benefit based on a prescribed formula will be paid.

insolvency could create severe problems for a fund. The Insolvency Act⁹⁵ contends with this problem by providing that the fund will be regarded as a preferred creditor of the employer with regard to contributions payable on behalf of the employees.⁹⁶

The principle of cross-subsidisation is central to defined benefit funds,⁹⁷ as members are entitled to a guaranteed earnings-related benefit. The link between earnings and benefit paid in a defined benefit fund means that higher earning fund members are paid correspondingly higher benefits than lower paid fund members employed by the same employer, with the result that the perception can exist that “the poor and unlucky subsidise the rich and lucky”.⁹⁸

A defined contribution fund can be likened to a savings fund.⁹⁹ Although defined contribution funds are often mistakenly called provident funds, these two concepts are not synonymous.¹⁰⁰

In a defined contribution scheme¹⁰¹ the contribution rate is specified by the rules of the fund, but the level of retirement benefits is determined by the accumulated value of contributions by both employer and employee, plus the accrued interest

⁹⁵ Act 24 of 1936.

⁹⁶ Section 98A(1)(b).

⁹⁷ *Page v Cape Municipal Pension Fund* [2001] 3 BPLR 1759 (PFA) 1762.

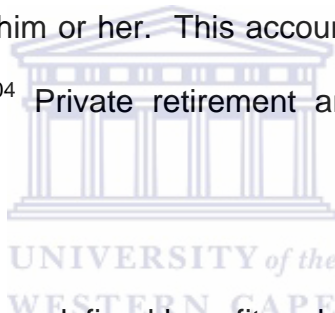
⁹⁸ Asher (2001) *Retirement and old age* 257.

⁹⁹ World Bank (1994) *Averting the Old Age Crisis* 83.

¹⁰⁰ Ogunronbi et al “Old age” in Olivier et al (eds) (1999) *Social security law – general principles* 113.

¹⁰¹ Also called a “fixed contribution”, “equishare” or “money purchase” fund (Downie (1999) *The essentials of retirement fund management in South Africa* chapter 1, para 2.C.1(a); Nobles (1993) *Pension, employment and the law* 8).

and other investment income credited to a specific account on behalf of the member.¹⁰² The higher the return on investments, the higher the benefit paid to the member. Various factors can therefore impact on benefits, such as, individual investment decisions, performance of the markets and fees charged by investment account managers. Hence, members are provided with no guarantees as to the amount they will receive on the date of retirement or withdrawal from the fund, and each individual member of the fund bears the risk of bad investments made on his or her behalf.¹⁰³ The administrator of the fund will keep and update an individual record for each member and the contributions made by, and on behalf of, him or her. This account will grow by the interest or investment return earned.¹⁰⁴ Private retirement annuities are always defined contribution funds.



The main difference between a defined benefit and a defined contribution fund is the party taking the risk for the investment performance of the fund: with a

¹⁰² Definition of “defined contribution category of a fund” in s 1 of the Pension Funds Act 24 of 1956; World Bank (1994) *Averting the Old Age Crisis* xxi; Smith Commission Report (1995) 25; OECD (1998) *Maintaining prosperity in an ageing society* 128; Heller (1998) *Rethinking public pension reform initiatives* 6; Nobles (1993) *Pension, employment and the law* 8; Willmore (1999) *Public versus private provision of pensions* 2; Munnell (2000) *Achieving social goals: the case for defined benefit versus defined contribution plans* 2; Sephton (1990) *A guide to pension and provident funds* 10; Olivier “Old age and retirement provision” in Olivier et al (eds) (2004) *Introduction to social security* 285; Department of Social Development (2007) *Reform of retirement provisions* 56. The determining factor that makes a fund a defined contribution fund is, therefore, the fact that the benefit is based on the income generated from contributions, and not the fact that the rules of the fund define the contributions payable by the parties. As soon as the rules of the fund provide a formula for the calculation of retirement benefits, even if the contributions payable are also defined in the rules (e.g. in “target benefit” pension funds), the fund would be a defined benefit fund (Reineck (1999) *A specie of promise and its effect on the pension fund surplus* 2 fn 7).

¹⁰³ As well as an increase in expenses.

¹⁰⁴ Klein “Retirement fund investments – international perspective” 2000 Pension Lawyers’ Association Conference 7.

defined benefit fund the employer takes the risk, but with a defined contribution fund the risk lies with the member, with the promise of better benefits attached.

Defined contribution funds have gained popularity in the last few decades. The current shift from defined benefit to defined contribution funds¹⁰⁵ can in part be explained by outlining the historical development of pension funds. Defined benefit funds first emerged in the UK at the behest of employers wanting to bestow discretionary long service awards on employees, with the object of fulfilling the social needs of those employees and their dependants.¹⁰⁶ Governments soon realised that such schemes were socially desirable, and extended tax incentives and regulation to such funds.¹⁰⁷ As the role of trade unions and wage-setting by collective bargaining increased, pension benefits and contributions to the scheme have come to be regarded as part of remuneration and employers' exclusive control over funds questioned.¹⁰⁸ For employers the attraction of defined benefit funds was fading, and thus they came to prefer the full control over the fund which defined benefit funds offered for the shift of the

¹⁰⁵ See George (2006) *Analysis of South African pension fund conversions: 1980-2006* PhD thesis (University of South Africa); Klein "Retirement fund investments – international perspective" 2000 PLA Conference.

¹⁰⁶ The nature of the defined benefit fund makes it a perfect vehicle to ensure long-term loyalty of employees to their employer, as their benefits are certain to increase with the number of years that they are employed (George (2006) *Analysis of South African pension fund conversions: 1980-2006* 5).

¹⁰⁷ *Kransdorff v Sentrachem Pension Fund* PFA/GA/3/98JM 8; World Bank (1994) *Averting the Old Age Crisis* 166.

¹⁰⁸ The perception that defined benefit funds were tools of employers to bind employees to them was one of the reasons for the trade union driven exodus of employees to defined contribution funds in the 1980s to 1990s. National Treasury (2004) *Discussion paper* 6 points to a worldwide shift from defined benefit to defined contribution funds during this period.

risk of poor investment performance to members that defined contribution funds offered.¹⁰⁹

In South Africa a major exodus from defined benefit funds to defined contribution funds led mainly by trade unions (in particular the Congress of South African Trade Unions (COSATU)) occurred in the 1980s to 1990s as employees sought to share in the perceived advantages of the stock market.¹¹⁰ As a result of the large-scale switch to defined contribution funds, most of the remaining defined benefit funds were closed to new members.¹¹¹ Although the public sector funds are still currently for the most part defined benefit funds, most private sector employees belong to defined contribution funds.¹¹²

Other factors leading to the large-scale conversion from defined benefit to defined contribution funds included:

- High levels of unemployment and lack of job security;
- Employee mobility;¹¹³

¹⁰⁹ National Treasury (2004) *Discussion paper 10*.

¹¹⁰ National Treasury (2004) *Discussion paper 10*; Department of Social Development (2007) *Reform of Retirement Provisions* 56. Unions representing employees negotiated with employers for the implementation of defined contribution funds for union members (Reineck (1999) *A Specie of Promise and its effect on the pension fund surplus* 5 fn 17). See also George (2006) *Analysis of South African pension fund conversions* 24.

¹¹¹ Shrinking membership numbers led to a decline in the financial viability of many of these defined benefit funds. The solution was to collapse them into new defined contribution funds, whilst still preserving the defined benefits to which the members were entitled. A hybrid fund, which is defined contribution in nature, but with some members being entitled to defined benefits, has become a common arrangement (National Treasury (2004) *Discussion paper 10*).

¹¹² National Treasury (2004) *Discussion paper 10*.

¹¹³ Strasheim "Determining 'fair retirement fund practices' in relation to fair withdrawal benefits" PLA Conference 2008 summarises the 'changing world of work' as follows: "The modern workplace is increasingly characterized by fluidity, uncertainty and constant change: industry-wide layoffs, downsizing, rightsizing, as well as initiatives to promote representative workplaces, such as reconfigurations to achieve affirmative action and employment equity objectives."

- More generous and transparent withdrawal benefits;
- The absence of (perceived) control over funds by employers; and
- The perception that fund members find it easier to understand how their benefits from a defined contribution fund are calculated.¹¹⁴

On the other hand, the main drawback of defined contribution funds is that the level of income generated by fund members will vary considerably among funds, as well as over time.

The level of income differs among beneficiaries from different funds, as those who are members of funds that are lucky or wise in their investments profit from a greater return than others, who are members of funds that are less careful in their investments, or just unlucky. The risk of a downturn in the market always exists¹¹⁵ or, even if the market as a whole does well, unwise investments could lead to poor performance by the fund. Unlike the defined benefit fund, there is no clear relationship between the member's salary close to retirement and the actual benefit received. As the retirement benefit depends largely on the investment performance of the fund, members bear the risk of governance failures, increasing expenses and inadequate benefit protection.¹¹⁶

The variation of the retirement benefit over time depends on the overall performance of the market at the time of retirement. One retiree may retire when

¹¹⁴ George (2006) *Analysis of South African pension fund conversions* 5 – 6; Pension Fund Adjudicator (2005) *Pension fund manual* 58.

¹¹⁵ See *Basil Kransdorff v Sentrachem Pension Fund* PFA/GA/3/98/JM 8.

¹¹⁶ National Treasury (2007) *2nd discussion paper* 21 and 26; *Masingi v Pick 'n Pay Provident Fund* [2002] 1 BPLR 2985 (PFA) 2987.

returns are high and another may retire during a downturn in the markets.¹¹⁷ Unfortunately, the full effect of stock market volatility is only felt when the member retires. Should the beneficiary on retirement wish to convert the retirement benefit into an annuity, the monthly annuity would depend on the state of the stock market in the year the individual retired. An individual who has the misfortune to retire and annuitise when the market is down could be faced with a meager income for the rest of his or her life.¹¹⁸

The risk to members of defined contribution funds is increased, as they do not necessarily have the required investment expertise, and are exposed to the possibility of poor advice and the vagaries of the market.¹¹⁹ It has been questioned whether it is appropriate “to leave members of the public, with varying levels of knowledge and experience of investment and finance, vulnerable to poor advice from, and possibly exploitation by, service and product providers”.¹²⁰ It has been suggested that steps be taken to provide members of defined contribution funds with education on investment and finance.¹²¹

¹¹⁷ National Treasury (2004) *Discussion paper 7*.

¹¹⁸ Kijakazi and Greenstein (1998) *How would various Social Security reform plans affect Social Security benefits? An analysis of the Congressional Research Service Report 13*. According to Asher (2001) *Retirement and old age 257*, benefits can fluctuate up to 30% over a year, with the result that fund members with a similar number of years of service can receive substantially different benefits depending on when they retire.

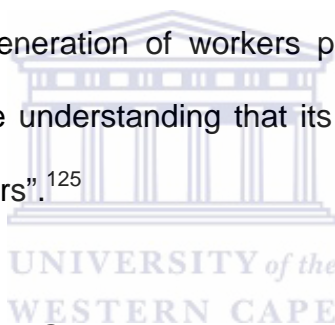
¹¹⁹ In the Department of Social Development discussion paper *Reform of Retirement Provisions* (2007) 88 it was stated that very few members of defined benefit funds who chose to convert to defined contribution funds on the advice of unscrupulous advisors would have understood “the implications of the arrangements being made”, particularly where the conversions involved “significant and hidden reductions in benefits”.

¹²⁰ National Treasury (2004) *Discussion paper 7*.

¹²¹ Asher (2001) *Retirement and old age 253*; *Masingi v Pick ‘n Pay Provident Fund* [2002] 1 BPLR 2985 (PFA) 2087. Members of defined contribution funds must be educated in the calculation of their benefits to enable them to dispute incorrect calculations (Department of Social Development (2007) *Reform of Retirement Provisions* 88).

2.7 PAY-AS-YOU-GO AND FULLY-FUNDED SCHEMES

In a pay-as-you-go (PAYG) programme¹²² the contributions (or taxes) paid by today's workers are not saved to pay for their future benefits,¹²³ but are instead paid out immediately to finance the benefits of present-day retirees. In turn, the future retirement benefits of today's workers will be paid out of the contributions of the next generation of workers.¹²⁴ Consequently, a sustainable PAYG programme has as its base a "social contract between successive generations according to which each generation of workers pays for the pensions of the preceding generation on the understanding that its pensions will be paid for by the next generation of workers".¹²⁵



The initial contributions to PAYG systems are on average lower than in the case of fully funded schemes, as the risk is spread,¹²⁶ which makes it the ideal system for a country starting out with a national system of social protection for older persons.¹²⁷ An important aspect of a PAYG system is the implied reliance by

¹²² Also named "repartition" schemes. See Pieters (1993) *Introduction into the basic principles of social security* 97.

¹²³ As is the case with fully-funded schemes.

¹²⁴ Ferrara (1999) *Social security is still a hopelessly bad deal for today's workers* 3; OECD (1998) *Maintaining prosperity in an ageing society* 133; Nobles (1993) *Pension, employment and the law* 9; James "New models for old-age security: experiments, evidence and unanswered questions" (1998) 13 (2) *The World Bank Research Observer* 272; Willmore (1999) *Public versus private provision of pensions* 2; Cameron "SA's new retirement structure takes shape" *Personal Finance* 20 January 2008 <http://www.persfin.co.za> (accessed 05/02/2009).

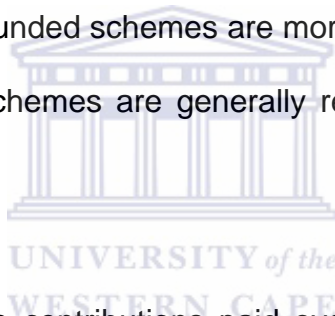
¹²⁵ Hemming (1998) *Should public pensions be funded?* 11.

¹²⁶ Contributions are also only required to cover that particular year's liabilities (Pieters (1993) *Introduction into the basic principles of social security* 97).

¹²⁷ In a PAYG system, those who retire in the early years of the programme will receive high returns on the relatively small amount of the contributions paid by them and their employers. The

beneficiaries on the solidarity of the younger generation to ensure that funds are available for their pensions,¹²⁸ as well as having to rely on the state to intervene should the fund run into financial trouble.

The risk that PAYG public funds may not be able to meet their liabilities falls on government. Government, therefore, has to have measures in place to deal with demographic changes, such as, the ageing of the population or any other factors that may create a generational imbalance. In effect, government¹²⁹ becomes an alternative source of funds for pension payments in the case of failed PAYG funds. For this reason fully-funded schemes are more common in private pension systems, whereas PAYG schemes are generally restricted to public retirement funding.¹³⁰



In a fully-funded system the contributions paid over an employee's career are saved and invested to provide benefits in retirement.¹³¹ Assets are therefore always sufficient to cover future liabilities.¹³²

same advantage does not apply in the case of employees retiring when the system has matured, as they would have contributed for most of their working years. See Ferrara (1999) *Social security is still a hopelessly bad deal for today's workers* 3. The difficulties of sustaining a PAYG system are discussed in more detail below at 5.3.4.

¹²⁸ Willmore (1999) *Public versus private provision of pensions* 4 is of the view that "there is no way for today's workers to bargain and contract effectively with unborn generations, so there is always a fear that tomorrow's workers might revolt". For more views on the issues of "intergenerational equity" and whether the law in fact can protect intergenerational solidarity, see 6.4.4 below.

¹²⁹ It is not uncommon for governments to create semi-independent "guarantors" for PAYG defined benefit pension schemes, e.g. the US Pension Benefit Guaranty Corporation (PBGC), created by the Employee Retirement Income Security Act of 1974.

¹³⁰ Kalisch and Aman (1998) *Retirement income systems: the reform process across OECD countries* 13.

¹³¹ Ferrara (1999) *Social security is still a hopelessly bad deal for today's workers* 4; Nobles (1993) *Pension, employment and the law* 9. In OECD (1998) *Maintaining prosperity in an ageing*

The perceived¹³³ advantages of a fully-funded scheme are:

- A clear link exists between contributions and retirement payments.
- Less likelihood exists that imbalances between contributions paid and pension payouts may occur, as the member's benefits are determined by how much he or she saves.¹³⁴
- Employee security exists against events such as employer insolvency or mergers, since with a fully-funded scheme benefits are segregated from the rise and fall of the employer's fortunes,¹³⁵ in that contributions are paid into an individual account.
- A PAYG system merely redistributes funds from one segment of the population to the other, "making retirees better off only by making workers worse off".¹³⁶ In the case of funded systems the benefits are provided from the income produced by investments on behalf of the employee, and therefore benefits can be paid without burdening others.¹³⁷
- If workers decide to 'escape' to the informal sector in order to evade having to contribute to a retirement fund, and then later attempt to join a fully-funded fund after realising their mistake, additional costs to the programme are borne by these workers themselves rather than being

society 126 the term "advance-funding" is used and it is defined as "the provision in advance for future liabilities by the accumulation of assets". Benefits paid from a fully-funded scheme are therefore always defined contribution benefits (see above at 2.6 for a description of defined contribution funds).

¹³² James "New models of old-age security" (1998) 13 (2) *The World Bank Research Observer* 275.

¹³³ Many of these "advantages" of fully-funded systems have been stated by detractors of PAYG systems, without any empirical evidence that fully-funded systems are on the whole more advantageous retirement fund options.

¹³⁴ Cameron "SA's new retirement structure takes shape" *Personal Finance* 20 January 2008 <http://www.persfin.co.za> (accessed 05/02/2009).

¹³⁵ See Cooper "Actuarial techniques and funding of pension plans in a period of inflation" in ILO (1977) *Pensions and inflation* 76.

¹³⁶ Ferrara (1999) *Social security is still a hopelessly bad deal for today's workers* 5. See below at 6.4.4 for more on the notion of 'intergenerational equity' and its effect on pension policies.

¹³⁷ For this reason, Ferrara (1999) *Social security is still a hopelessly bad deal for today's workers* 5 regards the essential difference between the two systems as being that the funded systems rely on wealth creation, while PAYG programmes rely on income redistribution.

- passed on to others, as would have been the case in PAYG systems.¹³⁸
- The financial implications of future pension provision are immediately made obvious with funded schemes, whereas with PAYG the cost implications of pension promises are not immediately clear. This “signalling” function of funded systems enables fund managers to use the information about future pension costs to avoid fiscally irresponsible behaviour.¹³⁹

2.8 RESIDENTIAL CARE AND COMMUNITY-BASED CARE

Most of the terms discussed above relate to financial provision for old age. In this section some of the expressions used in discussions of the non-financial care of older persons will be briefly explained.

The difference between residential care¹⁴⁰ and community-based care¹⁴¹ lies in the location where the care is received and the degree of care that is received. Long-term care in an old age home, a nursing home or other type of institution is regarded as residential care, as older persons are provided with care as well as accommodation.

¹³⁸ James “New models for old-age security: experiments, evidence and unanswered questions” (1998) 13(2) *The World Bank Research Observer* 288.

¹³⁹ Hemming (1998) *Should public pensions be funded?* 14-15.

¹⁴⁰ “Residential care” and “institutional care” are interchangeable and both terms are used throughout this thesis.

¹⁴¹ “Care” is defined in the Older Persons Act 13 of 2006 as “physical, psychological, social or material assistance to an older person, and includes services aimed at promoting the quality of life and general well-being of an older person”, with “caregiver” having a related meaning.

A residential facility is defined in the Older Persons Act¹⁴² as “a building or other structure used primarily for the purposes of providing accommodation and of providing a 24-hour service to older persons”.¹⁴³

Domiciliary care is the care afforded to older persons not residing in residential facilities. This includes community-based care and support, such as, service centres, day care programmes and recreational facilities. Community-based programmes are defined as -

- “prevention and promotion programmes, which ensure the independent living of an older person in the community in which the older person resides; and
- home-based care, which ensures that a frail older person receives maximum care within the community through a comprehensive range of integrated services”.¹⁴⁴

An older person for the purposes of this Act is defined as a male of 65 years and older or a female of sixty years and older. The same definition for an “older person” was used in the Social Assistance Act.¹⁴⁵ The age differentiation in terms of which men and women qualify for the older person’s grant led to a challenge in 2005 in the Pretoria High Court that this constituted a case of unfair

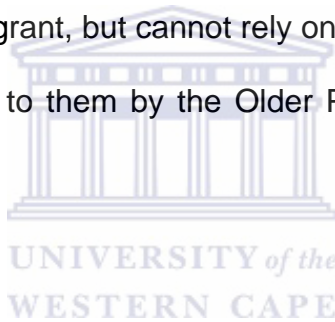
¹⁴² Act 13 of 2006, s 1.

¹⁴³ The Older Persons Act does not distinguish between state-run and state-subsidised homes as s 2 of the Aged Persons Act 81 of 1967, but its provisions are clearly aimed at regulating and monitoring the management of state-subsidised homes. Residents of state-run homes are fully financed by the state and, therefore, do not qualify for any other assistance such as older person’s grants. State-subsidised homes are usually funded by non-governmental organisations and are as a rule not established as profit-making concerns. See below at 3.3.4.5 for a discussion of the sections of the Older Persons Act in terms of which state-subsidised homes are monitored.

¹⁴⁴ Section 11 Older Persons Act.

¹⁴⁵ Act 13 of 2004, s 10.

discrimination on the basis of gender.¹⁴⁶ The Court was asked to grant an order that steps must be taken to equalise the qualifying age for both men and women at 60. The judgment is still pending, but the Social Assistance Act was subsequently amended,¹⁴⁷ and the qualifying age for men is progressively being reduced, so that men would also be entitled to receive the grant from age 60 as from 2010. No mention was made in the court application of the age differentiation in terms of which men and women qualify for assistance in terms of the Older Persons Act, nor has the Older Persons Act been amended to eliminate the differentiation. This oversight means that 60 year old men may apply for the older person's grant, but cannot rely on the protection against abuse and discrimination provided to them by the Older Persons Act before they turn 65.



¹⁴⁶ *Roberts and Others v Minister of Social Development and Others* Case No 32838/05 (TPD).

¹⁴⁷ Social Assistance Amendment Act 6 of 2008.

CHAPTER 3

CURRENT SOUTH AFRICAN LAW PROVIDING FOR OLDER PERSONS

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3.1 INTRODUCTION

One of the stated aims of this thesis is to determine who should bear the responsibility to provide and care for older persons and to examine the degree of protection against poverty, neglect and abuse in old age. The chosen approach to produce a solution to the problems of caring for older persons is to first examine the current situation, followed by a critical evaluation of the shortcomings and limitations of the existing structures. This chapter therefore serves as a summary of the current South African law on providing financial security for and caring for older persons.¹

This chapter is divided into three parts. Firstly, the constitutional rights of older persons that entitle them to protection are outlined and their right of access to social security is discussed. This part of the chapter explains the need for the statutory provisions that are discussed in the rest of the chapter.

The second section of the chapter deals with current law (mainly legislation) that provides income security in old age. The focus in the final part of the chapter is on the measures that are currently in place to provide care and support services for older persons, as well as recent legislative developments. Although the latter

¹ It is by no means intended to be an exhaustive study on retirement benefits or social grants for older persons. When a matter is dealt with in detail it is done so in order to stress the importance of the relevant legislation to the central topic of this thesis and to lay the foundation for further discussion in other chapters. Chapters 4 to 6 will elaborate on key issues identified in this chapter affecting the ability of the different role players (the state, families; the community; individuals making provision for their own retirement) to provide income security, care and support to older persons.

sections of the chapter examine legislation aimed at providing for and protecting older persons in general, it is also attempted to state upon whom the relevant legislation places the burden of providing for older persons.

3.2 THE CONSTITUTION AND OLDER PERSONS

The South African Constitution² contains the rights of all South Africans in its Bill of Rights, many of the provisions of which are applicable to older persons. These include:

- Section 9 prohibits unfair discrimination against anyone on the basis of age.
- Older persons have the right to have their dignity respected and protected.³
- The rights to bodily and psychological integrity⁴ and to freedom from all forms of violence⁵ are of special importance to older persons.
- Section 26 provides for the right of access to adequate housing.
- All South Africans have the right to have access to food, water and social security.⁶

The grants and benefits for older persons that are covered in this chapter are based on the state's duty to protect and promote the right of older persons to access to social security, including, if they are unable to support themselves and

² Constitution of the Republic of South Africa, 1996.

³ Section 10.

⁴ Section 12(2).

⁵ Section 12(1)(c).

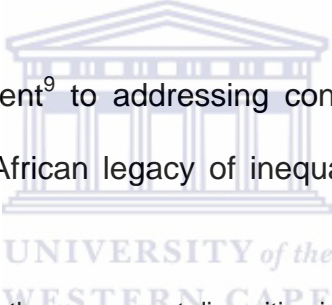
⁶ Section 27.

their dependants, appropriate social assistance. At the very least, the state should not deprive older persons of benefits that they are already receiving.⁷

3.2.1 The right to access to social security as a socio-economic right

The Preamble to the Constitution states that it aims to establish a society based on democratic values and to improve the quality of life of all citizens and free the potential of each person. This cannot be achieved without the State creating a comprehensive and integrated social security system.⁸

The constitutional commitment⁹ to addressing conditions such as poverty and deprivation and the South African legacy of inequality has been interpreted as follows:



We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.¹⁰

When interpreting any of the fundamental rights in the Constitution and, therefore, the right to access to social security, the courts must promote the

⁷ As the Bill of Rights has horizontal as well as vertical application (s 8 of the Constitution), some rights may be enforced against private parties such as retirement funds, employers and non-governmental organisations providing care and support services. See below at 3.2.4 for more on the horizontal application of social security rights.

⁸ De Wet "Can the Social State principle in Germany guide state action in South Africa in the field of social and economic rights?" (1995) *SAJHR* 36; White Paper for Social Welfare (1997) GN 1108 in GG 18166 of 8 August 1997 para 45.

⁹ Found in the Preamble and the Bill of Rights in the South African Constitution.

¹⁰ *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) *BCLR* 1696 (CC) 1700, para 8.

values that underlie an open and democratic society based on human dignity, equality and freedom.¹¹ The values of human dignity and equality are of special importance to the right of access to social security and the recognition of the state as a social state¹² and underlie all measures to protect and improve the lives of older persons.

Although the South African constitution is regarded as one of the most progressive in the world due to the inclusion of socio-economic rights in the Bill of Rights, the writers of the Constitution took great care to frame these rights “in such a way as not to place an absolute and unambiguous obligation on the government to fulfil them”.¹³ Socio-economic rights such as social security rights are formulated in such a manner as to place a higher premium on “access to” the relevant benefits, as opposed to the actual benefits themselves.¹⁴

Section 27 of the Constitution provides that everyone has the right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The state is required to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these rights.¹⁵ The social security measures dealt with in this chapter - that is, social assistance in the form of

¹¹ Section 39(1)(a) of the Constitution.

¹² Olivier et al “Constitutional framework” in Olivier et al.(eds) (2004) *Introduction to social security* 121.

¹³ Barberton “Paper Tigers? Resources for Socio-Economic Rights” (1999) 2 (1) *ESR Review* 6.

¹⁴ Martin “Just Administrative Action: The Key to Accessing Socio-Economic Rights” (1999) 2 (1) *ESR Review* 9.

¹⁵ Section 27(2).

grants to older persons, social insurance through retirement funds and the provision of care and support services to older persons - all fall within the scope of section 27.¹⁶

Section 7(2) of the Constitution deals with the realisation of the right of access to social security and to social assistance by placing an obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. The duty on the state to respect, protect, promote and fulfil the right of access to social security is, however, qualified by the wording of section 27(2). The qualifications include:

- the state is required to take *reasonable* legislative and other measures
- within its *available resources*
- to achieve the *progressive realisation* of this right.¹⁷

Section 27(2) does not merely qualify the right of access to social security, but also compels the state to devise a “comprehensive and workable plan” to meet its obligations.¹⁸

There are qualifications attached to the right to social assistance as well: it is to be means tested¹⁹ and only “appropriate” social assistance is guaranteed, which

¹⁶ In addition to other rights of older persons, such as the right not to be arbitrarily deprived of property (s 25), the right to have their dignity respected and protected(s 10) and equality rights (s 9).

¹⁷ My emphasis.

¹⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at 1189 para 38.

¹⁹ Section 27(1)(c) refers to access to social assistance “if they are unable to support themselves and their dependants...”.

means that one has to meet the requirements imposed at the state's discretion.²⁰ Only those who meet these requirements can lay claim to social assistance.

In addition, section 7(3) refers to external limitations by stating that the rights in the Bill of Rights are subject to the limitations contained in section 36.²¹ Although section 36(1) makes provision for the limitation of rights such as the right of access to social security, such a limitation will only pass constitutional muster if the limitation is effected by "law of general application", that is, not by administrative action, and all relevant factors referred to in the subsection are taken into consideration. Social security rights should therefore only be limited when the limitation serves a sufficiently important purpose. Having regard to the nature and extent of the limitation and the relations between the limitation and its purpose, the limitation should not restrict the social security right more than is necessary. A court should set aside a limitation on a social security right where there are other reasonable alternatives available through which the objectives of the limitation can be achieved.²²

²⁰ Eg the requirements for state grants for older persons discussed below at 3.3.1.1.1.

²¹ Section 36(1), the general limitations clause, reads as follows:

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose."

²² Olivier et al "Constitutional framework" in Olivier et al (eds) (2004) *Introduction to social security* 142.

3.2.2 *Limitations on social security rights*

Does the right to access to social security mean that the government merely has to ensure that there are no legal impediments on people wishing to make use of the benefits available, or is it actually required to take action and use available resources to realise this right? Should the government be allowed to provide only the most basic and minimum grants, and justify this by claiming that it is taking reasonable measures, within the limited resources available, to progressively realise the right as best it can? According to Barberton,²³ the answer to this question lies in the interpretation given by the courts to clauses such as “access to”, “reasonable measures”, “within its available resources” and “progressive realisation”. At the very least, it is clear that the intention of this formulation was not that the State would be obliged to make social security benefits available to all who apply for such benefits.²⁴

In *Government of the Republic of South Africa and Others v Grootboom and Others*²⁵ it was held that the interpretation of a right requires understanding of both its textual setting (both the Bill of Rights and the Constitution as a whole) and the social and historical context. There is a close relationship between the various socio-economic rights and they must be read as a whole. The state is obliged to “take positive action to meet the needs of those living in extreme

²³ Barberton “Paper Tigers? Resources for Socio-Economic Rights” (1999) 2 (1) *ESR Review* 7.

²⁴ See De Vos “Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa’s 1996 Constitution” (1997) 13 *SAJHR* 87.

²⁵ 2000 (11) BCLR 1169 (CC) 1184 para 22.

conditions of poverty, homelessness or intolerable housing”.²⁶ The right of access to social security should therefore also be interpreted in the context of the socio-economic circumstances prevailing in South Africa.

The significant link between social security rights and the other socio-economic rights was described by Yacoob J in the *Grootboom*²⁷ case as follows:

The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights.

3.2.2.1 “Access to”

Section 27(1)(c) guarantees everyone access to social security, including social assistance. This has been interpreted as creating the opportunity for everyone to apply for social security, but not providing any guarantee of social security or, more importantly, of social assistance. The government is still entitled to set the conditions to be met before the benefits are awarded, but should not act in an arbitrary or discriminatory manner when doing so.²⁸

“Access to” social security can also be linked to the beneficiaries’ ability to access the relevant programmes, which in turn relies on the right to just

²⁶ At 1184 para 24.

²⁷ At 1189, para 36. This landmark case mainly concerned the state's constitutional obligations in relation to housing (i.t.o. s 26), but the judgement dealt extensively with socio-economic rights in general.

²⁸ Van der Merwe (1998) *Social transformation in South Africa by means of social assistance: A legal perspective* 4; Olivier (1998) *Some trends and critical issues in South African social security* 6.

administrative action. Achieving the right of access to social security will depend on “whether or not the State administration conducts its affairs in a socially just and appropriate way”.²⁹

At very least the specific formulation in the Constitution creates the negative duty on the State not to do anything to encroach on the enjoyment of social security rights. Existing rights can therefore not be unjustly removed.

A case dealing with this particular violation of social security rights is *Ngxuza and Others. v The Permanent Secretary, Department of Welfare, Eastern Cape*.³⁰

The applicants were recipients of social grants for the disabled under the Social Assistance Act.³¹ They claimed that their grants were cancelled and suspended in an unlawful manner and without them being afforded the opportunity to make representations to the department of Welfare in the Eastern Cape.

In his judgment, Froneman J stated that:

The case is in a sense an “easy” one as far as the enforcement of socio-economic rights are concerned, at least at this stage of the proceedings. The court is not concerned with the nature of these rights and to what extent it should force the State to give effect to the rights (this might become an issue later, when the possible retrospective reinstatement of the rights of thousands of people needs to be decided upon). It is also not a case where the courts intrude upon the terrain of a democratically elected legislature where the electorate can, by voting, give better expression to the demands of democracy than the courts. What is at stake is the accountability of the unelected administrative bureaucracy of the State, not the actions of a democratically elected legislature. It is, of course within the competence of the government to pass legislation to regularise what appears on the papers to be a large-scale unlawful deprivation of social grants, but then it may face

²⁹ Martin “Just Administrative Action: The Key to Accessing Socio-Economic Rights” (1999) 2 (1) *ESR Review* 9.

³⁰ 2001 2 SA 609 (E).

³¹ A grant similar to the older person’s grant. See below at 3.3.1 for a detailed description of the grants for older persons paid under the Social Assistance Act 13 of 2004.

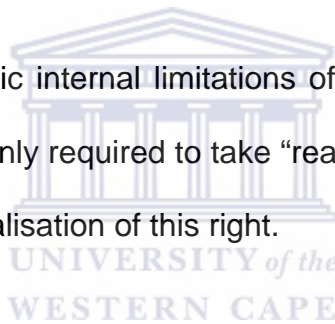
accountability in two different forms, namely the ultimate judgment of the electorate, or justification of that limitation of rights under section 36 of the Constitution.

What cannot be allowed, however, is the unlawful deprivation of these rights by way of administrative stealth. The Constitution forbids that and has made the courts the democratic guardians to prevent that from happening... The facts disclosed in the papers indicate that the welfare department of this province has been sadly lacking in that regard.³²

He held that the decision taken by the Department of Welfare to cancel or suspend the applicants' disability grants was unlawful and invalid. The applicants were held to be entitled to retrospective reinstatement of grants.³³

3.2.2.2 "Reasonable measures"

One of the more problematic internal limitations of the right to access to social security is that the state is only required to take "reasonable" legislative and other measures to achieve the realisation of this right.



As far as "reasonable measures" are concerned, a court considering the reasonableness of social security measures

will not enquire whether other more desirable or favourable measures could have been adopted or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do this, the requirement is met.³⁴

³² 2001 2 SA 609 (E) 626.

³³ See also *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [2004] 1 BPLR 5357 (EC). Similarly, the court in *Mahambehlala v Member of the Executive Council for Welfare and Another* [2004] 1 BPLR 5362 (SE) held that the unreasonable delay in the approval of an applicant's application was an infringement of her right to fair and just administrative action.

³⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) 1190-1 para 41. At para 43 it was stated that "a programme that excludes a significant segment of society cannot be said to be reasonable". A similar interpretation of the reasonableness of measures taken by the state was applied by Mokgoro J in *Khosa v Minister of*

According to the *Grootboom* case, it would not be sufficient for the state to provide statistics to back up claims of the steps taken to advance the right in question. The test is whether the measures are reasonable and effective in their conception and implementation³⁵ and whether they have responded to the needs of particularly vulnerable and marginalised people.³⁶ Other factors taken into consideration to determine the reasonableness of measures taken by the state to provide access to social security include the institutional capacity to implement the social security programme and the flexibility of the programme.

3.2.2.3 “Within available resources”

One of the major “keys to escape” provided by section 27(2) is the qualification added to the right of access to social security that the measures to be taken by the state to provide social security are to be taken “within its available resources”.³⁷ The capacity of the state to deliver the services in question will have to be taken into account when courts have to decide whether there have

Social Development; Mahlaule v Minister of Social Development 2004 (6) BCLR 569 (CC) 590-591, para 48.

³⁵ In the *Grootboom* case (para 42) it was stated that “an otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations”.

³⁶ At 1191, para 44.

³⁷ See the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (ICESCR) (1997) clause 10, where reference is made to the importance of the availability of adequate financial and material resources for the full realisation of socio-economic rights. It is, however, also stated that resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of socio-economic rights. For more on the Maastricht Guidelines and other principles relevant for the interpretation and application of the International Covenant on Economic Social and Cultural Rights and other norms of international and domestic law in the field of socio-economic rights, see 7.2 below.

been violations of social security rights.³⁸ If the state can prove that it does not have the necessary resources available to meet its social security obligations, there has been no violation of section 27(2). Only where the state is unable to prove a lack of resources as the justification for not complying with its constitutional obligations will a court proceed to the test for the reasonableness and justifiability of an infringement of social security rights in terms of section 36.³⁹

The realisation of social security rights will always be dependent on sufficient financial resources and on the economic priorities of the state. It is inherent to the nature of social security that it implies an outflow of state funds on a regular basis, whether for cash benefits (like the majority of social security benefits) or benefits in kind.⁴⁰ For this reason, critics of the inclusion of socio-economic rights in general in the bill of rights, because of doubts regarding their justiciability

³⁸ In *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC) para 11 it was held in the context of the right of access to health care that “the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.”

³⁹ See e.g. the majority view in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC) paras 60-62 for the impact that the lack of evidence presented by the respondents on the additional cost of extending social grants to permanent residents had on the court’s finding that the provision in the Social Assistance Act 59 of 1992 that excluded all non-citizens, including permanent residents, from social assistance benefits is unconstitutional.

⁴⁰ Unless private parties are responsible for the payment of benefits, e.g. pension funds paying retirement benefits, in which case there is generally no outflow of state funds involved. See below at 3.2.4 for the horizontal application of social security rights.

and enforcement, are even more vociferous when it comes to social security rights.⁴¹

Were “available resources” interpreted to mean only the amount available according to the national budget, the state could easily defend its spending on social security by arguing that it could only spend what it raises as revenue. This argument ignores the fact that government’s own fiscal and monetary policy determines the size of this “resource envelope”.⁴²

The measures undertaken to realise social security rights must be calculated to attain the goal of access to social security by all expeditiously and effectively, but the availability of resources will always remain an important factor.⁴³ However, the availability of resources must be considered in the context of the right concerned and the Bill of Rights, as stated by Mokgoro J in *Khosa v Minister of Social Development*:⁴⁴

It is also important to realise that even where the State may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits ... must be consistent with the Bill of Rights as a whole.

⁴¹ See Ben-Israel (1994) *Social Security in the Year 2000: Potentialities and Problems* 11-12.

⁴² Barberton “Paper Tigers? Resources for Socio-Economic Rights” (1999) 2 (1) *ESR Review* 7.

⁴³ *Grootboom* case 2000(11) BCLR 1169 (CC) 1193 para 46. In *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC) Mokgoro J accepted that “the concern that non-citizens may become a financial burden on the country is a legitimate one” (para 58). However, she found that there was no evidence *in casu* showing that the inclusion of permanent residents in grants would entail huge costs (para 62). See 4.3.1 below for a discussion for the effect of limited funds on the state’s ability to provide social security.

⁴⁴ 2004 (6) BCLR 569 (CC) 589 para 45.

This interpretation of the phrase “within available resources” is particularly important in the context of intergenerational solidarity. The whole debate on whether intergenerational solidarity or ‘intergenerational equity’ is the correct approach to social security legislation would not arise if the state had unlimited resources at its disposal. In fact, the central argument by the proponents of the ‘intergenerational equity’ view internationally is that the state is squandering limited resources on older persons to the detriment of younger generations. The economic priorities of the state will therefore determine whether it follows the intergenerational solidarity or the ‘intergenerational equity’ point of view. The interpretation of “within available resources” in the *Khosa* case requires the state to ensure that its economic priorities are consistent with constitutional values and the Bill of Rights as a whole and, hence, the state cannot ignore older persons’ social security rights, their right to the protection of their dignity and equality rights. As will be argued below,⁴⁵ this interpretation of “within available resources” allows the state to adopt measures to advance intergenerational solidarity in retirement funding.⁴⁶

3.2.2.4 “Progressive realisation”

The inclusion of the term “progressive realisation” makes it clear that the idea of including the right of access to social security was not that this right should be

⁴⁵ At 6.4.1.

⁴⁶ As long as these measures are also “reasonable” and provide for the “progressive realisation” of social security rights.

realised immediately. The state is, however, obliged to take visible and immediate steps to achieve the goal of access to social security for all.

The term “progressive realisation” also appears in the International Covenant on Economic Social and Cultural Rights (ICESCR). According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, the “progressive realisation” clause may not be used as a pretext for non-compliance with the ICESCR.⁴⁷ Although states are only required to realise socio-economic rights progressively, this “does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and other as soon as possible.” The state must therefore prove that it is making “measurable progress toward the full realisation of the rights in question”.⁴⁸

The UN Committee on Economic and Social Rights, in its General Comment No 3,⁴⁹ has analysed the term “progressive realisation” contained in the ICESCR as meaning that the State has the obligation to move as effectively and expeditiously as possible to securing its ultimate goal. In the *Grootboom* case⁵⁰ this approach was found to be helpful in determining the meaning of “progressive realisation” in the South African constitution and it was held that “there is no reason not to accept that it bears the same meaning in the constitution as in the document from which it was so clearly derived”.

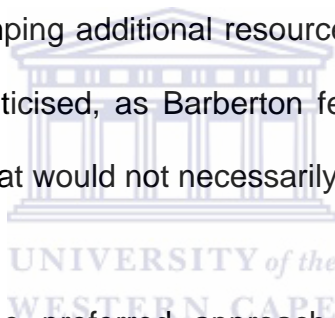
⁴⁷ See below at 7.2.2.2 for a more detailed discussion of the ICESCR.

⁴⁸ Maastricht Guidelines (1997) clause 8.

⁴⁹ UN Doc E/1991/23, para 9.

⁵⁰ 2000(11) BCLR 1169 (CC) 1192 para 45.

Barberson,⁵¹ on the other hand, finds the interpretation of progressive realisation in the General Comment most unhelpful, as its practical implications are unclear. He criticises an approach to the interpretation of “progressive realisation” which focuses on the input side of the equation by merely requiring government to progressively increase the amount of resources it allocates to socio-economic programmes. He finds this approach financially and economically unsustainable, as the money for increased spending on socio-economic programmes will have to be found by either cutting expenditure in other areas or increasing the level of taxation. Continuously pumping additional resources into inefficient government delivery systems is also criticised, as Barberson feels that service levels could also be improved in ways that would not necessarily require additional resources.



According to Barberson the preferred approach to interpreting “progressive realisation” is to focus on programme outputs and policy outcomes. The various advantages of this approach are:

- It requires far more transparency from government over its steps to realise socio-economic rights, placing a positive obligation on government to measure and report on its performance in social service delivery.
- Managers of government service delivery systems will be held more accountable as they would not be able to excuse inefficient service delivery by pointing out that all the correct administrative procedures were followed.

⁵¹ Barberson “Paper Tigers? Resources for Socio-Economic Rights” (1999) 2 (1) *ESR Review* 2.

- Government will be required to put systems in place to enable civil society to monitor and measure the performance of programmes.
- The outcome approach places the focus on delivery efficiency and programme effectiveness.

Adapting this outcome-based focus to the realisation of the right of access to social security, three questions can be asked in order to evaluate the results of government social security programmes:

- a) How many more people have improved standards of living as a result of the grants paid by government?
- b) What is the cost of each additional person receiving social security?
- c) How could the scope and level of grants be improved, given the existing socio-economic circumstances?⁵²

It is submitted that this approach is more helpful in establishing whether the state has achieved progressive realisation of social security rights than merely gauging whether it has made “measurable progress” towards the realisation of these rights.

3.2.3 The South African Human Rights Commission

The South African Human Rights Commission (SAHRC) is responsible for “promoting respect for human rights; promoting the protection, development and attainment of human rights; and monitoring observance of human rights.”⁵³ The SAHRC is obliged to request information from relevant organs of State on an

⁵² See Barberton “Paper Tigers? Resources for Socio-Economic Rights” (1999) 2 (1) *ESR Review* 3.

⁵³ National Report on the Status of Older Persons (2002) 17.

annual basis on measures taken by them to bring about the realisation of socio-economic rights.⁵⁴ It can report on what it perceives to be wrong spending priorities and can even support a court application based on violations of socio-economic rights. In *Ngxuza and Others v The Permanent Secretary, Department of Welfare, Eastern Cape*⁵⁵ the chairperson of the SAHRC was quoted as saying:

The Commission has fulfilled, as best as it is presently able, its role to educate, inform and persuade the officials of the Department to implement a fair procedure when canceling disability grants, or any welfare grant for that matter. Regrettably these measures have not had the desired effect. The Commission therefore supports this application.

The SAHRC's first annual *Economic and Social Rights Report*⁵⁶ commented on various issues relating to social security, in particular, criticising the narrow definition of social assistance in the Social Assistance Act⁵⁷ and the exclusionary nature of the current social security system. The 5th *Economic and Social Rights Report*⁵⁸ made specific reference to the coverage problems associated with voluntary retirement fund membership.⁵⁹ The emphasis in the 6th *Economic and Social Rights Report 2003-2006*⁶⁰ was on the service delivery challenges in the Eastern Cape.⁶¹ On the positive side, it indicated that significant progress had been made in realising social security rights and the establishment of the South African Social Security Agency was highlighted.⁶²

⁵⁴ Section 184(3) of the Constitution.

⁵⁵ 2001 2 SA 609 (E) 618.

⁵⁶ 1997-1998 Vol IV "Researcher's Evaluation of Government Responses" 34 - 40. See also the 2nd *Economic & Social Rights Report 1998-1999* 211-228; 3rd *Economic & Social Rights Report 1999-2000* 10-57; 4th *Economic & Social Rights Report* 171-234.

⁵⁷ Act 59 of 1992.

⁵⁸ 2002-2003, "Social Security" 38.

⁵⁹ The problems associated with voluntary fund membership are outlined at 5.5 below.

⁶⁰ At 64.

⁶¹ The impact of mismanagement of state grants on intergenerational solidarity is discussed at 4.3.4 below.

⁶² 6th *Economic and Social Rights Report*, 65.

The SAHRC has assigned the advancement of the rights of older persons as a focus area to one Commissioner and also established a committee to advise the SAHRC on its work in promoting and protecting the rights of older persons.⁶³ One of the major outcomes of these measures was the workshops held on the Older Persons Bill to seek input from communities and organisations on legislation for older persons.⁶⁴

3.2.4 Horizontal application of social security rights

The paragraphs above focused on the constitutional right to social assistance and the limitations to enforcing this right against the state. The discussion of the legislation related to older persons below will show that private actors such as pension funds and their trustees, or organisations responsible for running residential facilities for older persons can wield great power over older persons. For this reason, the horizontal application of human rights, which means that private actors are also bound by constitutional rights to the extent set out in section 8 of the Constitution, is of great significance to the protection of older persons' rights. The horizontal application of rights could potentially affect families of older persons, non-governmental and community organisations providing services to older persons, individuals dealing with older persons,

⁶³ National Report on the Status of Older Persons (2002) 52.

⁶⁴ SA Govt Information "South African Human Rights Commission (SAHRC) Workshops hear about plight of elderly from Gauteng, Mpumalanga, North West" <http://www.info.gov.za/speeches/2005/05020915451001.htm> (accessed 12/04/2009).

retirement funds and their trustees, contractors for the payment of grants to older persons and banks providing services to older persons.

In terms of the current policy framework,⁶⁵ the state is not expected to carry the burden of providing for vulnerable groups such as older persons on its own, but shares this responsibility with older persons' families and communities. The fundamental question is whether the legal duties placed on private actors also enjoy constitutional protection, and cannot be taken away without violating the beneficiaries' basic rights. A secondary question is whether horizontal application of rights provides leeway for the state to further dilute its responsibilities towards older persons in terms of the Constitution. An answer to this question is to be found in the means test, which allows the state to 'dilute' its responsibilities by, in effect, implying that private actors⁶⁶ are performing a duty that would otherwise have rested on the state.

Section 8 of the Constitution provides:

- (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

⁶⁵ See below at 4.2 for a summary of past and current government policy on the provision of social security and social services to older persons.

⁶⁶ E.g, the income paid to a beneficiary i.t.o. occupational retirement funds or retirement annuity funds paying benefit currently taken into account in the means test for the older person's grant.

The question is whether the right of access to social security is the type of right and creates the duties envisaged by section 8(2) and whether older persons can, for instance, claim that contractors providing inferior services at pension pay-points are infringing their social security rights. Whether non-state actors would be bound would depend on the nature of the right and the nature of any duty imposed by the right.⁶⁷ In addition, whether or not socio-economic rights such as the right of access to social security are “applicable” for the purposes of section 8(2) has been the subject of some debate. A full examination of the different views on the horizontal application of socio-economic rights falls outside the scope of this thesis. However, it can be concluded that there is sufficient authority that the duties created by section 27 of the Constitution may make the right of access to social security relevant in relations between non-state parties.⁶⁸ In the case of an alleged breach of an older person’s right of access to social security by another person, the factors to determine whether this is one of the circumstances where the Bill of Rights would be applicable to private

⁶⁷ S 8(2). See e.g. Rautenbach (2008) “Introduction to the Bill of Rights” *Bill of Rights Compendium* 1A41 where the rights to citizenship and a fair trial in criminal cases are cited as examples of rights where infringement by other private persons is unlikely.

⁶⁸ Rautenbach (2008) “Introduction to the Bill of Rights” *Bill of Rights Compendium* 1A41) states: “It cannot, for example, be argued categorically that the nature of the social rights in respect of, for example, access to housing, food, water and social security is such that such rights can never be relevant in private relations. It is not inconceivable that, in the absence of appropriate common-law and statutory measures, they may indeed be relevant in private relations involving housing, food, water, medical services and social security. The context in which the alleged breach of rights occurs, will often be an important factor, in particular, the nature of the relationship in which the parties are involved. Because a Bill of Rights is primarily intended to regulate unequal relations, the Bill of Rights is capable of being applied to unequal “private” relationships.” See also Chirwa “The horizontal application of constitutional rights” (2006) 2 *LDD* 42-45; Du Toit “The transfer of enterprises and the protection of employment benefits” (2004) 1 *LDD* 88-90; Rautenbach and Malherbe (2009) *Constitutional law* 340-341. *Contra* see Cheadle, Davis and Haysom (2009) *South African constitutional law: The Bill of Rights* 3-17, para 3.4.1.

relationships⁶⁹ are therefore the context in which the breach of rights occurs and the nature of the relationship between the older person and the other person. Due to the vulnerable position of older persons in general, and older person's grant recipients specifically, it can be said that the relationship between older grant recipients and other persons are sufficiently unequal so as to deserve regulation by the Bill of Rights. It is therefore submitted that circumstances can arise where private actors would be bound by section 27(1)(c).⁷⁰

Du Toit⁷¹ submits that as all socio-economic rights do not carry the same costs, all socio-economic rights are not necessarily unsuitable for horizontal application as between all parties.⁷² Where a particular prior legal nexus exists in terms of which one party is liable to perform then the socio-economic right that is infringed by non-performance is suitable for horizontal application.⁷³ It will be shown below⁷⁴ that the relationship between a retirement fund and its members has contractual and trust aspects, both creating the required "prior legal nexus" and therefore the affected fund members can claim that unfair fund rules or actions of

⁶⁹ In the context of the right of access to adequate housing, the court in *Modder East Squatters and another v Modderklip Boerdery (Pty) Ltd; President of the RSA and others v Modderklip Boerdery (Pty) Ltd* 2004 (8) BCLR 821 (SCA) para 31 stated: "Circumstances can indeed be envisaged where the right would be enforceable horizontally...".

⁷⁰ Olivier et al "Constitutional issues" in Olivier et al (eds) (2003) *Social Security: A Legal Analysis* 120 states other examples of private providers and deliverers of social security that may be found to be bound by s 27, such as insurance companies, employers, medical aid schemes and pension schemes.

⁷¹ Du Toit "The transfer of enterprises and the protection of employment benefits" (2004) 1 *LDD* 89.

⁷² A different view was expressed by Cheadle, Davis and Haysom (2009) *South African constitutional law: The Bill of Rights* 3-17, para 3.4.1 where the state's duty to take reasonable measures in respect of the right of access to social security (s 27(2)) is cited as an example of a provision that clearly binds the state only.

⁷³ Du Toit "The transfer of enterprises and the protection of employment benefits" (2004) 1 *LDD* 88.

⁷⁴ At 3.3.2.3.1.

the board of trustees infringed their right of access to social security. The Pension Fund Adjudicator has on more than one occasion determined that the Bill of Rights is binding on pension funds and that members of funds can enforce their constitutional rights vis-à-vis the funds and their trustees.⁷⁵

A claimant wishing to enforce a constitutional right against a non-state actor has to bring a common law or statutory action.⁷⁶ Once a court finds that a private actor, for example, a pension payment contractor is bound by the right of access to social security, statutory or common law remedies may be used to give effect to that right.⁷⁷

It will, of course, be possible in some instances for older persons to rely on rights other than the right of access to social security that clearly do apply to private conduct. Actions in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act (“the Equality Act”)⁷⁸ and the Older Persons Act⁷⁹ are available to older persons who claim that their rights have been infringed by residential facilities.

⁷⁵ *Manzini v Metro Group Retirement Fund and Another (1)* [2001] 12 BPLR 2808 (PFA); *Fourie v Free State Municipal Pension Fund* [2002] 12 BPLR 4131 (PFA).

⁷⁶ Chirwa “The horizontal application of constitutional rights in a comparative perspective” (2006) 2 *LDD* 43.

⁷⁷ *Ibid.*

⁷⁸ Act 4 of 2000. The right in question here is the right to equality i.t.o. s 9(4) of the Constitution which specifically applies to non-state action.

⁷⁹ The Older Persons Act 13 of 2006 provides protection for older persons against abuse in residential homes. The right in question here is the right to dignity i.t.o. s 10 of the Constitution. S 4(3) of the Older Persons Act mirrors s 8(2) of the Constitution and provides that the Act “binds both natural or juristic persons to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”.

Section 7 of the Constitution obliges the state to “protect”, in addition to respect, promote and fulfil the rights in the Bill of Rights and therefore also the right to access to social security. The positive constitutional duty on the state to protect constitutional rights includes the duty to take measures to prevent third parties from infringing on the individual’s rights.⁸⁰ The option may also exist to enforce social security obligations of non-state actors indirectly by suing the state for not providing appropriate protection against violation of social security rights.⁸¹

Section 27(2) obliges the state to ensure access to social security. When the state delegates its duties to private actors, it still has the duty in terms of section 7(2) to “protect” social security rights against violations and it “retains ultimate responsibility for ensuring that the package of measures adopted is sufficient”.⁸²

Even though the state may rely on private actors to fulfil some social security

⁸⁰ *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 397, paras 14-15; *The City of Cape Town v Rudolph and Others* 2003 (11) BCLR 1236 (C) 1266-7; *Jaftha v Schoeman and others* 2003 (10) BCLR 1149 (C) paras 31 and 39.

⁸¹ Chirwa “The horizontal application of constitutional rights in a comparative perspective” (2006) 2 *LDD* 44. The Constitutional Court for instance held that the state has the duty under international law to take reasonable and appropriate measures to prevent the violation of women’s fundamental rights and freedoms and that it will be liable for an infringement of a constitutional right by a non-state actor if it fails to take “reasonable and appropriate measures” to prevent such infringement (*Carmichele v Minister of Safety and Security and Another* 2001 4 SA 938 (CC) 957-958, para 45 and 965-965, para 62). In *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 446-447, para 21 it was held that where the state fails in its duty to protect fundamental rights in circumstances that offer no effective remedy other than an action for damages, it could be held liable unless there are other considerations affecting the public interest that outweigh the norm of accountability. See also *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) para 19; *Minister of Safety and Security and Another v Carmichele* 2004 (2) BCLR 133 paras 38 and 44.

⁸² Olivier et al “Constitutional issues” in Olivier et al (eds) (2003) *Social Security: A Legal Analysis* 82. I.t.o. the *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 40, national government has to ensure that laws, policies, programmes and strategies are adequate to meet the state’s obligation i.t.o. socio-economic rights. This corresponds with the call by the UNDAW Expert Group Meeting to “consider effective forms of holding non-state actors accountable for violations of economic and social rights” (UNDAW (1997) “Promoting women’s enjoyment of their economic and social rights” Expert Group Meeting Report para 24).

functions, the state must put measures such as legislation and administrative structures in place to regulate the actions of powerful non-state actors and thereby prevent violations of social security rights.⁸³

3.2.5 *Relevance for older persons*

According to the *Government of the Republic of South Africa and Others v Grootboom and Others*,⁸⁴ steps taken by government to better the lives of South Africans will only be regarded as “reasonable” if they provide for the needs of particularly vulnerable people. Even if one could discount the horrific accounts of abuse and neglect that are given in the Report of the Ministerial Committee on Abuse, Neglect and Ill-Treatment of Older Persons,⁸⁵ older persons as a group must be regarded as a vulnerable group as a result of their earning capacity ending at retirement age and failing health.⁸⁶ Measures to provide access to social security in South Africa could therefore not be regarded as “reasonable” if they do not make specific provision for older persons.

In many cases loss of dignity is part of the ageing process. This is generally as a result of failing health and the resultant loss of independence.⁸⁷ What is much worse is cases of indignity that is inflicted on the elderly by younger persons, in many cases family members. As a society we cannot talk of upholding values

⁸³ UNDAW (1997) Expert Group Meeting Report para 29.

⁸⁴ 2000 (11) BCLR 1169 (CC) 1191 para 44.

⁸⁵ The title of the report is *Mothers and Fathers of the Nation: The Forgotten People?* (2001).

⁸⁶ Kinsella and Ferreira (1997) *Aging trends: South Africa* International Brief 92-2, 4.

⁸⁷ Kinsella and Ferreira (1997) 4 and 6.

such as human dignity when older persons live in poverty and neglect. Whereas the law cannot protect older persons against ageing *per se*, it can protect their right to have their dignity respected. In order to uphold the constitutional value of dignity in respect of older persons, laws to protect them against poverty, neglect and abuse are required.⁸⁸ All legislation dealing with older persons should therefore be measured against the criterion of whether it upholds the dignity of older persons.

The State's duty to progressively realise older persons' right of access to social security does not merely entail a steady increase in the level of grants payable, but also means that older persons may not be deprived of benefits that they are already receiving. They should therefore be protected against actions by the state or other parties that arbitrarily deprive them of their grants⁸⁹ or that could place at risk their retirement savings.⁹⁰

3.3 LAWS PROVIDING FOR AND PROTECTING OLDER PERSONS

This section of the chapter serves to outline the laws regulating retirement benefits, state support to older persons with little or no other income, protecting older persons against abuse and providing a secure environment for older persons to stay. The legislation outlined in this chapter gives effect to the

⁸⁸ The Social Assistance Act 13 of 2004 currently provides for the payment of grants to older persons to alleviate poverty (see below at 3.3.1.1) and the Older Persons Act 13 of 2006 provides protection against abuse and neglect (see below at 3.3.4.5.1).

⁸⁹ See below at 4.3.4.2.

⁹⁰ See below at 5.3 to 5.7 for all the key issues and concerns relating to the individual providing for his or her own retirement.

constitutional rights discussed above and have to be interpreted in that light. As three whole chapters of this thesis⁹¹ are dedicated to the in-depth discussion of key and problem issues arising from the provision for retirement income and protection of older persons, the aim of this section is merely to give an overview of the protection currently provided.⁹²

The framework for retirement funding in South Africa can be described as a three-pillared or three-tiered approach.⁹³ The first tier, offering the most basic protection, is the non-contributory social assistance benefits payable to older persons.⁹⁴ In the absence of a national retirement fund, the next tier of funding for retirement is occupied by the occupational retirement funds providing employees with retirement funding.⁹⁵ The third tier consists of private retirement savings vehicles that provide protection to self-employed persons, as well as employees who wish to top up the retirement savings provided by occupational retirement funds.⁹⁶

⁹¹ Chapters 4 to 6.

⁹² With cross referencing to the relevant paragraphs in Chapters 4 to 6.

⁹³ The “three-pillar” approach is followed in most countries in the world, each giving its own content to the three types of financial support to the elderly. See below in Chapter 7 for a comparative study of retirement funding and for international organisations’ views on the various “pillars”.

⁹⁴ Discussed below at 3.3.1.

⁹⁵ See below at 3.3.2.

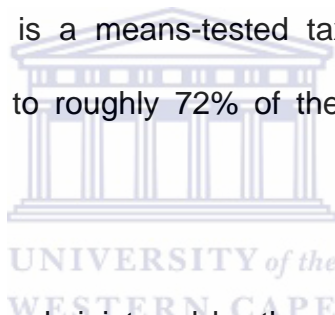
⁹⁶ Private retirement savings vehicles are outlined below at 3.3.3. This aspect will not be dealt with in detail as this research is concerned with intergenerational solidarity, and there is little or no solidarity involved in private retirement savings.

3.3.1 Social assistance for older persons

The constitution obliges the state to create a social assistance system that all persons who are unable to support themselves and their dependants have access to.⁹⁷ The legislative framework for social assistance is formed by the Social Assistance Act (SAA).⁹⁸ The focus of the paragraphs below will be the social assistance currently rendered to older persons.

3.3.1.1 Older person's grant

The older person's grant⁹⁹ is a means-tested tax-financed flat rate pension, currently providing benefits to roughly 72% of the elderly population of South Africa.



The grants were previously administered by the provincial departments tasked with Social Development, but in terms of the South African Social Security Agency Act¹⁰⁰ this task has shifted to the South African Social Security Agency ("SASSA" or "the Agency"¹⁰¹). The main objective of the Agency is to act as the sole agent that will ensure the efficient and effective management, administration and payment of social assistance.¹⁰²

⁹⁷ Section 27(1)(c).

⁹⁸ Act 13 of 2004, which has replaced the Social Assistance Act 59 of 1992.

⁹⁹ The 1992 Act referred to the social grant for the aged. These grants are sometimes also called "social pensions", "social old age pension" or "social allowances for the aged".

¹⁰⁰ Act 9 of 2004.

¹⁰¹ The SAA and the regulations refer to "the Agency", whereas government departments and the organisation itself refers to it as "SASSA".

¹⁰² Section 3 South African Social Security Agency Act 9 of 2004.

3.3.1.1.1 Requirements

In order to qualify for an older person's grant, the applicant:

- must be a South African citizen;¹⁰³
- must be resident in the Republic at the time of the application;¹⁰⁴
- if a female, must be 60 years of age;¹⁰⁵
- if a male, must be 61 years of age;¹⁰⁶
- as well as his or her spouse, must comply with the means test;¹⁰⁷
- must not be maintained or cared for in a state institution;¹⁰⁸ and
- must not be in receipt of another social grant in respect of him- or herself.¹⁰⁹

¹⁰³ Section 5 SAA. The citizenship requirement is broadened by the definition of "South African citizen" in the SAA. It includes non-citizens who prior to 1 March 1996 were in receipt of social assistance benefits. The definition also opens the door to the possibility that the Minister may include categories of persons under the definition of citizen who were previously excluded. In addition, s 2 includes citizens of countries that have concluded equality of treatment of citizen agreements with South Africa under the scope of application of the Act, as long as they reside in South Africa. Reg 2 GN R898 in GG 31356 of 22 August 2008 (hereafter "GN R898") makes no reference of the citizenship requirement and merely requires an applicant to be a permanent resident to be eligible.

¹⁰⁴ Section 5(b). S 16 makes provision for the discontinuation of payments to beneficiaries that are absent from South Africa for a period exceeding 90 days. See reg 31 GN R898 for the circumstances under which the Agency may continue payment of a grant to a beneficiary or procurator who is absent from South Africa.

¹⁰⁵ The 2004 Act makes provision for the age requirement in the primary legislation itself – s 10, whereas the age requirements were previously stated in reg 2(2) GN R418 in GG 18771 of 31 March 1998.

¹⁰⁶ The age requirement of 61 years of age applies only to 2009. Section 1 of the Social Assistance Amendment Act 6 of 2008 reduces the qualifying age for men gradually from 65 to 60 years of age in 2010. The amendment was made in response to litigation by a group of men aggrieved by the disparity between the age requirements for men and women. See above at 2.8.

¹⁰⁷ As set out in Annexure A of GN R898. The value of the applicant's grant is determined by taking into account the maximum social grant per annum as approved and either the annual income of the applicant or half the annual income of the applicant and his or her spouse. An applicant who owns assets worth 40 times the maximum social grant payable per annum is disqualified from receiving the grant (in the case of an applicant in a spousal relationship the cut-off point is 80 times the maximum annual grant).

¹⁰⁸ Such as a prison, a psychiatric hospital, a home for older persons; a care treatment center or a treatment center for drug dependants which is wholly funded by the state (reg 2(d) read with reg 1 of GN R898). If the grant is already being paid, the grant will lapse when the beneficiary is admitted to any of the listed institutions (reg 28(1)(b)). A reduced grant is payable to a beneficiary who is admitted at an institution that has a contract with the state to care for and maintain such beneficiary (as opposed to state-run institutions). The level of the reduced grant is an amount equal to 25% of the maximum amount payable for such grant (reg 22(1)).

With regard to the citizenship requirement referred to above, the majority judgement in *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Another v Minister of Social Development and Others*¹¹⁰ broadened the scope of application of the Social Assistance Act even further by declaring that the exclusion of permanent residents by section 3(c) of the 1992 Social Assistance Act¹¹¹ did not constitute a “reasonable legislative measure as contemplated by section 27(2) of the Constitution” and, therefore, was unconstitutional.¹¹² The majority of the court concluded that the word “everyone” in section 27(1)(c) of the Constitution cannot be read to refer only to citizens.¹¹³ They also came to the conclusion that such exclusion from state grants constituted unfair discrimination against permanent residents and that the unfairness would not be justifiable under section 36 of the Constitution.¹¹⁴ The court ordered that the words “or permanent residents” be read into the section containing the citizenship requirement.¹¹⁵

A beneficiary of a disability grant will be entitled to an older person’s grant as soon as he or she reaches the prescribed age.¹¹⁶

¹⁰⁹ Reg 2(c) GN R898.

¹¹⁰ 2004 (6) BCLR 569 (CC).

¹¹¹ The same citizenship requirement as in s 5 of the 2004 Act.

¹¹² 2004 (6) BCLR 569 (CC) 601, para 82.

¹¹³ At 590, para 47.

¹¹⁴ At 600, para 80. See 607 – 617 for Ngcobo J’s dissenting judgment.

¹¹⁵ At 603, para 88.

¹¹⁶ Reg 23 (1) GN R898. The age requirement for the older person’s grant is stated above.

3.3.1.1.2 *Applying for an older person's grant*

The regulations to the Social Assistance Act (SAA) stipulate the manner in which an application for the older person's grant is to be made. An applicant must provide a valid identity document¹¹⁷ which will support the information supplied regarding the age and citizenship requirements. The Agency will also require proof of marital status.¹¹⁸ To determine whether the applicant qualifies in terms of the means test, proof of assets as well as income of the applicant must accompany the application for the older person's grant.¹¹⁹ The Agency may conduct an investigation into the information supplied if such an investigation is deemed necessary.¹²⁰

Regulation 10(1) requires the applicant or his or her procurator¹²¹ to present him- or herself at either an Agency office or another designated place for the initial application.¹²²

If the Agency staff is of the opinion that the person is entitled to the grant applied for, they must grant it.¹²³ The applicant must be informed of approval or rejection

¹¹⁷ As well as that of his or her spouse where applicable (reg 11(1)(a)).

¹¹⁸ Reg 11(1)(c).

¹¹⁹ Reg 11(2)(a).

¹²⁰ Section 14(2) SAA.

¹²¹ A procurator is the person appointed by the beneficiary or the Agency to apply for and receive grants on the older person's behalf (s 1 SAA).

¹²² If an elderly applicant is not able to complete the application form by him- or herself, someone at the Agency must assist him or her (or his or her procurator) with the application (reg 10(2) GN R898).

¹²³ Section 14(3)(a) SAA.

of the application¹²⁴ and, in the case of rejection, the reasons why he or she does not qualify as well as the procedures the applicant may follow thereafter.¹²⁵

3.3.1.1.3 *Right to appeal*

An applicant who disagrees with a decision of the Agency must be informed of his or her right to appeal to the Minister of Social Development in writing within 90 days from finding out about the decision.¹²⁶ The appeal must state the grounds on which the appeal is based.¹²⁷

Upon receipt of the applicant's written appeal and the reasons furnished by the Agency for the rejection of the application, the Minister may decide to consider the appeal and vary, set aside or confirm the decision. Alternatively, the Minister may appoint an independent tribunal to consider the appeal.¹²⁸ The Minister remains liable for procedural failures related to an appeal and a resultant claim for administrative review should lie against the Minister.¹²⁹

¹²⁴ Reg 13(1) GN R898.

¹²⁵ Section 14(3)(b) SAA; reg 13(4) GN R898.

¹²⁶ I.t.o. reg 13(4) R898 the Agency must inform the applicant of his or her right to lodge an appeal at the same time when notifying him or her of the refusal of the grant application. Failure to lodge an appeal within the stated 90-day period does not mean that the applicant loses the right to approach a court for appropriate relief in terms of other legislation such as the Promotion of Administrative Justice Act 3 of 2000 (PAJA), but merely eliminates the possibility of utilising the internal remedy provided by the Social Assistance Act (*Vumazonke and others v MEC for Social Development, Eastern Cape* 2005 6 SA 229 (SE) 243; *Ntame v MEC, Dept of Social Development, Eastern Cape* [2005] 2 All SA 535 (SE) 546 para 32.

¹²⁷ Section 18 SAA. See below at 4.3.4.4.2 for the difficulties applicants face in lodging an appeal when they have not been provided with sufficient reasons for the rejection of their applications.

¹²⁸ Section 18(2) as amended by s 2 Social Assistance Amendment Act 6 of 2008.

¹²⁹ *Cele v SASSA* Unreported case no. 7940/07 D&CLD para 32.

3.3.1.1.4 *Payment of grant*

Once a grant is approved, it must be paid from the date on which the application is deemed to have been made.¹³⁰ Grants are paid in monthly payments by the Agency, or by any other party contracted by the Agency for payment of grants.¹³¹

An older person's grant will lapse on the last day of the month in which the older person dies¹³² or when the older person is admitted to a state-run institution.¹³³

The grant will also lapse if the older person has not claimed the grant for a consecutive period of three months.¹³⁴

To avoid erroneous payments, beneficiaries of manual payments have to identify themselves by means of identity documents. They also have to personally take receipt of the grant and sign for receipt of the amount of the grant received.¹³⁵

If an elderly beneficiary is unable to collect his or her grant money due to illness or other reasons beyond his or her control, the beneficiary may appoint and

¹³⁰ Reg 12(3) R898. The application is deemed to be made on the date that it is signed (reg 12(1)). The grant can be either be paid into the beneficiary's account at a financial institution via electronic transfers or paid manually to the beneficiary at a designated pay-point (reg 21(1)).

¹³¹ Reg 21 (2).

¹³² Reg 28(1)(a).

¹³³ Reg 28(1)(b).

¹³⁴ Reg 28(5).

¹³⁵ Reg 21(3).

authorise a procurator by a power of attorney to draw the grant on his or her behalf.¹³⁶

The regulations make provision for interim arrangements should a beneficiary not be able to personally collect payment of his or her grant due to illness of temporary incapacity. A grant could be paid to someone authorised by the beneficiary to receive the grant, if the Agency is provided with written authority signed by the beneficiary. This interim arrangement may only last for three months,¹³⁷ after which a permanent procurator needs to be appointed.

In the past there were many reports of “ghost beneficiaries”, i.e. grants being paid out in the name of older persons that have died. In practice that means that the persons receiving grants on their behalf were able to receive the grants long after the beneficiary’s death.¹³⁸ The regulations include measures to prevent payment to such “ghost beneficiaries” by requiring the persons receiving the grant to furnish proof of identification, as well as a life certificate¹³⁹ in respect of the

¹³⁶ Section 15 SAA. Reg 24(1)(a) R898 allows for a beneficiary to apply for someone else to receive grant on his- or her behalf when it can be proved to the Agency’s satisfaction that he or she cannot personally receive the grant or that it would create undue hardship for the beneficiary to receive it in person. If the person is unable to appoint a procurator, the Agency can nominate a person or welfare organisation to draw the grant on the beneficiary’s behalf (reg 24(1)(b)).

¹³⁷ Reg 21(3)(c).

¹³⁸ See e.g. the report in *ANC Today* (2005) 5 (30) <http://www.anc.org.za/ancdocs/anctoday/2005/text/at30.txt> (accessed 02/07/2009) of an employee of the Department of Social Development who had inserted ID numbers, names and addresses of deceased or non-existent people into the grant payment system and diverted the grant payments to herself.

¹³⁹ According to the definition clause of GN R898 a “life certificate” is an affidavit made and signed under oath or affirmation by a beneficiary before a commissioner of oaths or a designated officer of the Agency to prove that he or she is alive.

beneficiary. They are also required to provide an affidavit stating that the grant will in fact be handed over to the beneficiary.¹⁴⁰

The requirements for a procurator limit this position to persons permanently resident in South Africa with identification documents¹⁴¹ who are 18 years of age or older.¹⁴² Unrehabilitated insolvents are disqualified from being appointed as procurators, as are persons to whom the beneficiary is indebted.¹⁴³ Potential procurators must express their willingness to serve as procurators.¹⁴⁴

In some instances the procurator appointed by the Agency is a welfare organisation, particularly where the organisation runs the residential home where the beneficiary resides. In order to protect the beneficiary against abuse of this power by the welfare organisation, the Agency must ensure:

- that the welfare organisation is registered and has the financial and administrative capacity to act as a procurator;¹⁴⁵
- that the welfare organisation does not charge older persons any fees or charges or require them to make any contribution to repay the organisation for acting as procurator;¹⁴⁶
- that the organisation has a bank account into which the grant money can be paid;¹⁴⁷
- that the organisation's actions as procurator will be in the best interests of the older person applying for or receiving the grant.¹⁴⁸

¹⁴⁰ Reg 24(4).

¹⁴¹ Reg 24(3)(a) read with 24(3)(c).

¹⁴² Reg 24(3)(b).

¹⁴³ Reg 24(3)(d) and (f).

¹⁴⁴ Reg 24(3)(e).

¹⁴⁵ Reg 25(a) and (b).

¹⁴⁶ Reg 25(c).

¹⁴⁷ Reg 25(d).

Should the beneficiary decide to terminate the power of attorney appointing a procurator, he or she must notify the Agency of such termination and from when it is effective.¹⁴⁹ When the procurator finds out that his or her power of attorney has been terminated, he or she must transfer any money of the beneficiary still in his or her possession to the beneficiary within ten days of the termination.¹⁵⁰

3.3.1.1.5 Preventing abuse of grants

To ensure the efficient operation of the older person's grant system, the Agency needs to have access to the relevant information. Notwithstanding anything to the contrary in any law, any organ of state or financial institution¹⁵¹ must at the request of the Agency furnish it with information relating to an elderly applicant.¹⁵² Any grant applicant will be deemed to have agreed that any information held by him or her may be released to the Agency, without requesting his or her prior permission.¹⁵³

If an elderly applicant furnishes information that to his or her knowledge is untrue or misleading in any material respect or makes a false representation, in order that he or she or another person

¹⁴⁸ Reg 25(e).

¹⁴⁹ Reg 24(5).

¹⁵⁰ Reg 24(6).

¹⁵¹ Reg 30. Financial institutions include banks, long-term insurers and short-term insurers (defined in reg 1).

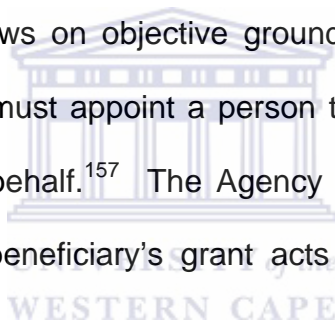
¹⁵² Section 22 SAA.

¹⁵³ Section 22(4).

- may obtain social assistance to which they are not entitled;
- may obtain more social assistance than to which they are entitled

such a person will be guilty of an offence.¹⁵⁴ The same goes for receiving social assistance knowing that he or she is not entitled to it and failing to inform the Agency of the error.¹⁵⁵

A beneficiary can spend the money in any way he or she wishes, but the Agency will have the power to investigate suspected abuse of grants.¹⁵⁶ This can only be done where the Agency has reasonable grounds to suspect abuse of the grant. Once the investigation shows on objective grounds that the grant had indeed been abused, the Agency must appoint a person to receive and administer the grant on the beneficiary's behalf.¹⁵⁷ The Agency must ensure that the person appointed to receive the beneficiary's grant acts in the best interests of the beneficiary.¹⁵⁸



A beneficiary must inform the Agency as soon as reasonably possible after any material changes in his or her circumstances,¹⁵⁹ e.g. when the beneficiary marries, is widowed, is divorced, receives an inheritance, accepts an offer of

¹⁵⁴ Section 21(1).

¹⁵⁵ Section 21(2). Unless specified otherwise, the penalties provided for in s 31(1) of the Act make a person convicted of an offence under the amended legislation liable to a fine or imprisonment not exceeding 15 years. These penalties are harsher than the previous maximum term of imprisonment of 12 months or a fine i.t.o. s 18 Social Assistance Act 59 of 1992.

¹⁵⁶ "Abuse of grants" is not defined in the Act or the regulations. Under the previous system the Department of Social Development could appoint an administrator to administer the grant on behalf of a beneficiary in the case of misspending, mental disability or alcohol abuse on the part of the beneficiary.

¹⁵⁷ Section 19 SAA.

¹⁵⁸ Reg 26(1).

¹⁵⁹ Section 14(5) SAA.

employment or sells property. This requirement is included to ensure that the Agency is notified of any increase in the income of the beneficiary.¹⁶⁰ The change in financial circumstances may lead to a decrease of the grant from the month following the change in circumstances. The beneficiary must be informed in writing of the decrease and the right to appeal the decrease.¹⁶¹

Reviews of grants are also required to take place, specifically where “there is reason to believe that changes in the beneficiary’s financial circumstances may occur”.¹⁶²

In terms of regulation 29(1) a grant may be suspended or cancelled

- (a) where the grant was obtained through fraud or misrepresentation;
- or
- (b) where it is shown that the grant had been approved and paid in error.¹⁶³

Although the grant is means tested and all reasonable measures are taken to avoid overpayment or payment to beneficiaries that are not entitled to the grant, such overpayments do occur from time to time. Should an older person’s grant

¹⁶⁰ Knowingly failing to inform the Agency of material changes in circumstances constitutes a criminal offence (s 21(3)).

¹⁶¹ Reg 27(7) GN R898.

¹⁶² Reg 27(2)(a).

¹⁶³ Reg 29 (2)-(5) provide for an elaborate procedure to be followed by the Agency before it can suspend a grant. The only exception to this procedure is the case of beneficiaries who have been found guilty of fraud (reg 29(2)). These measures will hopefully preclude further litigation in the vein of *Ngxuzza e.a. v The Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E) and *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [2004] 1 BPLR 5357 (EC). See below at 4.3.4.2.

be paid to a person in the belief that that person is entitled to the grant, while he or she is not, that amount must be repaid to the State by the beneficiary, or his or her estate in the case of a deceased beneficiary.¹⁶⁴ The Agency is tasked with recovering the amounts overpaid.¹⁶⁵

3.3.1.1.6 *Protection of beneficiaries*

Any right to an older person's grant may not be transferred, ceded or pledged without written consent by the Minister of Social Development. If a beneficiary attempts to transfer or cede or pledge such a right, payment of the amount in question may by order of the Minister be suspended or stopped.¹⁶⁶

In terms of the 1992 Social Assistance Act, if the estate of a beneficiary of a social grant was sequestrated, or if the beneficiary died, an amount payable to such beneficiary as social assistance was not regarded as part of the insolvent or deceased estate.¹⁶⁷ This situation changed with the 2004 Act, which makes provision for the benefits to form part of the beneficiary's estate¹⁶⁸ and only excludes it from an insolvent estate.¹⁶⁹

¹⁶⁴ Unless the beneficiary can satisfy the Minister that he or she received the grant without knowledge that he or she is not entitled thereto (s 17(1) and (3) SAA).

¹⁶⁵ Section 17(2).

¹⁶⁶ Section 20. The 1992 Social Assistance Act made no provision for permission by the Minister.

¹⁶⁷ Section 11(2) Social Assistance Act 59 of 1992.

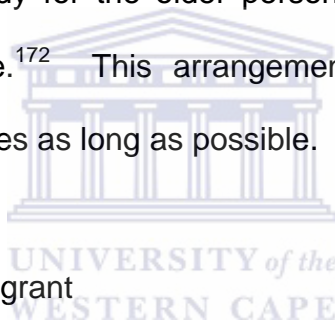
¹⁶⁸ "An amount that **accrues or has accrued to a beneficiary or his or her estate** in terms of this Act..." (my emphasis).

¹⁶⁹ Section 20(5) SAA.

In addition, the regulations also contain the rules and procedure applicable at pay-points to protect beneficiaries against creditors and moneylenders who try to enforce debts or conduct business within the pay-point area.¹⁷⁰

3.3.1.2 Grant-in-aid

A grant-in-aid is paid to an older person in receipt of an older person's grant, if that older person is in such a physical or mental condition that he or she requires regular attendance by another person.¹⁷¹ If the State already provides care in an institution, or pays a subsidy for the older person's care and housing, then a grant-in-aid is not payable.¹⁷² This arrangement aims to encourage older persons to stay in their homes as long as possible.



3.3.1.3 War veteran's grant

Veterans of certain wars¹⁷³ who are over 60 years old can apply for a war veteran's grant.

3.3.2 Occupational retirement funds

The benefits payable from retirement funds are analogous to social insurance benefits, as they are contributory benefits that are paid out when the social risk,

¹⁷⁰ Regs 32 - 35 GN R898.

¹⁷¹ Section 12 SAA. A medical officer or medical practitioner (defined in reg 1) must certify that the older person needs regular care (regs 5(1) and 11(6) GN R898).

¹⁷² Reg 5(2).

¹⁷³ Listed in s 11 (b) SAA. The last war listed in the definition of "war veteran" is the Korean War of 1950-1953.

retirement, occurs. The South African retirement fund system differs from social insurance arrangements for older persons found in most other countries, in that it consists of various independent funds.¹⁷⁴ The absence of a central social insurance scheme for retirement is one of the definitive defects of the retirement fund system in South Africa.

The chief object of a retirement fund (whether a pension or provident fund) is to provide retirement benefits to members. Occupational retirement funds will therefore be studied against the criterion of ensuring that the expected benefits will be available at retirement for those who rely upon them. Firstly the legislative framework for protecting retirement benefits will be outlined, followed by a description of the benefits payable by retirement funds. Next, the statutory provisions related to the administration of funds will be discussed. As disputes regarding benefits and management will inevitably occur, the dispute resolution measures available will be outlined.

¹⁷⁴ According to National Treasury (2007) *Social security and retirement reform: second discussion paper* 5 there are more than 13 500 funds in South Africa. See below at 5.5 for a discussion of the problems resulting from the absence of a national social insurance programme offering retirement benefits and at 7.3 for the descriptions of national public social insurance schemes found in other countries.

3.3.2.1 Retirement fund legislation

3.3.2.1.1 *Pension Funds Act 24 of 1956*

The main role of the Pension Funds Act is to safeguard the interests of retirement fund beneficiaries and to prevent the abuse of retirement funds by unscrupulous employers and other persons dealing with the funds.¹⁷⁵ The stated objects of the Act are to provide for the registration, incorporation, regulation and dissolution of pension funds.

South Africa was the first country in the world to regulate retirement funds in one piece of legislation, such as the Pension Funds Act, instead of a variety of laws and legal principles. The reason for formalising the pension fund industry through legislation was twofold:

- a) protecting the interests of contributing fund members who have an expectation of retirement benefits;
- b) the state's interest in the solvency of retirement funds.¹⁷⁶

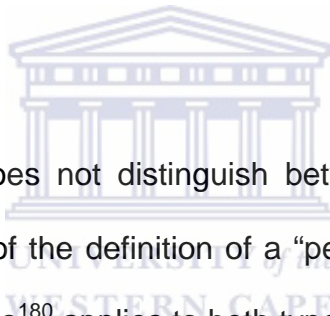
However, there are also historical reasons for the unique pension fund legislation in South Africa. The pension fund system was created during the apartheid era when there was "strong emphasis on the social security needs of the white

¹⁷⁵ *Mostert NO v Old Mutual Life Assurance Company (South Africa) Ltd* [2001] 8 BPLR 2307 (A) 2311 para 13.

¹⁷⁶ Downie (1999) *The Essentials of Retirement Fund Management in South Africa* Chapter1-A2.

population” and their need for high benefit levels.¹⁷⁷ Therefore, the interests that the legislation initially intended to protect were those of white fund members.¹⁷⁸ The occupational fund system has since become more inclusive, but the bias toward the protection of employees in the formal economy remains.

The second of the abovementioned reasons for the comparatively strict regulation of the pension fund industry, reflects the reality that the state cannot avoid the responsibility of caring for older persons completely. Even in cases where individuals make provision for their own old age, the state still has to protect their interests.



The Pension Funds Act does not distinguish between pension and provident funds,¹⁷⁹ and the segment of the definition of a “pension fund organisation” that deals with occupational funds¹⁸⁰ applies to both types of retirement funds:

“(a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members or former members;”¹⁸¹ or
“(b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons.”¹⁸²

¹⁷⁷ Van der Berg (2002) *Issues in South African social security* 39.

¹⁷⁸ See Liebenberg and Tilley (1998) *Poverty and inequality hearings: Social security theme 5*.

¹⁷⁹ The distinction between pension and provident funds is explained above at 2.5.

¹⁸⁰ Part (a) of the definition also covers retirement annuity funds. Retirement annuity funds are discussed below at 3.3.3.1. The Financial Services Laws General Amendment Act 22 of 2008 added beneficiary funds as paragraph (c) funds. Beneficiary funds fall outside the scope of this thesis.

¹⁸¹ A paragraph (a) fund.

¹⁸² A paragraph (b) fund.

a) The Registrar of Pension Funds

The main tasks of the Registrar of Pension Funds are to register and supervise retirement funds and to protect fund members' interests. The office of the Registrar of Pension Funds is established by the Pension Funds Act.¹⁸³ This position is filled *ex officio* by the Executive Officer of the Financial Services Board (FSB).¹⁸⁴

Even though there is a range of retirement funds, they all need to conform to the abovementioned definition of a retirement fund organisation in order to be registered and recognised by the Registrar of Pension Funds.¹⁸⁵

Section 4 requires all retirement funds to be registered. This fact offers important protection to fund members, as the Registrar can refuse to register a fund until he or she is satisfied that the fund's rules are consistent with the Act and the regulations and based on financially sound principles.¹⁸⁶ Each fund must also regularly report to the Registrar.¹⁸⁷ The Registrar has the power to inspect any fund's operations.¹⁸⁸ The only funds that are exempt from registering under the

¹⁸³ Section 3.

¹⁸⁴ The Executive Officer of the FSB is appointed by the Minister of Finance i.t.o. s 13 Financial Services Board Act 97 of 1990.

¹⁸⁵ Downie (1999) *The Essentials of Retirement Fund Management in South Africa* Chapter 1, 2.A.

¹⁸⁶ Reg 8(2) GN R 98 in GG 162 of 26 January 1962 read with s 4(4) and (5) Pension Funds Act 24 of 1956.

¹⁸⁷ Reg 12 requires all administrating insurers and pension funds to send financial returns to the Registrar on an annual basis in the format detailed in the regulations.

¹⁸⁸ Section 25 Pension Funds Act confers on the Registrar all the powers in terms of the Inspection of Financial Institutions Act 80 of 1998 (see below at 3.3.2.1.4.).

Pension Funds Act are:

- State funds;¹⁸⁹ and
- foreign funds.¹⁹⁰

In order to ensure compliance with the Pension Funds Act, the Registrar is entitled to apply to court for the cancellation or suspension of the registration of a fund if the fund has willfully violated any provision of the Act or if the Registrar, upon inspection of the fund, is of the opinion that the fund's registration should be cancelled or suspended.¹⁹¹

b) Protection of rights of members



One of the main objectives of the Pension Funds Act is to protect members' interests and, consequently, most of the provisions of the Act deal with the protection of rights of members.

To ensure that the persons controlling a pension fund do not lose sight of the main object of the fund, which is to provide retirement benefits to members, the Act prohibits a fund from carrying on any business other than the business of a

¹⁸⁹ Although the management board of a fund “to which the State contributes financially” may, with the consent of the Minister of Finance, apply for registration (s 4A). Unless state retirement funds are registered in terms of the Pension Funds Act, they are governed by the legislation in terms of which they were created.

¹⁹⁰Section 2 Pension Funds Act requires foreign funds to apply for registration, but if they comply with the provisions ensuring protection for South African residents and the soundness of the fund, they are exempted from the rest of the provisions of the Pension Funds Act.

¹⁹¹Section 27(2).

pension fund, unless it is to safeguard an investment made by the fund.¹⁹²

In case of a voluntary dissolution of a fund, the interests of members are protected by the provisions of section 28 of the Pension Funds Act. A fund may be dissolved and its assets distributed as provided for in its rules.¹⁹³ A liquidator must be appointed to realise the assets and discharge the liabilities of the fund, keeping in mind the rights and reasonable benefit expectations of the members, as well as additional benefits, the payment of which by the fund has become an established practice.¹⁹⁴

The Pension Funds Act also provides protection to fund members by regulating the internal administration of funds. It lays down requirements relating *inter alia* to the boards of management, appointment and duties of a principal officer. The aim of these requirements is to prevent losses to members due to maladministration of the funds.¹⁹⁵

It is submitted that the most important practical protection afforded to fund members by the Act is the creation of the office of the Pension Fund Adjudicator. Since the establishment of this office, members with complaints against

¹⁹²Section 10.

¹⁹³Section 28(1).

¹⁹⁴Section 28(4). A notice, stating when and where the preliminary account (detailing the assets and liabilities of the fund and how the liquidator plans to distribute and discharge them) would be available for inspection by interested parties, and calling upon such interested parties to report any objections to the Registrar, is to be published in the *Government Gazette* and two other newspapers by the liquidator (s 28(7)). After considering any objections, the Registrar may direct the liquidator to amend the preliminary account (s 28(9)).

¹⁹⁵ See below at 3.3.2.3 for more discussion of the statutory regulation of the administration of retirement funds.

retirement funds do not have to endure cumbersome court proceedings, but have the opportunity to be heard in a procedurally fair, economical and expeditious manner.¹⁹⁶

3.3.2.1.2 *Income Tax Act 58 of 1962*

The Pension Funds Act is not the only legislation providing protection to fund members. Many of the rules regarding the structure of retirement funds are found in the Income Tax Act. No retirement fund will, for instance, be approved by the Commissioner for the South African Revenue Service (SARS) unless the fund and its rules comply with the provisions of the definitions in section 1 of the Income Tax Act. The Income Tax Act is also an important tool in encouraging employees to make provision for their retirement, so that they do not have to rely on the state in old age, in that the Act provides for tax concessions in respect of contributions or benefits, depending on the type of fund.¹⁹⁷

Tax relief is also offered to occupational retirement funds, but funds that do not conform to the requirements set out in the Act may forfeit the tax relief. By requiring the Commissioner to approve the rules of all funds, the Income Tax Act ensures that funds are not abused to evade taxation.¹⁹⁸

¹⁹⁶See ss 30A-30W of the Pension Funds Act and also below at 3.3.2.3.4 for a discussion of the functions of, and procedures followed by, the Pension Funds Adjudicator.

¹⁹⁷ See below at 3.3.2.1.2 (b) – (d).

¹⁹⁸Downie (1999) *The Essentials of Retirement Fund Management in South Africa* Chapter 5, 1.P.

a) Definitions

The requirements before a pension fund¹⁹⁹ can be approved as such under the Income Tax Act are:

- “(i) that the fund is a **permanent fund *bona fide* established for the purpose of providing annuities for employees on retirement from employment** or for the dependants or nominees of deceased employees, or mainly for the said purpose and also for the purpose of providing benefits other than annuities for the persons aforesaid or for the purpose of providing any benefit contemplated in paragraph 2C of the Second Schedule or section 15A or 15E of the Pension Funds Act, 1956 (Act No. 24 of 1956); and
- (ii) that the rules of the fund provide-
- (aa) that all annual contributions of a recurrent nature to the fund shall be in accordance with specified scales;
 - (bb) that membership of the fund throughout the period of employment shall be a condition of the employment by the employer of all persons of the class or classes specified therein who enter his employment on or after the date upon which the fund comes into operation;
 - (cc) that persons who immediately prior to the said date were employed by the employer and who on the said date fall within the said class or classes may, on application made within a period of not more than 12 months as from the said date, be permitted to become members of the fund on such conditions as may be specified in the rules;
 - (dd) that not more than one-third of the total value of the retirement interest may be commuted for a single payment, and that the remainder must be paid in the form of an annuity (including a living annuity) except where two-thirds of the total value does not exceed R50 000 or where the employee is deceased;
 - (ee) that a partner of a partnership is regarded as an employee of the partnership; and
 - (ff) that the Commissioner shall be notified of all amendments of the rules; and
 - (gg)²⁰⁰
- (iii) that the rules of the fund have been complied with:

Provided further that a fund contemplated in subparagraph (i) of the further proviso to the definition of “pension preservation fund” which is deemed to be approved or which is approved in terms of that definition or which fails to submit its rules as required by that paragraph is deemed with effect from the earlier of the date of the deemed approval or 30 September 2009 to be a fund which is not approved in terms of this definition;...²⁰¹

In terms of paragraph (i) of the requirements the pension fund has to be a fund

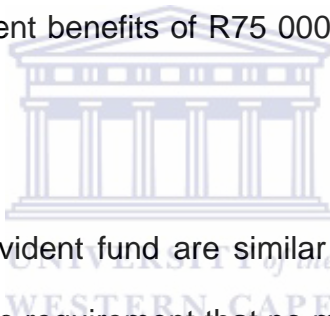
¹⁹⁹ Para (c) of the definition. Pension funds for employees in the public sector are included under paragraphs (a) and (b) of the definition of pension funds. Paragraphs (a) and (b) funds include funds established by law, funds established for the employees of any local authority or control board (as defined in the Marketing of Agricultural Products Act 47 of 1996) or of the Development Bank of Southern Africa.

²⁰⁰ Subparagraph (dd) was amended by the Taxation Laws Amendment Act 3 of 2008 and the Revenue Laws Amendment Act 60 of 2008. Sub-paragraph (ee) was amended, and sub-paragraph (gg) deleted by the Taxation Laws Amendment Act 3 of 2008.

²⁰¹ My emphasis. For more on the role of the rules of a pension fund, see below at 3.3.2.3.2.

“bona fide established for the purposes of providing annuities for employees on retirement from employment”.²⁰² The South African Revenue Service (SARS) Commissioner would therefore not approve, or would even withdraw tax approval, of a pension fund that allows members an option of receiving either a lump sum withdrawal benefit or a retirement benefit at retirement.²⁰³

In terms of sub-paragraph (dd) no more than one-third of the total value of the annuities to which a pension fund member may become entitled upon retirement may be paid as a lump sum, unless two-thirds of the total value does not exceed R50 000.²⁰⁴ Hence retirement benefits of R75 000 or less may be commuted in full as a lump sum.



The requirements for a provident fund are similar to those for a pension fund, except for the absence of the requirement that no more than one-third of the total value should be paid out in a lump sum and the rest as a pension over the rest of the member’s life. The essential difference between a pension fund and a provident fund is therefore that the former provides annuities for employees on retirement (with only a limited lump sum payment) and the latter’s benefits may be paid out as a lump sum. In addition, the Commissioner will also have to be satisfied that the provident fund is

“a permanent fund *bona fide* established solely for the purpose of providing benefits for employees on retirement from employment, or solely for the purpose of providing benefits for dependants or nominees of deceased employees or a deceased former employee or solely for a combination of such purposes and also

²⁰² Annuities are periodic payments throughout the retired life of the member (see above at 2.5).

²⁰³ General Note 4/95.

²⁰⁴ Sub-para (dd) as amended by the Revenue Laws Amendment Act 60 of 2008.

for the purpose of providing any benefit contemplated in paragraph 2C of the Second Schedule or section 15A or 15E of the Pension Funds Act, 1956 (Act No. 24 of 1956).²⁰⁵

b) Contributions can be deducted

Apart from the difference in how pension and provident funds treat members upon retirement, the other main distinction between these types of funds lies in the tax concessions available to members. Employees can, depending on their choice of membership of pension or provident funds, either receive tax deductions while contributing to a fund or receive tax-free portions of their benefits at retirement.



Employees who are members of pension funds are allowed a maximum deduction²⁰⁶ in respect of their contributions as calculated in terms of section 11(k)(i). The tax deductible amount is calculated as the greater of R1 750 or 7,5% of pensionable earnings.²⁰⁷ No employee deduction is allowed in the case of provident funds.²⁰⁸

²⁰⁵ Section 1 Income Tax Act definition of “provident fund” as amended by the Revenue Laws Amendment Act 60 of 2008. Ss 15A to 15E of the Pension Funds Act provide for apportionment and utilisation of surplus.

²⁰⁶ This basically means that the tax on their contributions is deferred until their retirement, when their average income rate will be lower than when they were still employed (Cameron “Secure good line of defence for your retirement” *Personal Finance* (Jan 28, 2006) <http://www.persfin.co.za> (accessed 09/06/2006)).

²⁰⁷ In practice, this means that this amount will be deducted from his or her remuneration before his or her employee’s tax is calculated.

²⁰⁸ For this reason some employers and employees have come to “salary sacrifice agreements” that compensate for the lack of tax benefits while still employed. A detailed examination of salary sacrifice agreements and the SARS Commissioner’s reaction to their existence falls outside the scope of this thesis.

c) Taxation of lump sum benefits

Pension fund members are allowed a lump sum withdrawal to the maximum of one-third of their fund value at retirement.²⁰⁹ A portion of this lump sum payable upon retirement will be tax free,²¹⁰ the balance being taxed at rates set in annual income tax legislation. The same rule applies in the case of commutation of annuities. In the case of provident funds, the whole benefit can be paid out as a lump sum, with a tax-free portion calculated in a similar manner as for pension funds.

The Fourth Schedule determines the procedure to be followed in the case of payment of lump sum benefits. Employers and fund administrators are required to apply for a tax directive from the Commissioner to determine the amount of tax to be withheld before the lump sum is paid out.²¹¹

d) Taxation of pensions or annuities

A pension fund is defined as one in terms of which members may commute a maximum of one-third of their benefits by way of a lump sum, the remaining two-thirds to be used to purchase a compulsory annuity.²¹² The net remuneration

²⁰⁹ The only exception being if two-thirds of the total value does not exceed R50 000 where the full amount can be taken as a lump sum. See above at 3.3.2.1.2 (a).

²¹⁰ I.t.o. formula B of the Second Schedule to the Income Tax Act (as amended) the first R300 000 is tax free.

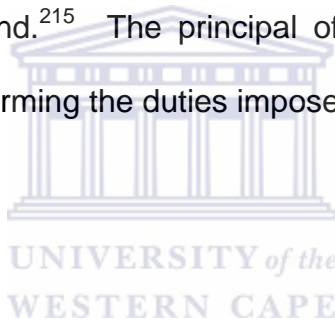
²¹¹ Para 9(3) Fourth Schedule.

²¹² See Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 671-672 where they explain the types of annuities that qualify as

received as an annuity from a pension fund is regarded as income and is subject to the Standard Income Tax on Employees (SITE).²¹³

e) Taxation of retirement funds

In terms of section 10(1)(d), pension funds, provident funds and retirement annuity funds are exempt from income tax. They are, however, subject to tax in terms of the Tax on Retirement Funds Act.²¹⁴ The formula to determine the taxable amount of a retirement fund is based on the gross interest and net rental income received by the fund.²¹⁵ The principal officer of the fund will be the person responsible for performing the duties imposed by this Act.²¹⁶



f) Summary

It is in the Income Tax Act that the true distinctions between pension funds and provident funds are crystallised. Where an employer offers employees the choice of joining a pension or provident fund, the tax implications of their decisions should be made clear to them from the outset. With pension funds, a tax saving while contributing is an obvious advantage, as long as the member is aware that the annuitised portion of their retirement benefit would be fully taxable.

compulsory annuities. They can range from guaranteed and with-profit annuities to flexible annuities.

²¹³ Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 674-675 provide a detailed description of the application of the SITE system to pensioners.

²¹⁴ Act 38 of 1996.

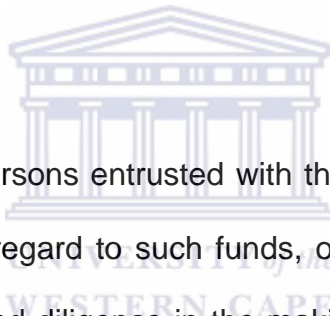
²¹⁵ Section 5 read with s 3. I.t.o. s 2 the current tax rate for retirement funds is 9%.

²¹⁶ Section 8(2)(a).

Conversely, with provident funds, although there is no tax deduction of contributions available, a portion of the lump sum paid at retirement is tax-free.

3.3.2.1.3 *The Financial Institutions (Protection of Funds) Act 28 of 2001*

The Financial Institutions (Protection of Funds) Act replaced the Financial Institutions (Investment of Funds) Act 39 of 1984. It deals with the investment, safe custody and administration by defined financial institutions of fund and trust property.²¹⁷ Pension, provident and retirement annuity funds are included under “financial institutions”.²¹⁸



The Act provides that all persons entrusted with the administration of funds and trust property should, with regard to such funds, observe the utmost good faith and exercise proper care and diligence in the making of an investment or in the control or administration of the funds.²¹⁹ They should also not make use of the funds in a manner calculated to gain direct or indirect improper advantage for themselves or any other person to the prejudice of the fund and its beneficiaries.²²⁰

A director, member, partner, official, employee or agent of a financial institution

²¹⁷ Defined in as s 1 as any asset “invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership, company or trust for, or on behalf of, another person, partnership, company or trust”.

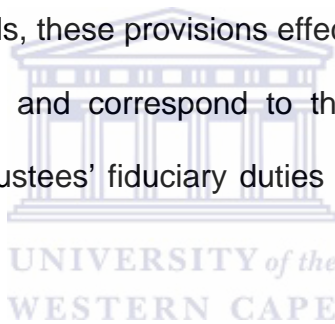
²¹⁸ The definition clause refers to the definition of “financial institution” in the Financial Services Board Act 97 of 1990, which includes any pension fund organisation registered i.t.o. the Pension Funds Act under financial institutions.

²¹⁹ Section 2(a) Financial Institutions (Protection of Funds) Act 28 of 2001.

²²⁰ Section 2(c).

who takes part in any decision to make an investment out of the funds of the institution or trust property in a company or other undertaking in which he or she has a direct or indirect financial interest, must declare such interest in writing to the board of management or other governing body, before that investment is made. A record of every declaration of interest must be made in the minutes of board or governing body meetings.²²¹ The duty to disclose interest will affect trustees of privately administered or non-exempt funds more than those of funds where investment decisions are delegated to insurers or asset managers.²²²

In relation to retirement funds, these provisions effectively codify the common law fiduciary duties of trustees and correspond to the provisions in the Pension Funds Act with regard to trustees' fiduciary duties of good faith and the duty to disclose.²²³



It is an offence to contravene any provision of the Act or to fail to comply with any provision thereof. Conviction of this offence could lead to a fine or imprisonment for a period not exceeding 15 years or both. In addition, any person contravening or failing to comply with the provisions of the Act is liable to the pension or provident fund or beneficiary concerned for any profit made by him and for any damage suffered by the retirement fund or beneficiary as a result of the

²²¹ Section 3.

²²² Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 480.

²²³ See below at 3.3.2.3.1.

contravention or failure.²²⁴

In terms of section 5 the Registrar may, on good cause shown, apply to the High Court for the appointment of a curator to take control of, and to manage the whole or any part of, the business of a fund. The curator acts under the control of the Registrar and must provide him or her with information required.²²⁵

The Registrar has the power to apply to the High Court to compel any fund to comply with any law or to cease contravening a law. He or she may also apply for a court order to compel a fund to comply with a lawful request, directive, or instruction made, issued or given by him or her.²²⁶

Finally, the Registrar may declare a specific practice or method of conducting business irregular or undesirable after he has invited interested persons to make representations and has consulted with the board of trustees of the fund.²²⁷ The fund may not continue an “irregular or undesirable” practice or method of conducting business after the registrar’s declaration.

²²⁴ Section 10.

²²⁵ Section 5(6) and (7).

²²⁶ Section 6.

²²⁷ Section 7.

3.3.2.1.4 *Other relevant legislation*

Apart from the abovementioned key statutes providing a framework for retirement provision, additional protection to pension and provident fund members is also provided by other legislation.

The Inspection of Financial Institutions Act²²⁸ provides for the inspection of the affairs of financial institutions, including pension fund organisations registered in terms of the Pension Funds Act.²²⁹

The Long-term Insurance Act²³⁰ replaced the Insurance Act 27 of 1943. The Act aims to provide for the registration of long-term insurers and to regulate the activities of long-term insurers and intermediaries. Many of the core administrative and asset management functions of funds are fulfilled by insurance companies, but it is particularly in the area of disability and death benefits where the role of insurance companies is most important.

Retirement funds make use of intermediaries such as investment managers on a regular basis. Members also make use of financial advisors for guidance on investments of lump sums. To protect retirement funds and members against

²²⁸ Act 80 of 1998.

²²⁹ Section 1 of the Inspection of Financial Institutions Act defines a “financial institution” as any institution referred to in the definition of “financial institution” in section 1 of the Financial Services Board Act 97 of 1990, which in turn lists a pension fund as a financial institution (sub-section (a)(i) of the definition).

²³⁰ Act 52 of 1998, as amended by the Insurance Amendment Act 17 of 2003.

abuses by financial services providers, the Financial Advisory and Intermediary Services Act²³¹ together with subordinate legislation regulates financial service providers. “Financial service providers” means any person who gives advice and/or an “intermediary service”²³² regarding a financial product. Financial products are defined in section 1 of the Act and include long-term or short-term insurance contracts, as well as retirement fund benefits.²³³

3.3.2.2 Benefits payable under retirement funds

Before the benefits usually paid by retirement funds are outlined, it must be pointed out that the combination of benefits that are paid out would depend on the rules of the particular fund. The law does not dictate which benefits must be paid;²³⁴ its role is limited to ensuring that the rules listing the benefits paid under a particular fund are made available to prospective members.

²³¹ Act 37 of 2002.

²³² “Intermediate service” is defined as

“any act other than the furnishing of advice, performed by a person for or on behalf of a client or product supplier-

- (a) the result of which is that a client may enter into, offers to enter into or enters into any transaction in respect of a financial product with a product supplier; or
- (b) with a view to –
 - (i) buying, selling or otherwise dealing in (whether or a discretionary or non-discretionary bases), managing, administering, keeping in safe custody, maintaining or servicing a financial product purchased by a client from a product supplier or in which the client has invested;
 - (ii) collecting or accounting for premiums or other moneys payable by the client to a product supplier in respect of a financial product; or
 - (iii) receiving, submitting or processing the claims of a client against a product supplier.”

²³³ Paras (c) and (d) of the definition of “financial product”.

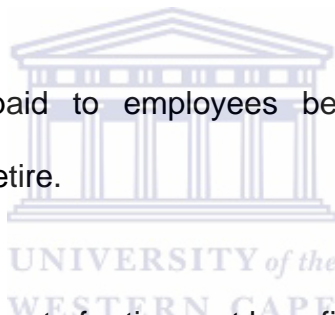
²³⁴ With the exception of minimum benefits payable i.t.o. the Pension Funds Second Amendment Act 39 of 2001.

In terms of the definition of pension and provident funds in the Income Tax Act,²³⁵ the benefits payable in terms of these funds are limited to retirement benefits, death benefits and withdrawal benefits.

This thesis will focus mainly on retirement benefits; other benefits such as withdrawal benefits will only be discussed in so far they affect the member's ability to provide for his or her own old age.²³⁶

3.3.2.2.1 *Retirement benefits*

Retirement benefits are paid to employees belonging to an occupational retirement fund when they retire.



There are two types of payment of retirement benefits:

- a) A lump sum is paid to provident fund members and in the case of pension fund members, up to one third of the benefit is payable as a lump sum on retirement.
- b) The other portion of the pension fund benefit is annuitised and is paid as a regular pension to retired members.²³⁷

The benefit payable on retirement depends on whether the fund is a defined

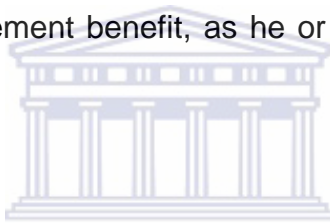
²³⁵ See above at 3.3.2.1.2.

²³⁶ Other benefits such as disability benefits, insured benefits, divorce benefits and benefits paid to the dependants of a deceased member fall outside the scope of this thesis.

²³⁷ See above at 2.5 for a more detailed discussion of the distinction between provident and pension funds.

benefit or defined contribution fund.²³⁸

The fund rules will determine the normal retirement age for members of that fund.²³⁹ In some cases a member may qualify for retirement benefits even though he or she has not reached the normal retirement age for that fund as stated in the rules.²⁴⁰ Benefits from defined benefit funds are calculated keeping number of years of membership in mind. The nearer a member is to retirement, the closer the early retirement benefit would be to the full retirement benefit. A member retiring early from a defined contribution fund should receive a benefit close to his or her full retirement benefit, as he or she would receive his or her pro rata share of the fund.



In *Stols v SA Timber & Joinery Works (Pty) Ltd and Another*²⁴¹ the Adjudicator had to determine whether the employer had acted unreasonably in withholding its consent to the complainant's early retirement. In terms of the rules of the pension fund, a member who had completed ten years continuous service, was within five years of the normal retirement date and had obtained the employer's consent thereto, was eligible for early retirement. The complainant was eligible for early retirement but, when she applied, the employer refused to grant its consent and she had to settle for the lesser resignation benefit.

²³⁸ The distinction between defined contribution and defined benefit fund is covered in detail at 2.6 above.

²³⁹ *Harilall v Maxirand Provident Fund* [2002] 1 BPLR 2933 (PFA) 2935.

²⁴⁰ Maharaj "Retirement benefits" in Jeram (ed) (2005) *An introduction to pensions law* 26.

²⁴¹ [2003] 8 BPLR 5077 (PFA).

Although the rules conferred a discretion on the employer to grant early retirement, the question here was whether the employer had exercised this discretion reasonably, that is, whether it had taken all relevant considerations into account and ignored irrelevant considerations.²⁴² The Adjudicator found that the employer had ignored factors such as the complainant's length of service, that there were no apparent negative factors surrounding her employment and resignation and that the complainant qualified in terms of the early retirement rule with regard to age and service. The employer had also stated that it had not agreed to the early retirement as granting the complainant's application would have set a precedent and the company could not afford to lose so many employees in such a short period of time. In response, the Adjudicator found that one payment would not set a precedent, as the employer is expected to exercise its discretion each time based on the specific circumstances of each case. With the employer's decision in this case being based on its fear of setting a precedent, it had fettered its discretion.²⁴³

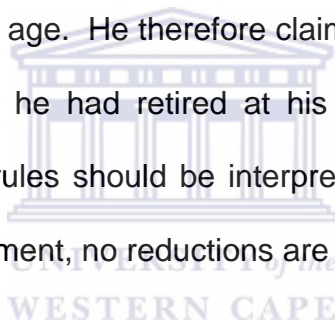
Events such as dismissal related to operation requirements might lead to early retirement from a fund. This would generally be the case where the employee to be dismissed is within a few years of normal retirement age.

In *Wilson v South African Mutual Life Assurance Society Pension Fund and*

²⁴² At 5079 para 8.

²⁴³ At 5079 para 10-12.

*Another*²⁴⁴ the complainant belonged to a defined benefit fund. He was given the option to retire early²⁴⁵ in terms of a rule which allowed for early retirement “at any time within the five-year period immediately preceding the Officer’s Normal Retirement date”.²⁴⁶ This, however, took place when the complainant was dismissed for operational requirements. The fund rules made no provision for retrenchment benefits. In terms of the rules, early retirement benefits were subject to reductions²⁴⁷ of the pension. The complainant argued that his pension should not have been reduced as early retirement was imposed upon him since he was retrenched. It was through no fault of his own that he could not complete service to normal retirement age. He therefore claimed that the fund should have calculated his benefit as if he had retired at his normal retirement age. He specifically asked that the rules should be interpreted so that where a member retires early due to retrenchment, no reductions are applicable.



The Adjudicator held that the complainant was not entitled to more than the reduced benefits. In the absence of special retrenchment benefits, he had opted for the early retirement benefit and was therefore subject to the rules governing it. The rules include the reduction factors applied to early retirement benefits “to account for the fact that the pension is being purchased at a younger age and thus payable over a longer period of time and also the fact that the benefit has

²⁴⁴ [2000] 6 BPLR 693 (PFA).

²⁴⁵ Or withdraw from the fund, but early retirement offered more generous benefits and enabled him to remain on the fund’s medical aid scheme.

²⁴⁶ At 694.

²⁴⁷ Section 2(e) of rule XVI provided for a reduction factor of 2,5% to be applied in relation to early retirement.

had less time to accumulate to ensure the defined benefit at retirement”.²⁴⁸ The rules do not take the reason for early retirement into consideration and apply the reduction factors in all cases. The Adjudicator therefore dismissed the complaint and held that the complainant was not entitled to more than the early retirement benefit calculated in terms of the rules of the fund, including the applicable reduction factors.

Even though the rules of the pension fund may provide for early retirement at the employer’s instance, this measure may not be abused to permit employers to dismiss employees for operational reasons without having to comply with the relevant rules of labour law.²⁴⁹ A test to determine whether an employer was legitimately and genuinely exercising a right to retire some employees or was in fact retrenching them was laid down in *Mutare Board & Paper Mills (Pvt) Ltd v Kodzenai*.²⁵⁰ According to Gubbay CJ it would depend on the circumstances of each case, but “[i]f large numbers of employees of the same class by age or type of occupation were suddenly and simultaneously required to proceed on early retirement then, in the absence of a convincing explanation, their retrenchment would be inferred”.²⁵¹ In casu, the thirty-eight employees who were “retired” early were advised that their early retirement was required in order to reduce the strength of the workforce. This was therefore clearly a case of a dismissal related to operational requirements disguised as early retirement.

²⁴⁸ *Wilson v South African Mutual Life Assurance Society Pension Fund and Another* [2000] 6 BPLR 693 (PFA) 697.

²⁴⁹ Section 189 Labour Relations Act 66 of 1995.

²⁵⁰ [2002] 2 BPLR 3041 (ZS).

²⁵¹ At 3044.

In some instances the fund rules may make provision for the fund and/or the employer to exercise their discretion to increase the early retirement benefit. In *Harilall v Maxirand Provident Fund*²⁵² the complainant was a member of a defined contribution fund and upon retiring early from the fund he was entitled to a lump sum benefit representing his member share.²⁵³ The Adjudicator was satisfied that the complainant's early retirement benefits were calculated correctly, but noted that the rules allowed for the fund and the employer to exercise their discretion to increase any benefit. The particular rule that allowed for greater benefits, however, only allowed the fund to exercise its discretion upon receiving notice from the employer to do so, as the increased portion would have to be paid by the employer. In casu, the employer was experiencing grave financial difficulties and was therefore unable to request the fund to exercise its discretion to increase the benefit. As a result, the Adjudicator dismissed the complaint and found that the complainant had received the benefits that he was entitled to in terms of the rules of the fund.

*Cassette v Sage Group Pension Fund and Another*²⁵⁴ also dealt with a complaint about the employer and the fund refusing to enhance an early retirement benefit. The complainant was retrenched and her pension benefit was first calculated in terms of the early retirement rule, which made provision for a reduction of one-third of 1% for each complete month by which her date of retirement preceded

²⁵² [2002] 1 BPLR 2933 (PFA).

²⁵³ I.t.o. master rule 5 of the fund.

²⁵⁴ [2002] 11 BPLR 4026 (PFA).

the normal retiring date. However, the rules also made provision for a waiver of the reduction factor²⁵⁵ as long as the employer paid the additional amounts representing the value of the reduction to the fund.²⁵⁶ The employer decided not to exercise its discretion to waive the reduction, which made the fund unable to enhance the early retirement benefit. The complainant was dissatisfied with this situation and opted for the early withdrawal benefit instead. She contended that she would have elected to receive the early retirement benefit, had it not been for the reduction of benefits.

The complainant lodged a complaint with the Adjudicator based on her argument that, owing to the fact that she was retrenched, the employer should have exercised its discretion to waive the early retirement reduction. The Adjudicator held that the employer's discretion to enhance a benefit has to be exercised "in a judicious manner by considering relevant factors and discarding irrelevant considerations".²⁵⁷ In the Adjudicator's opinion, the employer in this case had properly exercised its discretion and had gone beyond its duty to accommodate the complainant.²⁵⁸

It can be concluded from the survey of case law above that where the fund rules make provision for early retirement upon the employer's discretion, the employer

²⁵⁵ Rule 4.2; *Cassette v Sage Group Pension Fund and Another* [2002] 11 BPLR 4026 (PFA) 4027, para 6.

²⁵⁶ Rule 4.4.

²⁵⁷ *Cassette v Sage Group Pension Fund and Another* [2002] 11 BPLR 4026 (PFA) 4032, para 7.

²⁵⁸ A meeting had been held to discuss the available options i.t.o. the pension fund rule; the generous severance package; two different positions were offered to the complainant, both which she refused.

should take all relevant factors into consideration in deciding whether to grant early retirement or not. Employers may not disguise dismissal for operational requirements as early retirement. Where the rules allow early retirement, but with a reduced benefit, employees who opt for early retirement are bound by the rules and the resultant reduced benefit.

3.3.2.2.2 *Withdrawal benefits*

The motivation for the examination of withdrawal benefits in a work that focuses mainly on financial security in old age is that, in a labour market where so many people are dismissed for operations requirements, withdrawal benefits have become more the norm than the exception. In an insecure labour market, “fair withdrawal benefits become the primary means of ensuring fulfillment of the legislative policy of encouraging the preservation of retirement assets for use in old age.”²⁵⁹

As membership of an occupational retirement fund is linked to employment, membership of such a fund ends when an employee is dismissed, retrenched or resigns prior to retirement age,²⁶⁰ in which case withdrawal benefits are payable. The circumstances of the termination of the employment relationship may determine the mode of exit from the fund and consequently the amount payable

²⁵⁹ Adjudicator Murphy, quoted in Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 214.

²⁶⁰ As opposed to early retirement discussed above at 3.3.2.2.1.

to the member.²⁶¹

With defined benefit funds the normal benefit upon retirement equals a percentage of final salary multiplied by the years of service. Only retiring employees are entitled to the full benefit. Employees who leave service prior to retirement age will therefore forfeit a portion of their benefit.

Most defined benefit funds' rules offer members who leave before retirement age only their own contributions plus nominal interest thereon. On rare occasions, employer contributions are added to this amount.²⁶²

Another option that is offered to longer serving members upon the occasion of their withdrawal from the fund is that they can elect to preserve the actuarial reserve value²⁶³ of their retirement benefit by transferring that amount to an approved fund.²⁶⁴

In the case of defined contribution fund members retiring, length of service is irrelevant as their benefit is based on their "accumulated credit" or "member's

²⁶¹ MacKenzie "Withdrawal benefits" in Jeram (ed) (2005) *An introduction to pensions law* 56.

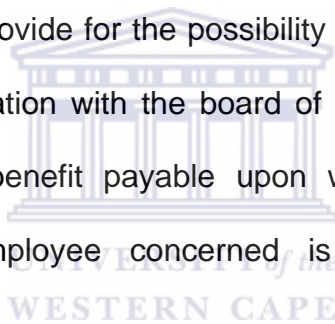
²⁶² The inclusion of employer contributions is rare in defined benefit funds, as many employers do not contribute in a direct manner, but are instead liable to "contribute" if there is a shortfall in the fund. Identifying the employer's contributions is therefore problematic (MacKenzie "Withdrawal benefits" in Jeram (ed) (2005) *An introduction to pensions law* 59).

²⁶³ Actuarial reserve value is "the amount (capital discounted to present day value) that the fund deems necessary to hold in asset value on behalf of the member in order to pay him the benefit promised on retirement" (MacKenzie "Withdrawal benefits" in Jeram (ed) (2005) *An introduction to pensions law* 59).

²⁶⁴ MacKenzie "Withdrawal benefits" in Jeram (ed) (2005) *An introduction to pensions law* 59. The fund must give the withdrawing member a reasonable opportunity to exercise his or her options. See *Maepa v Sanlam Retirement Fund (Office Staff)* [2002] 2 BPLR 3093 (PFA).

share”.²⁶⁵ The member’s share is made up of the employee contributions plus that portion of the employer contributions which has not been deducted for risks benefits²⁶⁶ and fund costs. This method of calculating benefits does not totally exclude penalties for leaving service before retirement, as some fund rules make provision for a “vesting scale”,²⁶⁷ in terms of which the employer’s contributions will only vest as part of the member’s credit after a period of years.²⁶⁸ Many funds have, however, removed penalty provisions such as vesting scales from their rules regarding withdrawal benefits.²⁶⁹

The rules of a fund often provide for the possibility of the board of management, or the employer in consultation with the board of management to exercise the discretion to enhance a benefit payable upon withdrawal from the fund,²⁷⁰ particularly when the employee concerned is dismissed for operational



²⁶⁵ The portion of employee and employer contributions credited directly to the member’s individual account (MacKenzie “Withdrawal benefits” in Jeram (2005) *An introduction to pensions law* 62).

²⁶⁶ Including group life insurance and disability premiums.

²⁶⁷ A defined contribution fund member does not “own” his member’s share before retirement or withdrawal. Employee contributions, employer contributions and a portion of investment returns become part of the member’s share to which he or she is entitled upon withdrawal from the fund – these amounts “vest” in the member over a period of years. The amount payable on the date of accrual, i.e. date of retirement or withdrawal, may therefore differ from the amounts that have vested in the member (MacKenzie “Withdrawal benefits” in Jeram (ed) (2005) *An introduction to pensions law* 61 and 62).

²⁶⁸ E.g. 20% of the employer’s contributions vesting for each year of service until 100% is reached at the end of year five. See also *Fourie v Free State Municipal Pension Fund* [2002] 12 BPLR 4131 (PFA) 4132 para 4 for rule 39(1) of the fund, which is a good example of how a vesting scale works.

²⁶⁹ MacKenzie “Withdrawal benefits” in Jeram (ed) (2005) *An introduction to pensions law* 58.

²⁷⁰ In *Joffe v Lenco Holdings Ltd and Another* [2000] 4 BPLR 395 (PFA), the Adjudicator found that an employer that decided not to exercise its discretion to enhance withdrawal benefits based on a fairly rigid policy not to award an enhancement, unless in recognition for good performance, had effectively abdicated its power and responsibility by rigidly applying its policy and not taking into account relevant factors, such as, the complainant’s length of service or that he was relatively close to retirement age.

reasons.²⁷¹

The above-mentioned arrangements for withdrawal benefits all reflect the position prior to the introduction of minimum benefit requirements in terms of the Pension Funds Second Amendment Act.²⁷² As more funds comply with the requirements of the Second Amendment Act, there will be less scope for enhancement of benefits on an *ad hoc* basis as the reserves from which these discretionary benefits are to be paid will be diminished.²⁷³

The minimum withdrawal benefit payable to a member leaving the fund before retirement may not be less than the minimum individual reserve determined in terms of section 14B(2).²⁷⁴ The “minimum individual reserve” of a member of a defined benefit fund will be the greater of the present value of the benefit payable from the member’s retirement age based on certain prescribed assumptions,²⁷⁵ and the member’s contributions and “such share of the employer contributions paid in respect of the members as has vested in the employee in terms of the

²⁷¹ See *Harris v AECI Pension Fund and Another* [2000] 7 BPLR 737 (PFA); *Lezar v Braitex Pension Fund and Another* [2001] 8 BPLR 2380 (PFA).

²⁷² Act 39 of 2001. The minimum benefits requirements became applicable to most funds a year from their surplus apportionment dates (S 14A(2)(b) Pension Funds Act, as amended). S 15B(1) requires fund boards to submit a scheme for the proposed apportionment of any actuarial surplus “as at the effective date of the statutory actuarial valuation of the fund coincident with, or next following” the commencement date of the Second Amendment Act (7 December 2001). Such scheme must be submitted within 18 months from the “effective date”. It is submitted that most funds should have already implemented the minimum benefits requirements by 2006 taking into account the three-year actuarial valuation cycle (see below at 3.3.2.3.3) as well as the 12 months opportunity from the surplus apportionment date for stakeholders to renegotiate the benefit structure.

²⁷³ MacKenzie “Withdrawal benefits” in Jeram (ed) (2005) *An introduction to pensions law* 67.

²⁷⁴ Section 14A(1)(a).

²⁷⁵ Published under Board Notice No. 35 in GG 24809 of 25 April 2003.

rules of the fund” plus returns earned.²⁷⁶ In the case of defined contribution fund members, their minimum individual reserve will be made up of the member’s individual account²⁷⁷ plus a proportional share of the investment reserve account, the member surplus account and such contingency reserve accounts as are deemed appropriate by the board.²⁷⁸

The minimum benefit requirements imposed by the Pension Funds Second Amendment Act have improved the fortune of many members who were left at the mercy of trustees and employers before.²⁷⁹ There are still some issues of concern, such as:

- Members withdrawing from defined benefit funds are only entitled to their employers’ vested contributions, as opposed to their defined contribution fund counterparts who are entitled to full employer contributions.
- Boards of management will still have discretionary powers, e.g. over

²⁷⁶ Section 14B(2)(a). Note that only employer contributions that have already “vested” are included.

²⁷⁷ Which in terms of s 14B(1) includes the fixed-rate contributions paid by the employer on behalf of the member.

²⁷⁸ S 14B(2)(b).

²⁷⁹ A survey of case law on the position before the minimum benefit requirements becoming applicable illustrates that the following issues were of particular concern to fund members upon withdrawal from the fund: the nature of the actuary’s duty to rely on estimates and assumptions when determining amounts to be transferred to an approved fund (*Associated Institutions Pension Fund v Le Roux and Others* [2001] 8 BPLR 2285 (A); *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] 10 BPLR 6107 (SCA)); instances where individual members were disqualified from receiving the full withdrawal benefit provided for in the fund rules (*Allie v Southern Staff Pension Fund* [2002] 5 BPLR 3402 (PFA)); discriminatory arrangements, where one group of withdrawing members stand to receive substantially less than another for a purely arbitrary reason (*Fourie v Free State Municipal Pension Fund* [2002] 12 BPLR 4131 (PFA)); amendment of defined contribution fund rules according to which members’ shares are calculated in order to protect the fund against unforeseen falls in the investment market (*Armellini v Southern Field Staff Defined Contribution Fund* [2001] 3 BPLR 1693 (PFA)); penalties in fund rules for cases where a member’s employment is terminated by dismissal on grounds of misconduct, or where members resign to avoid such dismissal (*Manzini v Metro Group Retirement Fund and Another (1)* [2001] 12 BPLR 2808 (PFA); *Sebola v Johnson Tiles (Pty) Ltd and Others* [2002] 3 BPLR 3242 (PFA)).

the proportionate share of the contingency reserve accounts payable to a member withdrawing from a defined contribution fund.

- It remains to be seen what effect the “renegotiating” of benefit structures in preparation for the minimum benefit requirements will have on overall benefits. The language used creates the impression that the savings that will have to be affected to implement the minimum benefit requirements might be at the cost of other benefits.
- As was stated above, there will be less scope for discretionary enhancement of withdrawal benefits due to a decrease in the reserves from which such enhanced benefits would have been paid.

3.3.2.3 The administration of retirement funds

3.3.2.3.1 *Boards of management*



The main function of retirement funds is to provide benefits to members on their retirement. It is therefore imperative that the persons in charge of the funds fulfil their functions in such a manner that the members could be confident that their interests are protected. It is in this context that the election of boards of management and their duties will be discussed.

a) Composition of boards of management:

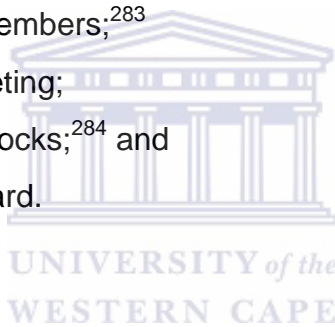
Every fund must have a board consisting of at least four members²⁸⁰ and

²⁸⁰ The terms “board member”, “member” and “trustee” are used interchangeably. The Registrar may on application allow a fund to have fewer than four board members if he is satisfied that it would be impractical and unreasonably expensive to require such number of trustees (provided that fund members will still have the right to elect at least 50% of the board members): s 7B(1)(a)

members of the fund have the right to elect at least 50% of the board.²⁸¹ A fund without a properly constituted board could find itself in legal difficulty.

The rules of the fund should provide for the following matters regarding the establishment of a board of management for the fund:²⁸²

- the constitution of the board;
- the election procedure for board members who are to be elected by fund members;
- the appointment and terms of office of members of the board;
- the procedures to be followed at board meetings;
- the voting rights of members;²⁸³
- the quorum for a meeting;
- the breaking of deadlocks;²⁸⁴ and
- the powers of the board.



Pension Funds Act 24 of 1956. The Registrar will accept *prima facie* that it would be impractical or unreasonably expensive for the fund to have four or more trustees if the fund has fewer than 50 members or its assets are less than R2.5 million (Registrar of Pension Funds *Circular PF No 96*, para 5.2). The Registrar will also consider the geographical distribution of employers and/or members and whether it is a defined benefit or defined contribution fund (funding method). The Registrar will only allow an exemption from the requirements for the composition of a board when he is satisfied that the standard of record-keeping, payment of benefits, general fund administration, investment and internal controls of the fund will not be adversely affected thereby.

²⁸¹ Section 7A(1). It is not compulsory for members to elect board members (“at least 50% of whom the members of the fund **shall have the right** to elect”: my emphasis) and as a result a fund with a board of management will not be illegal purely because all board members are employer-appointees. Retirement annuity funds, beneficiary funds and preservation funds are exempt from the requirement that members of the fund have the right to elect board members (s 7B(1)(b) as amended by the Financial Services Laws General Amendment Act 22 of 2008).

²⁸² Section 7A(2).

²⁸³ Voting rights are not addressed in the Act but have to be specified in the fund rules. Employers may well insist on some form of control of investment decisions of defined benefit funds before they will be prepared to assume the investment risk (Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 93).

²⁸⁴ E.g. the election of a chairperson with a casting vote. See *Circular PF No 96*, para 4.9 and *Circular PF No 98*, para 3.2. The PF Circulars serve as guidelines of what is considered to be sound practice by pension funds by the Financial Services Board (*Van Wezel v Gencor Pension Fund and Others* [2001] 2 BPLR 1668 (PFA) 1674 para 20).

The Registrar of Pension Funds has laid down several additional requirements relating to boards of management, including the following:

- Even though board members need not be fund members, the fund rules may require member-elected trustees to be members of the fund, if so agreed to by the appropriate employee negotiating fora.²⁸⁵
- The term of office of a board member should be limited to five years.²⁸⁶
- Any material change in the composition of fund membership may necessitate a change in the composition of the board of management.
- If the board of trustees consists of more than four trustees, the quorum at board meetings should be structured in such a way that both member elected trustees and employer appointed trustees are included.²⁸⁷

Active members usually get preference when member representatives to the board are nominated. In terms of the definition of “member” in the Pension Funds Act this is not the correct approach as the definition only excludes “any such member or former member or person who has received all the benefits which may be due to him from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund.” Consequently, deferred members and pensioners should also be considered as nominees for members of the board²⁸⁸ and have a right to vote for members of the board.²⁸⁹

²⁸⁵ *Circular PF No 96*, para 4.2.

²⁸⁶ *Circular PF No 96*, para 4.5.

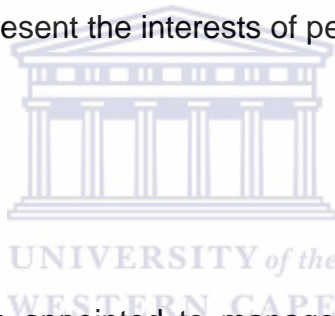
²⁸⁷ *Circular PF no 96*, para 4.8.

²⁸⁸ Although, according to Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 96, deferred members and pensioners are likely to constitute minorities in the funds and therefore in the context of a board of management.

²⁸⁹ *Circular PF No 98*, para 3.1.

In *Longo v Cape Joint Pension Fund*²⁹⁰ the complainant objected to an amendment to the rules of the fund that was made without consulting existing pensioners or granting them any option to benefit under the amendment. The Adjudicator affirmed that there are no statutory requirements for the appointment of a board member specifically for pensioner members. He also found that on the facts there was no proof that, had there been pensioner representatives on the board, the rule amendment would have allowed all pensioners a benefit as the complainant claimed. He did, however, concede that it might be a good idea in the interests of transparency if provision was made for appointment of board members specifically to represent the interests of pensioner members.²⁹¹

b) Duties of trustees



Boards of management are appointed to manage the dealings of a fund in a manner that will further the objectives of the fund as stated in the rules.

Retirement funds are viewed as trust funds²⁹² and are therefore subject to the principles of the common law of trusts, which specifies important codes of behaviour for people responsible for the management of a trust. Trustees are in a position of trust and have to act in accordance with their fiduciary duties at all

²⁹⁰ [2000] 6 BPLR 623 (PFA).

²⁹¹ At 627, para 21.4.

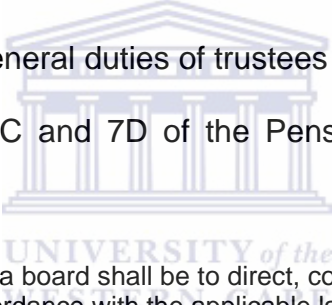
²⁹² Address by Dr Chris Stals, Governor of the South African Reserve Bank, at the 1996 Annual Conference of the Institute of Retirement Funds.

times.²⁹³

The common law duties and responsibilities of trustees were summarised in the Mouton Committee Report²⁹⁴ as the duty –

- a) to act with due care and diligence,²⁹⁵
- b) to act in good faith;²⁹⁶
- c) to obtain expert advice if the trustees' own knowledge is found wanting;
- d) to avoid conflicts of interest;
- e) to hold assets for the benefit of the fund and its members; and
- f) to act with impartiality in respect of all beneficiaries.²⁹⁷

Some of the fiduciary and general duties of trustees of retirement funds have also been codified in sections 7C and 7D of the Pension Funds Act. Section 7C provides:

- 
- “(1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.
- (2) In pursuing its objects the board shall –
- (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;
 - (b) act with due care, diligence and good faith;

²⁹³ See Du Toit (2007) *South African trust law: Principles and practice* (2nd ed) 81-82.

²⁹⁴ *The Report of the Committee of Investigation into a Retirement Provision System for South Africa* (1992) Vol 1 (hereafter “Mouton Committee Report”) 178-180). The Mouton Committee was appointed in 1998 to “review the effectiveness of the retirement provision systems in South Africa and propose guidelines for any changes that are deemed necessary to move towards the goal of providing all South Africans with adequate income in their old age” (Mouton Committee Report (1992) 2).

²⁹⁵ In terms of this duty all trustees are required to be fully acquainted with all the legal aspects pertaining to their positions as trustees.

²⁹⁶ According to the Mouton Committee, a trustee’s overriding duty is to act with due care and in good faith. All the other common law duties are derived from these two duties (Mouton Committee Report 178).

²⁹⁷ Trustees may in terms of this duty not act against the interests of one member to the benefit of others.

- (c) avoid conflicts of interest;
- (d) act with impartiality in respect of all members and beneficiaries.”

Section 7C(1) ties in with the common law duty to know the content of relevant legislation and case law. This duty requires trustees to obtain expert advice on matters on which they are not specialists.²⁹⁸

The instances where a board is specifically required to take all reasonable steps to ensure that members’ interests are protected are listed in section 7C(2)(a).²⁹⁹

The interests of members should be protected particularly in the event of an amalgamation or transfer of any business contemplated in section 14.³⁰⁰ The complainant in *Van Wezel v Gencor Pension Fund and Others*³⁰¹ centered his complaint on the transferring fund’s failure to hedge the value of his benefits pending his transfer from the one fund to the other, and alleged that had the fund done so, the transfer value would have been substantially more favourable. The Adjudicator based his determination on section 7C(2)(a) which “gives primacy to the taking of reasonable steps to ensure the protection of member interests within the context of the rules of the fund and the provisions of the Act”,³⁰² read with section 7C(2)(b) which obliges the board to act with due care, diligence and good faith. Although the transferring fund had the power in terms of its rules to

²⁹⁸ Mouton Committee Report (1992) 179; Downie (1999) [chapter 6, 2.A.]; Financial Services Board *Circular PF No 98* para 4.2.

²⁹⁹ *PF Circular No 98* provides that, in order for the board of management to meet its obligations in terms of section 7C(2)(a), it should “bear in mind that at all times it should act in the best interest of all fund members and that timeous, relevant and meaningful communication takes place with all members in a comprehensive manner to enable members to make balanced and informed decisions.” (para 4.4.1.3).

³⁰⁰ Amalgamations and transfers i.t.o. s 14 are discussed below at 5.4.4.

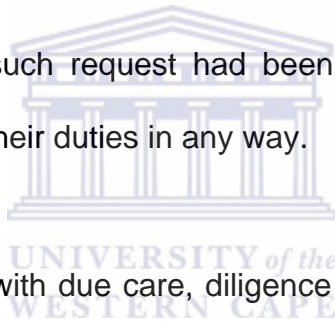
³⁰¹ [2001] 2 BPLR 1668 (PFA).

³⁰² At 1673 para 16.

conclude an agreement to place funds on call, it was never formally requested to do so. The Adjudicator stressed that board members should not act as representatives of a specific interest group but rather act reasonably in the best interests of all the beneficiaries of the scheme. Their duty to act with due care requires them to act honestly and prudently, “taking all those precautions which an ordinary prudent man of business would take in the managing of similar affairs of his own”.³⁰³ The Adjudicator summarised the general rule as being that

pending transfer trustees are obliged to follow a prudent investment strategy based on suitable expert advice and that they should give proper and timeous consideration to investing transfer values at fixed rates of interest in response to a legitimate request to do so from affected members or their authorised representative.³⁰⁴

He was satisfied that no such request had been made *in casu* and that the trustees had not breached their duties in any way.



As regards the duty to act with due care, diligence and good faith, the Financial Service Board gave some guidance in *Circular PF No 98*. The duty to act in good faith includes the duty to avoid misleading and deceptive acts or representations. Trustees should not unreasonably rely on any provision that enables them to exclude or restrict any duty they have toward a member.³⁰⁵ The duty to act with due care and diligence is described as meaning that board members should act “as can reasonably be expected from a prudent person in a like position and under similar circumstances”.³⁰⁶

³⁰³ At 1675 para 23.

³⁰⁴ At 1677 para 27.

³⁰⁵ *Circular PF No 98* para 4.5.1.

³⁰⁶ “Prudence” denotes not taking risks without taking due account of the consequence of the risks (para 4.5.2).

The impartiality required of board members in terms of section 7C(2)(d) obliges them to have all members' interests at heart, including those of pensioners, deferred pensioners and beneficiaries. Impartiality of board members is particularly significant in the case of decisions on investments and allocation of surplus, as these are occasions where the interests of present and future members of the fund may conflict.³⁰⁷

In addition to the duties listed in section 7C, section 7D requires the board of trustees³⁰⁸ to

- ensure proper record keeping;³⁰⁹
- ensure that proper control systems are employed in the fund;³¹⁰
- ensure adequate and appropriate communication of information to members of the fund;³¹¹

³⁰⁷ *Circular PF No 98* para 4.6.

³⁰⁸ Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 99 draw attention to the fact that ss 7C and 7D only apply to boards of trustees and not to all officers of the fund.

³⁰⁹ Particularly in the light of s 33(2) of the Constitution (the right to administrative justice) which states that “[e]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons.” Section 33(2) is implemented by means of s 5 the Promotion of Administrative Justice Act 3 of 2000, and judicial review of administrative action ordinarily occurs i.t.o. the Act and not the Constitution directly. See *Minister of Health v New Clicks SA (Pty) Ltd* 2006 1 BCLR 1 (CC) 38 para 96; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 BCLR 158 (CC) 185-186 paras 92-93. Proper minutes of all resolutions passed by the board of management should therefore be kept. See also *Circular PF No 98* para 5.1.

³¹⁰ Although it is impossible to prevent all instances of theft and fraud, the trustees must ensure that control measures are introduced that would make it more difficult to perpetrate fraud (Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 102). *Circular PF No 98* para 5.2 lists the measures that trustees are required to take to ensure that proper control systems are in place.

³¹¹ *Circular PF No 86* provides for the minimum disclosure requirements to be observed by funds. It sets out the minimum requirements for information to be contained in the explanatory pamphlets supplied to new members on admission to the fund, as well as the notification to members of special events such as restructuring of the fund, withdrawal from service, retirement and death. In addition, *Circular PF No 98* para 5.3.3 states that “the board should pay due regard to the information needs of the members concerned and communicate relevant meaningful

- take all reasonable steps to ensure that contributions are paid timeously to the fund;³¹²
- obtain expert advice on matters where they may lack sufficient expertise;³¹³ and
- ensure that the rules and operation and administration of the fund comply with the Pension Funds Act, the Financial Institutions (Protection of Funds) Act and other applicable laws.

Trustees are rarely elected to the board of trustees on account of their knowledge of the law applicable to retirement funds. For this reason the final duty listed in section 7D might be quite onerous for many trustees. They need to have in-depth knowledge of the fund's rules and administrative procedures and be familiar with diverse laws, ranging from the Constitution to the Pension Funds Act. Lack of legal expertise would not excuse them from compliance with this duty, as they are required to obtain expert advice on matters where they may lack sufficient expertise. Hence the duty to ensure compliance with applicable law and the duty to obtain expert evidence on matters where trustees may lack sufficient expertise have to be read together.

The Act does not prescribe specific penalties for non-compliance with sections 7C and 7D. This does not mean that there are no consequences for non-

information in a timely and comprehensive manner to enable members to make balanced and informed decisions”.

³¹² See para 5.4.1. *Circular PF No 86*.

³¹³ As more members approach the PFA with complaints about maladministration of the fund, trustees and funds are exposed to claims for damages. Trustees need to obtain expert advice to protect themselves against personal liability (Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 103). They will have to be careful before endorsing such advice, however, as they remain responsible for the final decision (para 5.5.1 *Circular PF No 86*).

compliance,³¹⁴ as

- trustees who are in breach of the corresponding common law fiduciary duties are still exposed to the penalties imposed under common law;³¹⁵
- trustees run the risk of delictual claims against them in their personal capacities for damages suffered by the fund as a result of their negligence, theft or fraud;
- conviction of a contravention of the Financial Institutions (Protection of Funds) Act could lead to a penalty of up to 15 years imprisonment.³¹⁶

Both the common and statutory law requires trustees to ensure that existing interests of the members of the fund are protected. In addition, they are required to take positive steps to advance the interests of members and should therefore exercise their discretionary powers in the best interests of the members.³¹⁷ They are nonetheless required to administer and manage the fund in accordance with its rules.³¹⁸



3.3.2.3.2 Retirement fund rules

Each retirement fund has its own set of rules.³¹⁹ The fund's board is bound by its

³¹⁴ Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 104.

³¹⁵ E.g. trustees can be ordered to return profits made as a result of improper conduct (Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 104.

³¹⁶ Section 10(1) Financial Institutions (Protection of Funds) Act 28 of 2001.

³¹⁷ See Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 101.

³¹⁸ Mouton Committee Report (1992) Vol 1, 178.

³¹⁹ General Note 17 (25 April 1996) allows retirement fund administrators to submit their standard rules to the Commissioner of SARS for approval. Subsequent requests for approval of fund rules based on the standard rules (set of model rules) can then be processed more efficiently.

rules,³²⁰ which regulate the operation and administration of the fund and set out the rights and obligations of the various parties to the fund, thereby making the rules the most important fund document, equivalent to its constitution.³²¹ Accordingly, rules can only be amended in the manner prescribed by the rules themselves and after approval of such amendments or additions by the Registrar.³²² It is imperative for trustees to acquaint themselves with the rules, as these determine how the trustees are required to administer the fund.³²³

What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it. They have no inherent and unlimited power as trustees to deal with a surplus as they see fit, notwithstanding their fiduciary duty to act in the best interests of the members and beneficiaries of the fund.....[T]heir substantive powers at any given moment are circumscribed by the rules as they are at that moment. The fact that power to change the rules exists is irrelevant when assessing whether or not the particular exercise of power in question was *intra* or *ultra vires*.³²⁴

Fund rules may not be inconsistent with the Pension Funds Act. Regulation 30(2) of the Pension Funds Act lays down the information required before the Registrar of Pension Funds will approve the rules of a fund.³²⁵

³²⁰ Members and officers of the fund are also bound by the rules, as well as any person who claims under the rules or a person with a derived claim (s 13 Pension Funds Act).

³²¹ In *Abrahamse v Connock's Pension Funds* 1963 2 SA 76 (W) an employee had failed to apply for membership of the pension fund by the date fixed by the fund's rules. In an action against the pension fund he averred that the fund should be estopped from denying he was a member as monthly contributions were deducted from his salary. Trollop J held that the fund, as a body corporate, was bound by its rules which were available for inspection and as the rules made no provision for late applications for membership the fund could not be bound by estoppel to do anything beyond its legal capacity. In *Levy v Trade and Finance Group Retirement Fund and Another* [2000] 12 BPLR 1375 (PFA) 1378 the Adjudicator identified the problem that fund members as a rule do not challenge the validity of rules that they perceive as harsh or pressurise the trustees to amend such rules. A fund member's failure to challenge a rule may "in many ways" be regarded as an acceptance of the rule.

³²² Section 12. Trustees should keep their fiduciary duties in mind when amending the rules of the fund (*Circular PF No 98* para 4.3).

³²³ Downie (1999) *The essentials of retirement fund management in South Africa* chapter 4, 1.B.

³²⁴ *Tek Corporation Provident Fund and Others v Lorentz* 1999 4 SA 884 (SCA) 898 para 28.

³²⁵ Reg 30(2) GN R 98 in GG 162 of 26 January 1962 (as amended).

What then should trustees' attitude towards existing discriminatory rules be? Are they bound by these rules or may they repeal them? Hunter³²⁶ refers to section 7D(f) of the Pension Funds Act, which provides that the duties of a board of trustees shall among others be to

ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001, ... and all other applicable laws.

She argues that this provision means that trustees are obliged to repeal unfair rules, e.g. rules that discriminate against members who are transferring out of a fund in favour of those who will remain.³²⁷

Section 9 of the Constitution obliges all persons not to discriminate unfairly. The Promotion of Equality and Prevention of Unfair Discrimination Act³²⁸ gives effect to this duty outside the employment context and is one of the "applicable laws" referred to in section 7D(f). Hence, trustees must ensure that discriminatory rules are repealed.

In *Group of Concerned SAPREF Pensioners v SAPREF Pension Fund and Others*,³²⁹ one of the issues for determination was the validity of the retrospective amendment of a rule which made the fund, instead of the employer, responsible for all the fund's expenses. The Adjudicator referred to his determination in *San*

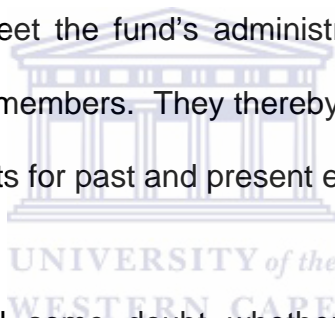
³²⁶ Hunter "The Tek Judgment: An Appropriate Judicial Response to Pension Fund Surpluses" PLA Conference 1998.

³²⁷ See below at 5.4 regarding the position of members transferring out of a fund.

³²⁸ Act 4 of 2000, s 2(a).

³²⁹ [2000] 1 BPLR 44 (PFA).

*Georgio v Cape Town Municipal Pension Fund*³³⁰ that, as part of their duty to act with care and diligence, trustees of funds are required to exercise their powers reasonably and justifiably. In order to determine whether the trustees had acted reasonably, the Adjudicator considered their fiduciary duties, particularly the duty to act in the beneficiaries' best interests and the duty to act in good faith. In terms of section 12 of the Pension Funds Act a fund may amend any rule in the manner directed by its rules. Rule 51 of the fund allows the trustees to amend the rules, but requires the concurrence of the employer. The Adjudicator held that the trustees had acted unreasonably by giving in to the employer's dictate that it was no longer willing to meet the fund's administration expenses, without any notice to, or input from, the members. They thereby lost sight of the fund's object which was to provide benefits for past and present employees.³³¹



The Adjudicator expressed some doubt whether section 12 authorises the retrospective amendments of rules. Even if retrospective rule amendments are possible, such amendments would still have to be reasonable and constitutional. In determining the reasonableness of a retroactive measure, the Adjudicator has to establish the public interest served by such measure and “the extent to which that end can be implemented only by retrospective action impacting on pre-existing rights”.³³² He held that options other than retrospective amendment of the rules, such as negotiations between the employer and member, were available and that the essence of the rule amendment was an attempt to provide

³³⁰ PFA/WE/8/98.

³³¹ [2000] 1 BPLR 44 (PFA) 64.

³³² At 65.

the employer with unilateral access to the surplus. In his view the retrospective amendment of the rule was both unlawful and unreasonable.³³³

Even though the rules are binding on the fund and members in terms of section 13, the Adjudicator held that where rules are inconsistent or incompatible with other provisions of the Act, those other provisions will prevail over section 13 and the rule. According to the Adjudicator “[r]ules consequent upon an abuse of power or maladministration do not enjoy binding effect because that effect would be incompatible with the provisions of Chapter VA of the Act aimed at empowering the Adjudicator to reverse abuses of power and maladministration in the affairs of pension funds.”³³⁴ It therefore appears that trustees would not be bound by unreasonable and unlawful rules.

3.3.2.3.3 *Administrative functions*

The various types of administrative functions can be classified as follows:

- general administrative functions, such as the collection of contributions, payment of pensions, keeping records of members, production of accounts, communication with members;
- investment functions, including investment of money or payment to an insurance company, keeping in mind the needs of the fund;
- technical functions, such as the actuarial valuation of the fund;
- the making of policy decisions, such as increases in benefits, changing the

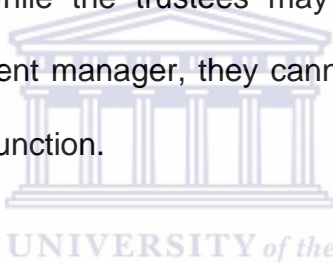
³³³ Ibid.

³³⁴ At 69.

rules and dealing with individual cases.³³⁵

These administrative functions are mainly carried out by a fund administrator, who may be an employee of the employer, an insurance company or, as the case with most large funds, a professional administration company.³³⁶ The administrator must be approved by the Registrar.³³⁷

The trustees may delegate the investment functions to an investment manager,³³⁸ giving him or her the task of managing the assets of the fund.³³⁹ Downie³⁴⁰ stresses that, while the trustees may delegate the task of asset management to an investment manager, they cannot abdicate the responsibility attached to the investment function.



According to the Pension Funds Act every registered fund must have a principal officer.³⁴¹ He or she is the fund's official contact person with the Registrar for the purposes of compliance with the Act and regulations.³⁴² In practice, the main task of the principal officer is to manage the day-to-day affairs of the fund and

³³⁵Sephton (1990) *A guide to pension and provident funds* 33; Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 139.

³³⁶Downie (1999) *The essentials of retirement fund management in South Africa*, chapter 5, 1.1.

³³⁷Section 13B(1). The Registrar may set conditions for the approval of the administrator.

³³⁸Portfolio managers and insurers may also be appointed by the trustees of the fund to administer the investments of the fund (Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 138).

³³⁹As opposed to self-administered funds where the board of management itself is responsible for investment administration.

³⁴⁰Downie (1999) *The essentials of retirement fund management in South Africa* chapter 5, 1.L..

³⁴¹Section 8. The pension fund regulations define a principal officer as the "principal executive officer referred to in section 8 of the Act, who may be a member of the body managing the affairs of the fund or controlling the fund" (board of trustees or similar body).

³⁴²Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 113.

convene trustee meetings at which he or she reports on progress made on fund matters.³⁴³ All documents submitted to the Registrar need to be signed by the principal officer and at least one other person authorised in terms of the rules of the fund.³⁴⁴

The Pension Funds Act also requires all registered funds to appoint an auditor³⁴⁵ and a valuator (an actuary or a person considered to have actuarial knowledge).³⁴⁶

It is the duty of an actuary or valuator³⁴⁷ to perform the technical functions of calculating the amount of money the fund will need to meet its obligations to the members. Every fund is required to have the financial condition of the fund investigated every three years by a valuator, and has to submit a copy of the valuator's report to the Registrar.³⁴⁸ Should the Registrar suspect that an investigation would show that the fund is not in a sound financial condition, he or she can at any time require the fund to have its financial situation investigated by

³⁴³ Downie (1999) *The essentials of retirement fund management in South Africa*, chapter 5, 1.D.

³⁴⁴ Section 20(1) read with reg 20. Other duties of the principal officer include notifying the Registrar of amendments to rules, providing members with summaries of rule amendments and signing annual accounts and statements. See Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 114-116.

³⁴⁵ Section 9.

³⁴⁶ Section 9A. The Registrar may exempt a fund from ss 9 and 9A "where practicalities impede the strict application of a specific provision" (s 2(5)(a)).

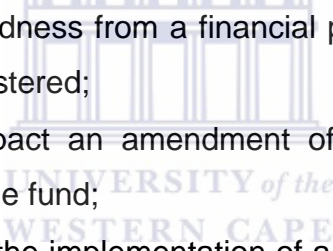
³⁴⁷ The term "valuator" is used in the Act. A valuator is defined as "an actuary or any other person who, in the opinion of the Registrar, has sufficient actuarial knowledge to perform the duties required of a valuator in terms of this Act." The valuator need not be a natural person, but can be a firm of actuaries or an insurer (Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 211).

³⁴⁸ Section 16(1). Unless the Registrar is satisfied that the financial methods adopted by the fund are such as to render the periodical investigations by a valuator unnecessary, in which case the fund reports its financial situation to the Registrar directly (s 17(1)).

a valuator.³⁴⁹

When the Registrar decides in the light of the reports submitted that the fund is not in a sound financial situation, he or she can give the fund three months to submit a scheme setting out how it intends to rectify the situation within a reasonable period.³⁵⁰ A report by a valuator on the scheme must also be submitted to the Registrar.

In addition to evaluating the financial soundness of the fund every three years, the valuator also has to

- 
- certify as to the soundness from a financial point of view of the rules of a fund that is to be registered;
 - certify as to the impact an amendment of the rules will have on the financial position of the fund;
 - submit a scheme for the implementation of a proposed amalgamation or a transfer to the Registrar;
 - determine the payments payable upon termination of the fund;
 - affirm the appropriateness of a surplus apportionment in terms of section 15B.³⁵¹

The final group of administrative functions, linked to the setting of policy, is connected to the fiduciary duties of the trustees and is performed by the trustees.

They may appoint consultants to assist them in these tasks, e.g. to ensure that

³⁴⁹Section 16(5).

³⁵⁰Section 18(1). The fund has three months from receiving the directive from the Registrar to comply. Similar provision is made in s 18(1A) for the scheme of arrangements to be submitted in the case of a deficiency in a fund.

³⁵¹Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 213-214.

the rules of the fund are competitive and comply with the legal requirements.³⁵²

The trustees, nonetheless, still remain responsible for determining policy in the final instance, even though they follow the advice of a consultant.

The most common problems connected with the administration of retirement funds include

- problems with collection of contributions;
- problems with payment of benefits;
- evasion by employers;
- underreporting of earnings of employees by employers;
- inadequate maintenance of records;
- high administrative charges;
- misuse of funds and/or corruption.³⁵³

As it would be impossible for trustees of a fund to completely prevent dishonesty, fraud and theft, they are required to take out a fidelity insurance policy “to indemnify the pension fund against losses owing to the dishonesty or fraud of any of its officials or such other indemnification as the Registrar may allow”.³⁵⁴ If the Registrar agrees, the employer can guarantee such indemnification instead.³⁵⁵

Another means of avoiding dishonesty in the financial affairs of the fund required

³⁵²Downie (1999) *The essentials of retirement fund management in South Africa*, chapter 5, 1.P.

³⁵³Iyer “Pension reform in developing countries” (1993) 132 *International Labour Review* 196-7.

³⁵⁴Reg 30(2)(u) GN R 98 in GG 162 of 26 January 1962.

³⁵⁵Downie (1999) *The essentials of retirement fund management in South Africa*, chapter 4, 1.C.3.

by law is the appointment of an auditor.³⁵⁶ The auditor's task is to ensure that money has been received and paid as required. The Act also requires the regular submission of accounts from the fund that have been duly audited and reported on by an auditor.³⁵⁷

The statutory measures discussed above indicate a concerted endeavor to control all the role players in the retirement fund industry in an effort to “regulate the industry effectively and protect the interests of members”.³⁵⁸

3.3.2.3.4 *Complaints procedure*

The measures adopted to protect members of retirement funds against maladministration and fraud in the funds that were discussed above are mostly preventative in nature. What then should a pension fund member do if he or she feels that he or she has a valid complaint against the fund or employer with regard to pension benefits or the manner in which the fund is administered?

The Act provides for a complaints procedure that aims to, as far as possible,

³⁵⁶ Section 9. The auditor may not be an officer of the fund. Only auditors registered under the Public Accountants' and Auditors' Act 80 of 1991 may be appointed.

³⁵⁷ Section 15 requires the fund to submit (unless the fund has been exempted i.t.o. s 2(5)(a)), within six months from the expiration of the financial year, the prescribed statements in regard to its revenue, expenditure and financial position, as well as any special reports by the auditor, annual reports and statements which may have been presented to members or shareholders in respect of any of its activities during the financial year.

³⁵⁸ Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 136.

dispose of complaints³⁵⁹ outside of the courts of law. Chapter VA of the Act³⁶⁰ established the office of the Pension Funds Adjudicator for this purpose.³⁶¹

Any aggrieved fund member or other interested party has the right to lodge a written complaint with the fund or the employer involved.³⁶² The fund or employer has 30 days after receipt of the complaint to properly consider the complaint and respond to the complainant in writing. If the complainant is not satisfied with the reply or if the fund or employer fails to reply within 30 days, the complainant may lodge a complaint with the Pension Fund Adjudicator.³⁶³ The idea is therefore that the complainant³⁶⁴ should attempt to settle the matter internally with the fund or employer³⁶⁵ before a complaint is lodged with the Adjudicator.

³⁵⁹“Complaint” is defined in s 1 of the Act as one “relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging -

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.”

³⁶⁰ Sections 30A to 30X.

³⁶¹ Section 30B.

³⁶² In *Khambule v CNA Ltd, now CNA (Pty) Ltd and Others (1)* [2001] 9 BPLR 2472 (PFA) 2479, para 32-33, the Adjudicator held that the fact that the complaint may not have been as precisely formulated as the fund and/or the employer would have liked it, does not preclude his jurisdiction.

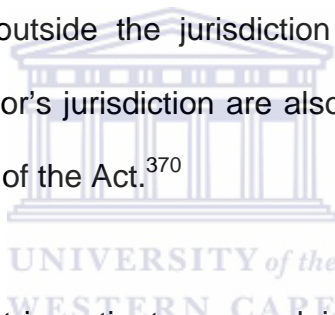
³⁶³ Section 30A. In *Armellini v Southern Field Staff Defined Contribution Fund and Another* [2001] 3 BPLR 1693 (PFA) the complaint was sent to the Adjudicator’s office before it was lodged with the fund. The complaint was subsequently lodged with the fund, which responded to it and the complaint was then re-lodged with the Adjudicator. The Adjudicator accepted the complaint as complying with the requirements of s 30A.

³⁶⁴ A member or former member of a pension fund, a beneficiary or former beneficiary of a fund, or an employer who participates in a fund (s 1).

³⁶⁵ The “respondent” is usually the fund or the employer, but the Adjudicator may join any person as respondent that he believes has a sufficient interest in the case to be made a party (s 30G).

The main aim of the Adjudicator is to hear complaints in a “procedurally fair, economical and expeditious manner”.³⁶⁶ To this purpose the Adjudicator is empowered to investigate any complaint and to make any order which a court of law may make.³⁶⁷ The Adjudicator may also decide that the complaint must first be referred for dispute resolution and, if it is not resolved, once again lodged with the Adjudicator.³⁶⁸

If proceedings relating to the complaint have already been instituted in a civil court, the complaint falls outside the jurisdiction of the Adjudicator.³⁶⁹ The parameters of the Adjudicator’s jurisdiction are also determined by the definition of a “complaint” in section 1 of the Act.³⁷⁰



The Adjudicator will also not investigate a complaint if three years have passed

³⁶⁶Section 30D.

³⁶⁷The Adjudicator has been granted the powers of a Commission of Inquiry. In terms of s 30J(3), ss1-4 and 6 of the Commissions Act applies to the Adjudicator. See *Basil Kransdorff v Sentrachem Pension Fund PFA/GA/3/98 JM 2*.

³⁶⁸Section 30E.

³⁶⁹Section 30H(2). S 30H(4) in addition excludes the Adjudicator's jurisdiction in the case of complaints in connection with a scheme for the apportionment of surplus in terms of s 15B, which relate to the decisions taken by the board or any stakeholder in the fund or any specialist tribunal convened in terms of s 15K.

³⁷⁰The Adjudicator would, for instance, not have jurisdiction to assess the fairness of a dismissal (*Manzini v Metro Group Retirement Fund and Another (1)* [2001] 12 BPLR 2808 (PFA) 2812), or of a complaint about the application and interpretation of a document other than the rules, eg instructions issued by an employer to a fund as in *Shell Southern Africa Pension Fund and Another v Sligo and Others* [1999] 11 BPLR 235 (C). The Adjudicator's jurisdiction may include complaints such as allegations that the manner in which the fund operated a scheme utilising provident fund monies to provide a housing benefit for fund members entailed maladministration of the fund, resulting in prejudice to the complainant (*Khambule v CNA Ltd, now CNA (Pty) Ltd and Others (1)* [2001] 9 BPLR 2472 (PFA)); exercise of a discretion by an employer not to increase an early retirement benefit (*Harris v AECL Pension Fund and Another* [2000] 7 BPLR 737 (PFA)); or the manner of payment of a retirement benefit by a retirement annuity fund (*Dempster v South African Retirement Annuity Fund and Another* [2005] 8 BPLR 696 (PFA)).

from the date on which the act or omission that the complaint is based on occurred.³⁷¹ Where the complainant was unaware of the occurrence of the act or omission on which the complaint is based, the period of three years commences when the complainant becomes aware or ought reasonably to have become aware of the happening, whichever occurs first.³⁷²

There is no prescribed procedure for conducting an investigation and the Adjudicator may follow any procedure which he or she considers appropriate.³⁷³

Any fund or person against whom the allegations contained in the complaint are made must be afforded an opportunity to comment on the allegations.³⁷⁴ No party to the complaint is entitled to legal representation at the proceedings before the Adjudicator.³⁷⁵ This is to ensure that proceedings before the Adjudicator are informal, accessible, expeditious and inexpensive. It is also intended to avoid unfair advantage to large pension funds, that can afford extensive legal representation, over individual members.

The Adjudicator keeps records of investigation proceedings and any member of the public may obtain a copy of such record.³⁷⁶ After completion of an

³⁷¹Section 30I.

³⁷²Section 30I(2). See e.g. *Longo v Cape Joint Pension Fund* [2000] 6 BPLR 623 (PFA). S 30I(3), which gave the Adjudicator the power to condone time-barred claims, was deleted by Pension Funds Amendment Act 11 of 2007.

³⁷³Section 30J.

³⁷⁴Section 30F.

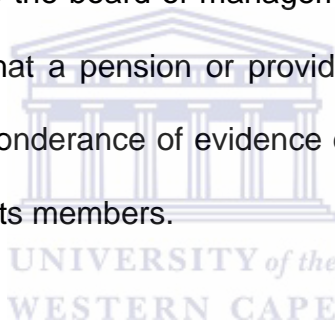
³⁷⁵Section 30K. In *Henderson v Eskom and Another* [1999] 12 BPLR 353 (PFA), the Adjudicator interpreted s 30K as meaning that neither of the parties before the Adjudicator can insist on legal representation, but that the Adjudicator has the discretion to allow legal representation of the parties.

³⁷⁶Section 30L.

investigation, the Adjudicator sends a statement containing his decision and the reasons therefore to all the parties concerned.³⁷⁷ A decision by the Adjudicator is binding and has the same status as a civil judgment of any court of law.³⁷⁸ An aggrieved party has six weeks from the date of the Adjudicator's determination to apply for relief to the High Court with jurisdiction, which will consider the merits of the complaint in question.³⁷⁹

3.3.2.4 Legal status of a pension or provident fund

Because of the reference to the board of management of a fund as “trustees”, a popular perception exists that a pension or provident fund in law constitutes a trust.³⁸⁰ However, the preponderance of evidence demonstrates that a fund is a legal person separate from its members.



Once a retirement fund is registered, it acquires its own legal identity and is acknowledged as a separate legal persona. According to section 5(1)(a) of the Pension Funds Act, the effect of registration under the Act is that the fund³⁸¹ becomes

a body corporate capable of suing and being sued in its corporate name and of doing all such things as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules.

³⁷⁷ Section 30M.

³⁷⁸ Section 30O. Execution of judgment occurs in the same manner as for a civil court of law.

³⁷⁹ Section 30P. See eg *Shell Southern Africa Pension Fund and Another v Sligo and Others* [1999] 11 BPLR 235 (C).

³⁸⁰ See the Adjudicator's comments in *Venter v Protektor Pension Fund* [2000] 3 BPLR 340 (PFA) 345.

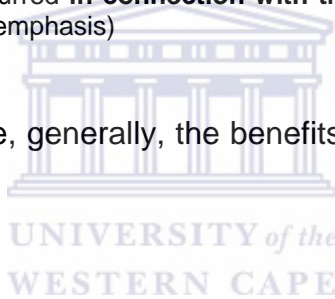
³⁸¹ S 5(1)(a) applies to paragraph (a) pension fund organisations, i.e. an association of persons established with the object of providing benefits to members. See above at 3.3.2.1.1 for the distinction between paragraph (a) and (b) pension fund organisations.

A retirement fund can therefore enforce its decisions and rules by means of legal proceedings.³⁸²

Section 5(1)(b) of the Pension Funds Act states as one of the effects of registration of retirement funds³⁸³ that

all the assets, rights, **liabilities and obligations** pertaining to the business of the fund shall, notwithstanding anything contained in any law or in the memorandum, articles of association, constitution or rules of any body corporate or unincorporate having control of the business of the fund, be deemed to be assets, rights, **liabilities and obligations** of the fund to the exclusion of any other person, and no person shall have any claim on the assets or rights or be responsible for any liabilities or obligations of the fund, except in so far as the claim has arisen or the responsibility has been incurred **in connection with transactions relating to the business** of the fund. (my emphasis)

The liabilities of the fund are, generally, the benefits paid to members, as well as administrative costs.



As section 5(1)(b) does not specifically make reference to the fund becoming a “body corporate capable of suing and being sued” as section 5(1)(a) does, it has been argued that the legislature only intended to confer legal personality on section 5(1)(a) funds to the exclusion of section 5(1)(b) funds. In *Mostert NO v Old Mutual Life Assurance Company (South Africa) Ltd*³⁸⁴ the Supreme Court of Appeal (per Smalberger ADCJ) analysed section 5(1)(b) and held that it should

³⁸²Downie (1999) *The essentials of retirement fund management in South Africa*, chapter 1, 2.B.

³⁸³ S 5(1)(b) applies to paragraph (b) pension fund organisations, i.e. any business carried on under a scheme or arrangement established with the object of providing benefits for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, e.g. an agreement between an employer and an underwriter to provide benefits for a category of employees. See Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 85.

³⁸⁴ [2001] 8 BPLR 2307 (A).

be seen within the context of section 5(1) as a whole. Where it states that upon registration all the assets, rights, liabilities and obligations of the fund shall be “deemed” to be those of the fund, it also means that the assets are to be “regarded” as the assets of the fund. The fund therefore owns the assets, which sets it apart from non-legal persona such as a trust or a deceased estate.³⁸⁵

Smalberger ADCJ concluded:

Although the Fund has its origins in a scheme, it was established for the benefit of persons who have become its members. The Fund is clearly an entity separate from its members. It can hold its assets and acquire rights and incur obligations apart from them and has perpetual succession. It has the essential attributes of a *universitas* at common law with concomitant legal personality.... The result is that if section 5(1)(b) does not in terms confer legal personality, on a proper interpretation it must be taken to do so.³⁸⁶

In addition, section 5(1)(c) provides that the assets, rights, liabilities and obligations of any fund (including any assets held by any person in trust for the fund), as existing immediately prior to its registration, shall upon registration vest in the registered fund without any formal transfer or cession.

All the money and assets belonging to a retirement fund is owned by the fund. The fund is also obliged to maintain the necessary accounting records.³⁸⁷

A retirement fund is a legal persona and therefore its legal capacity to enter into a particular contract “must be sought for exclusively within the express or implied

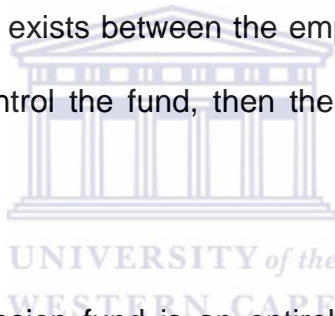
³⁸⁵ At 2317 para 47.

³⁸⁶ At 2318 para 49. This interpretation could mean that paragraph (a) funds acquire their legal status through a statute (s 5(1)(a)), whereas paragraph (b) funds are regarded as common law legal persons. See also *Venter v Protektor Pension Fund* [2000] 3 BPLR 340 (PFA) 345.

³⁸⁷ Section 5(2).

provisions of its constitution".³⁸⁸ If the authority to enter into a contract is to be found outside of the rules, the contract will be null and void as the board of management has exceeded its powers in entering into such as contract and their actions will be *ultra vires*.³⁸⁹

It was held in *Technical Workers Union v Transnet*³⁹⁰ that the Industrial Court did not have jurisdiction over a pension, provident or medical aid fund which functions separately from the employer's business in the sense that the employer does not control the fund. The reason for this is that the fund is a third party and no employment relationship exists between the employee and the fund. Should the employer, however, control the fund, then the Industrial Court would have had jurisdiction.³⁹¹



Taking the point that a pension fund is an entirely separate legal entity to its extreme, the employer in *SA Clothing & Textile Workers Union v Garlick Stores (1922) (Pty) Ltd*³⁹² denied that it was under a duty to negotiate with the union regarding the amalgamation of the business of the fund with that of another fund. It contended that it had been the board of trustees of the fund that had taken the decision to amalgamate the fund. The employer therefore allegedly did not have

³⁸⁸ *Abrahamse v Connock's Pension Fund* 1963 2 SA 76 (W).

³⁸⁹ *Tek Corporation Provident Fund and Others v Lorentz* 1999 4 SA 884 (SCA) 898 para 28. In *Venter v Protektor Pension Fund* [2000] 3 BPLR 341 (PFA) 346, the Adjudicator drew attention to the fact that the Pension Funds Act does not contain a provision similar to s 36 of the Companies Act 61 of 1973 which seeks to ameliorate the effects of the *ultra vires* – doctrine.

³⁹⁰ (1994) 15 ILJ 1084 (IC) 1088 (under the pre-1995 definition of an unfair labour practice).

³⁹¹ The same would currently apply to the CCMA and the Labour Court.

³⁹² (1996) 17 ILJ 255 (IC).

the power to set aside the trustees' decision to amalgamate.³⁹³

Brand SM agreed that the fund was a separate legal entity and that once the board of trustees had made the decision to amalgamate, there was nothing the employer could have done to set aside such decision. However, after studying the rules of the fund, the conclusion was reached that the employer had such a dominant position relative to other interested parties in the board of trustees, that it could have influenced the decision taken by the board.³⁹⁴

Section 5(1)(b), read in conjunction with the prohibition on loans to or investment in the shares of the employer by the fund,³⁹⁵ forbids the employer from using the fund to finance its own business.

Based on section 5(1)(b), applicant's counsel in *Lorentz v Tek Corporation*³⁹⁶ argued that the whole of the assets of the pension fund are owned and vest in the pension fund to the exclusion of all other persons and that the employer accordingly has no claim to any part of the surplus. Navsa J agreed in principle

³⁹³ At 258.

³⁹⁴ The relevant rules scrutinised *in casu* were rule 9.1, which determines that the fund is to be controlled by a board of trustees, comprising three employer trustees and two employee trustees; rule 9.1(2), stacking the board even more in the employer's favour by stating that the employer has the right to remove from office any member of the board and to replace such a member with another; rule 9.2(1), empowering the employer to appoint the chairman and vice-chairman of the board of trustees; and rule 11.5(b), giving the employer a veto over all the rules of the fund. The definition of an "unfair labour practice" in s 186(2) of the Labour Relations Act 66 of 1995 (as amended) includes "any unfair act or omission that arises between an employer and an employee involving ... (a) unfair conduct by the employer relating to the ... provision of benefits to an employee" and therefore arguably takes account of a situation such as the dominant position of the employer on the board of trustees described above.

³⁹⁵ Section 19(5B)(b).

³⁹⁶ 1998 1 SA 192 (W). See also *Group of Concerned SAPREF Pensioners v SAPREF Pension Fund and Others* [2000] 1 BPLR 44 (PFA) 50.

but pointed out that the proviso to section 5(1)(b) might, under the appropriate circumstances, be interpreted as permitting the employer to take a contribution holiday.³⁹⁷ It was found that the employer seeking the trustees' agreement to it taking a contribution holiday after over-contribution could be construed as a claim arising "in connection with transactions relating to the business of the fund".³⁹⁸

On appeal, in *Tek Corporation Provident Fund and Others v Lorentz*,³⁹⁹ Marais JA reiterated that the fund is a legal *persona* that owns its own assets and that the trustees of the fund owe a fiduciary duty to the fund, its members and other beneficiaries. He pointed out that although the employer "is not similarly burdened", it however does owe a duty of good faith to the fund and its members.⁴⁰⁰ As to the employer's right to the surplus, Marais JA held:

Once a surplus arises it is *ipso facto* an integral component of the fund. Unless the employer can point to a relevant rule of the fund or statutory enactment or principle of the common law which confers such entitlement or empowers the trustees to use the surplus for its benefit, the employer has no right in law to the

³⁹⁷ A "contribution holiday" in the case of a defined benefit fund means "payment by the employer of less than the contribution rate the valuator recommends be payable by the employer, taking into account the circumstances of the fund and ignoring any surplus or deficit" (s 1 Pension Funds Act). See above at 2.6 for employers' contribution liability in defined benefit funds. In relation to a defined contribution fund, "contribution holiday" means "payment by the employer of less than the employer contribution rate defined in the rules prior to application of any credit balance in any employer reserve account as defined in the rules or employer surplus account" (s 1 Pension Funds Act).

³⁹⁸ *Lorentz v Tek Corporation* 1998 1 SA 192 (W) 227. It was, however, held that on the facts the proviso to the section did not apply.

³⁹⁹ 1999 4 SA 884 (SCA).

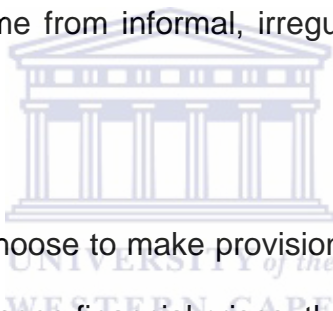
⁴⁰⁰ At 894 para 15. E.g. where the employer insists that a substantial surplus be kept in the fund to prolong its contribution holiday, whereas the trustees have recommended that pensions be increased (and such increase would have no effect on the employer's liability to contribute), the employer's behaviour would not be consistent with the good faith it is required to show towards its employees (at 897 para 24). See also *Group of Concerned SAPREF Pensioners v SAPREF Pension Fund and Others* [2000] 1 BPLR 44 (PFA) 53; *Harris v AECI Pension Fund and Another* [2000] 7 BPLR 737 (PFA) and specifically, *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 (Ch) where the requirements for the employer's duty of good faith were stated.

surplus.⁴⁰¹

3.3.2.5 Protection of retirement benefits

The absence of legislation mandating retirement fund membership effectively removes those workers who prefer to take extra cash home, instead of contributing to a pension or provident fund, from the scope of application of schemes providing for retirement.⁴⁰²

Attempts are being made to extend the coverage of retirement schemes to persons deriving their income from informal, irregular or unregulated economic activities.⁴⁰³



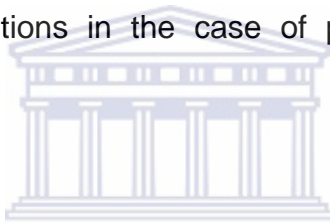
To ensure that those who choose to make provision for their old age do not lose these benefits due to unforeseen financial crises, the Pension Funds Act protects retirement benefits from creditors. The general rule to prevent alienation of benefits is contained in section 37A of the Act. It provides that no benefit or right to such benefit may be reduced, transferred or otherwise ceded, pledged, hypothecated or be liable to be attached or subjected to any form of execution under a judgment. A maximum amount of R3000 per annum can be taken into

⁴⁰¹ At 895, para 17. Since 2001, matters related to a surplus in a fund, such as rights of use of, a surplus, apportionment of existing and future surpluses, the utilisation of a surplus for the benefit of members or the employer, and the right to share in surplus accounts on exist from the fund are regulated i.t.o. ss 15A – 15K Pension Funds Act.

⁴⁰² Conditions of service often make retirement fund membership compulsory, but this is not necessarily the case. See below at 5.5 for a more detailed discussion of the problems caused by the voluntary nature of the pension system.

⁴⁰³ Measures to provide social security, including retirement benefits, to workers in the informal economy are discussed below at 5.6.

account in terms of section 65 of the Magistrates' Courts Act judgment debt procedures.⁴⁰⁴ If a member or beneficiary tries to part with his or her benefit in one of the above ways, the fund may withhold or suspend payment of benefits.⁴⁰⁵ The fund may however pay out a benefit transferred to the member's dependant, beneficiary or guardian of a dependant.⁴⁰⁶ Exceptions to this provision are deductions allowed under section 37D,⁴⁰⁷ and where the fund wishes to recover arrear contributions owed to the fund by the member, but excluding amounts which are in arrear due to the failure of the employer to pay over the contributions after deduction thereof from the member's salary.⁴⁰⁸ The Act also makes provision for exceptions in the case of payment of income tax and maintenance payments.⁴⁰⁹



If the fund's rules provide for the deduction of any debt due by the member to the fund before the benefit is paid, section 37A(2)(a) regards the deduction as an impermissible deduction. The same goes for the set-off of any debt against a benefit.⁴¹⁰

If a member's estate is sequestrated, retirement benefits form no part of the

⁴⁰⁴ Procedure for execution of judgment debts, Magistrates' Courts Act 32 of 1944 (as amended).

⁴⁰⁵ Section 37A(1).

⁴⁰⁶ Proviso to s 37A(1).

⁴⁰⁷ Even though these deductions strictly speaking reduce the member's benefits, s 37A(1) makes allowance for this exception by providing "Save to the extent permitted by this Act..." The deductions allowed i.t.o. s 37D are listed below.

⁴⁰⁸ Section 37A(3)(c) and (d).

⁴⁰⁹ See Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 162-164 for more on the practical problems faced by funds that are required to make deductions from fund benefits for arrear maintenance.

⁴¹⁰ Section 37A(2)(b).

insolvent estate and cannot be claimed by creditors of the insolvent estate.⁴¹¹ This has prompted Marx and Hanekom⁴¹² to observe that “[i]t appears that members who are insolvent enjoy better protection against creditors in respect of their retirement fund benefits than those who could only be said to be in financial difficulty.”

Section 37D permits a fund to make the following deductions from retirement benefits:

- (a) any amount due to the fund in respect of a housing loan granted to the member by the fund;⁴¹³
- (b) any amount due to the fund in respect of the fund’s liability under a guarantee furnished in respect of a housing loan to the member made by another party, e.g. a bank;⁴¹⁴
- (c) any amount owed to the employer in respect of a housing loan;
- (d) any amount owed to the employer in respect of a guarantee furnished in respect of a housing loan made by another person;
- (e) compensation to the employer for damage caused to the employer by reason of theft, fraud, dishonesty or misconduct by the member, if the member has admitted his or her liability in writing, or if the member has been convicted in court;⁴¹⁵
- (f) any payments made by the fund by arrangement with, and on behalf of, the member for medical aid subscriptions;

⁴¹¹ Section 37B.

⁴¹² Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 164.

⁴¹³ I.t.o. s 19(5).

⁴¹⁴ Section 37D(1)(a)(ii).

⁴¹⁵ Section 37D(1)(b)(ii). In *Buthelezi v Municipal Gratuity Fund and Another (1)* [2001] 5 BPLR 1996 (PFA) 1999 paras 18-20 the Adjudicator held that a fund may withhold payment of a benefit for a reasonable time pending the determination or acknowledgment of a debt. He stressed that the implicit power to withhold the benefit must be exercised reasonably and within a reasonable time. *In casu*, the delay of just under two years was regarded as an unreasonably long delay.

- (g) any payments made by the fund by arrangement with, and on behalf of, the member for insurance premiums;
- (h) any payments made by the fund by arrangement with, and on behalf of, the member in respect of any purpose approved by the registrar, on the conditions determined by him, upon a request in writing from the fund.⁴¹⁶

Before 2007, the payment of divorce benefits was regulated in terms of the Divorce Act⁴¹⁷ which provided that the non-member spouse would only receive payment upon retirement of the member spouse. The new position⁴¹⁸ is that benefits in terms of a divorce orders are deemed to have accrued on the member spouse on the date of the divorce order. The fund must therefore deduct the member's benefit on the day the fund receives the court order and either pay it over to the non-member spouse or transfer it to an approved fund.⁴¹⁹ The fund may also deduct amounts payable by the member in terms of a maintenance order.⁴²⁰

⁴¹⁶ Section 37D(1)(c)(iii).

⁴¹⁷ Section 7(8) of the Divorce Act 70 of 1979.

⁴¹⁸ Section 37D(1)(d) Pension Funds Act (as introduced by the Pension Funds Amendment Act 11 of 2007 and amended by the Financial Services Laws General Amendment Act 22 of 2008). The new position applies retrospectively to divorces concluded prior to 13 September 2007 (s 37D(4)(d)). For an overview of the position before and after the 2007 and 2008 amendments, see Nevandwe "The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockroft v Mine Employees Pension Fund*, [2007] 3 BPLR 296 (PFA)" (2009) 1 *LDD* 1-12.

⁴¹⁹ Section 37D(4).

⁴²⁰ Section 37D(1)(d) Pension Funds Act (as amended).

3.3.2.6 Summary

The object of retirement funds is to provide members with benefits when they retire, so that they can provide for themselves financially and not be a burden on the state (and thereby taxpayers). Any fund rules or administrative practices that may have the effect of reducing a member's ability to provide for him- or herself financially when he or she retires would hence be in conflict with the recognised purpose of a retirement fund.⁴²¹ A variety of measures have been put into place to ensure that retirement benefits are only utilised to provide for the member's retirement and not for other purposes. These measures range from tax incentives for certain choices of funds to protecting retirement benefits against creditors, and the creation of a dispute resolution procedure.



3.3.3 **Private retirement savings vehicles**

Insurance companies offer private pension policies or retirement annuities, utilised mainly by those who have no other retirement options, particularly the (professional) self-employed or those employees who are not covered by an occupational retirement scheme. Retirement fund members also make use of private retirement savings methods such as retirement annuities and endowment policies to supplement their income on retirement. The retirement savings vehicles discussed below are all examples of how an individual can provide for financial security in his or her old age. Given the nature of these savings methods, the solidarity that is found between members of an occupational

⁴²¹ *Sebola v Johnson Tiles (Pty) Ltd and Others* [2002] 3 BPLR 3242 (PFA) 3249.

retirement fund is lacking.

3.3.3.1 Retirement annuity fund

Retirement annuity funds have been operating in South Africa since the 1960s to provide self-employed persons benefits similar to those of retirement funds.⁴²²

Although a retirement annuity fund operates similarly to a defined contribution pension fund,⁴²³ it can be distinguished from a pension fund in that membership of the fund is voluntary and not linked to employment.⁴²⁴ As no employer contribution is made on the member's behalf, the retirement benefit consists of the member's own contributions to the fund⁴²⁵ plus investment returns.

The following extract from *Tshabalala and Others v South African Retirement Annuity Fund*⁴²⁶ provides a helpful summary of how a retirement annuity fund operates in practice:

The rules of the fund allow its board of management to apply to the underwriter ... to issue policies in favour of the fund on the lives of the members. The fund collects contributions from the members and in turn pays them over to the underwriter. A member may decide what contribution he/she wishes to make to the fund, subject to certain conditions laid down by the insurer with whom the fund concludes the policy contract. Contributions start at the inception date of membership, and are payable as the board of the fund agrees with the underwriter. All monies payable by the underwriter in terms of the provisions of the policy are paid to the fund. The board, in turn deals with the payment of benefits in accordance with the rules of the fund. Upon attaining membership of the fund, a certificate is issued to each member by the underwriter setting out the benefits and conditions applicable to the benefits.

⁴²² Cameron (2006) "Secure good line of defence for your retirement" *Personal Finance* 28 January 2006 <http://www.persfin.co.za> (accessed 09/06/2006).

⁴²³ Retirement annuity funds are also administered in terms of the Pension Funds Act.

⁴²⁴ Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 637; Sephton (1990) *A guide to pension and provident funds* 38.

⁴²⁵ Para (b)(i) of the definition of "retirement annuity fund" in the Income Tax Act 58 of 1962.

⁴²⁶ [2001] 1 BPLR 1534 (PFA) at 1535, para 4.

The Commissioner of SARS will only approve a retirement annuity fund if its rules provide that a maximum of one-third of the retirement annuity may be commuted in cash. The remaining two thirds must be applied to the purchase of a life annuity.⁴²⁷ Age restrictions are also placed on retirement annuity benefits, as benefits are only payable from age 55.⁴²⁸

In *Dempster v South African Retirement Annuity Fund and Another*,⁴²⁹ the Adjudicator dismissed a complaint about the retirement annuity fund's refusal to pay out the capital value of the retirement annuity as a lump sum. The complainant had already received the one-third of the value of the retirement annuity as a cash lump sum and was to receive the remainder as a monthly pension as allowed for in the rules of the fund. As a result of financial difficulty she required the capital value to be paid out as a lump sum. As neither the definition of a retirement annuity fund nor the rules of the particular fund made provision for such a payment, the Adjudicator could not order the fund to make the lump sum payment.

Retirement annuities have traditionally been used as the main retirement vehicle by entrepreneurs who are not members of occupational retirement funds. They are also utilised by many pension and provident fund members who wish to

⁴²⁷ Except where two-thirds of the total value does not exceed R 50 000 (definition of "retirement annuity fund" para (a) read with (b)(ii) Income Tax Act, as amended by the Taxation Laws Amendment Act 8 of 2007.

⁴²⁸ Retirement age is minimum 55 (definition of "retirement annuity fund", para (b)(v) read with definition of "normal retirement age" Income Tax Act).

⁴²⁹ [2005] 8 BPLR 696 (PFA).

supplement their retirement savings. The reason for the preference for retirement annuities was mainly based in the tax incentives⁴³⁰ that are similar to those enjoyed by pension fund members.

Retirement annuity fund membership is not completely without disadvantages, as

- Initially the major portions of contributions to retirement annuities are spent on administrative expenses and only a small portion is allocated to investments. The Adjudicator has lashed out against the practice of retirement annuity funds to charge costs that do not form part of the rules of the fund, thereby significantly reducing the benefit payable to the member.⁴³¹
- Retirement annuities are inherently inflexible, as they may not be touched before the age of 55, except where the member's full benefit value is less than R7 000 or the member plans to emigrate. In *Tshabalala and Others v South African Retirement Annuity Fund*,⁴³² the Adjudicator held that, where the rules of a fund are subject to the provisions of the Income Tax Act, they must be adhered to even if it may cause unintended hardship to members. As a result, he dismissed a claim of a group of retirement annuity fund

⁴³⁰ Similar to the tax deductions allowed in the case of contributions to a pension fund - see above at 3.3.2.1.2(b). S 11(n)(aa) provides the formula for determining the maximum amount of member contributions that are deductible from gross income. The greatest of :

- (a) 15% of an amount equal to the amount remaining after admissible deductions from, or set-off against, the income derived during the year of assessment, excluding income from retirement-funding employment and any retirement fund lump sum benefit;
- (b) R3 500 less any current deductible contributions to a pension fund; or
- (c) R1 750.

Upon retirement, a portion of the lump sum (maximum one-third) is paid tax-free. The remaining two-thirds that are annuitised are taxed as income.

⁴³¹ See also *De Beer v Central Retirement Annuity Fund and Another* [2005] 3 BPLR 257 (PFA); *Schwartz v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 435 (PFA); *Walters v MM Retirement Annuity Fund and Another* [2005] 8 BPLR 719 (PFA).

⁴³² [2001] 1 BPLR 1534 (PFA).

members who claimed payment of their benefits before they had attained the age of 55.

Other private retirement funding possibilities include deferred compensation schemes, unit trusts and endowment policies.

3.3.3.2 Deferred compensation schemes

In the case of a deferred compensation scheme, the employer invests a sum of money on behalf of the employee in lieu of a salary increase, based on a mutually arranged plan between the employer and employee. These schemes are generally set up by employers to reward employees for long service or as a measure to retain employees' service, as employees find it difficult to leave their employment and hence lose benefits.⁴³³

Deferred compensation schemes are usually funded by endowment policies taken out by the employer on the life of the employee. The employer is the owner of the policy and pays the contributions. On retirement of the employee, the investment is realised and the returns are paid over to the employee as a cash lump sum (gratification). On the one hand there are certain tax advantages attached to a deferred compensation scheme,⁴³⁴ but the tax advantage involved

⁴³³ E.g. the tax concessions that make deferred compensation schemes attractive relative to other savings vehicles only come into effect five years prior to retirement.

⁴³⁴ If the employee receives a pay increase, that increase could lead to increased tax payable, whereas with deferred compensation the employer invests the "increase" before tax, which results in better benefits. See also s 11W Income Tax Act.

in this type of benefit will be more important than the corresponding salary increase only in the case of better-paid employees with higher tax brackets, e.g. senior executives. With this type of scheme the employee's retirement provision is linked closely to the employer's fortunes, with the risk that in the event of the employer's insolvency it could be unprotected.⁴³⁵

3.3.3.3 Unit trusts

Whereas retirement annuity funds are the alternative to pensions available to person other than employees, unit trusts are the nearest available option to someone who has no occupational provident fund but whose retirement planning is based on receiving a lump sum payment upon retirement.

A unit trust can be described as a fund set up by a management company to channel investors' money into certain specified assets, particularly shares. The units reflect the underlying value of the overall investment portfolio, protecting the investor against the risk of a particular share price falling. In the case of a unit trust investment, the units may be sold as and when money is required, making a lump sum of money available to the investor. This option is more flexible than the retirement annuity, although unit trusts are not usually seen as short-term investments.⁴³⁶

⁴³⁵ Sephton (1990) *A guide to pension and provident funds* 39.

⁴³⁶ Sharenet."What are unit trusts?" http://www.sharenet.co.za/free/library/ut_01.htm (accessed 2009/07/02); "How to get a retirement annuity to work for you" *Business Times* (2 Febr 1997) <http://www.btimes.co.za/97/0202/btmoney/money8.htm> (accessed 02/07/2009).

Unit trusts are regulated by the Collective Investment Schemes Control Act.⁴³⁷

The objects of the Act are to regulate and control the establishment and administration of collective investment schemes⁴³⁸ and therefore also unit trusts.

3.3.3.4 Endowment policy

An endowment policy with an insurance company is a further alternative when saving for a specific goal such as financial security after retirement. It is mainly used as an alternative retirement savings vehicle to retirement annuities for persons wishing to supplement their retirement income from retirement funds.

In the case of an endowment policy, the person making provision for retirement pays regular fixed monthly premiums on the policy. On maturity of the policy (usually at retirement age) he or she receives a lump sum benefit which is usually dependant on the investment returns earned by the insurer.⁴³⁹

Contributions (premiums) to an endowment policy are made with after-tax money but, on the other hand, no tax is payable on the proceeds of an endowment

⁴³⁷ Act 45 of 2002, which replaced the Unit Trusts Control Act 54 of 1981.

⁴³⁸ A collective scheme for the purposes of this Act is defined in s 1 as “a scheme, in whatever form, including an open-ended investment company, in pursuance of which members of the public are invited or permitted to invest money or other assets in a portfolio, and in terms of which-

(a) two or more investors contribute money or other assets to and hold a participatory interest in a portfolio of the scheme through shares, **units** or any other form of participatory interest; and

(b) the investors share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of a scheme or on any other basis determined in the deed,

but not a collective investment scheme authorised by any other Act.” (my emphasis).

⁴³⁹ Sephton (1990) *A guide to pension and provident funds* 40.

policy on maturity.⁴⁴⁰ Other advantages of endowment policies are that endowments can be used as security for a loan and that substantial death benefits are payable from endowment policies. However, heavy penalties are imposed if the policy is stopped before the end of its term.

The administration of endowment policies and the duties of parties involved are regulated in terms of the Long-term Insurance Act.⁴⁴¹ The Act makes provision for the appointment of the Registrar of Long-term Insurance, who is responsible for administering the Act, and for supervising compliance with the Act.⁴⁴² All insurers carrying on long-term insurance business have to be registered to do so and must carry on their business in accordance with the Act.⁴⁴³

Part IV of the Act deals with the various financial requirements and arrangements put in place to ensure that insurers at all times maintain their business in a sound financial condition.⁴⁴⁴ Should an insurer fail to meet this requirement (or be in danger of failure) it should contact the Registrar for assistance.⁴⁴⁵

⁴⁴⁰ Cameron "You can't beat RAs for tax benefits and versatility" *Personal Finance* 11 Oct 2003. <http://www.persfin.co.za> (accessed 02/07/2009).

⁴⁴¹ Act 52 of 1998.

⁴⁴² Section 2.

⁴⁴³ Section 7(1).

⁴⁴⁴ Section 29(1) requires insurers to have suitable assets sufficient to cover their properly valued liabilities and to conduct their business in such a manner that they would be able to meet their liabilities and capital adequacy requirement at all times.

⁴⁴⁵ Section 35.

In terms of section 48⁴⁴⁶ every new policy holder must be provided with a summary of the main features of the policy within 60 days of entering into the policy. Policy holders are also entitled to a copy of the full policy document. This ensures transparency and understanding by policyholders of their rights and benefits, as well as any limitations that might be placed on such rights and benefits by the policy.

Section 62 makes provision for the creation of a set of Policyholder Protection Rules. Such rules were drafted by the Registrar and took effect on 1 July 2001.⁴⁴⁷

3.3.3.5 Other retirement savings vehicles

In addition to the savings methods discussed above, other options such as savings accounts and notice or fixed deposits at banks, or savings clubs or the Stokvel method of saving are available to individuals wishing to improve their post-retirement financial position.⁴⁴⁸

⁴⁴⁶ Section 48 forms part of part VII of the Act which deals with the regulation of certain business practices for consumer protection .

⁴⁴⁷ The detailed provisions of the Long-term Insurance Act and the Policyholder Protection Rules fall outside the scope of this work. See Marx and Hanekom (2004) *The manual on South African retirement funds and other employee benefits* (Vol 1) 445-473.

⁴⁴⁸ See Dekker and Olivier "Informal forms of social security and informal sector social security" in Olivier et al (eds) (2004) *Introduction to social security* 91 for Stokvels and other kinship or community-based social security measures.

3.3.4 Provision of care and support services to older persons

3.3.4.1 Introduction

Care and support services for older persons form part of social security.⁴⁴⁹ However, most legislation aimed at realising older persons' right of access to social security focuses on the payment of grants or retirement benefits. The Department of Social Development also treats care and support services for older persons as a function separate from the payment of grants. There is no national legislation dealing specifically with access to and allocation of care and support services to older persons.

In 2001 the Ministerial Committee on Abuse, Neglect and Ill-treatment of Older Persons gave horrific accounts of older persons suffering neglect and abuse in residential care, in their communities and in their family homes in their report titled *Mothers and Fathers of the Nation: the forgotten people?*⁴⁵⁰ The long-awaited Older Persons Act⁴⁵¹ provides the legislative framework for the provision of care and protection to older persons.

The aim of this section of the chapter is to trace the legislative and policy developments from the Aged Persons Act⁴⁵² up to the current Older Persons Act.

⁴⁴⁹ See above at 1.3 and 2.2. The two types of care and support services, residential and domiciliary care are defined above at 2.8. See also Olivier "The concept of social security" in Olivier et al (eds) (2004) *Introduction to social security* 16-17.

⁴⁵⁰ Hereafter "*Mothers and Fathers of the Nation Report*".

⁴⁵¹ Act 13 of 2006.

⁴⁵² Act 81 of 1967 (as amended by the Aged Persons Amendment Act 100 of 1998).

The Older Persons Act is compared to the Aged Persons Act to determine whether any significant progress has been made in increasing the protection provided to older persons.

3.3.4.2 Older persons and the parties responsible for their care

The state plays a pivotal part in ensuring that “the necessary environment is created for older persons to make a meaningful contribution to the socio-economic and political development of the country, within the context of a safe, secure and sustainable developmental environment”.⁴⁵³

According to the White Paper for Social Welfare,⁴⁵⁴ the state cannot accept sole responsibility for meeting the basic socio-economic needs of all persons in need of support and civil society will have to meet some of the social service needs. Families are regarded as the basic unit of society and would be required to carry some of the responsibility of providing social support.⁴⁵⁵ Social welfare programmes are to be designed to enhance people’s independence,⁴⁵⁶ therefore state assistance is to be reserved for those unable to support themselves and their dependants.⁴⁵⁷

⁴⁵³ Department of Social Development (2002) *National Report on the Status of Older Persons* Report to the Second World Assembly on Ageing, Madrid, Spain 7 (hereafter “National Report on the Status of Older Persons (2002)”).

⁴⁵⁴ GN 1108 in GG 18166 of 8 August 1997 (hereafter “White Paper for Social Welfare (1997)”) at 19.

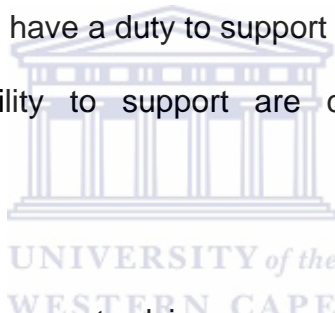
⁴⁵⁵ White Paper for Social Welfare (1997) 20.

⁴⁵⁶ Department of Social Development (2001) “The Road to Social Development” 3.

⁴⁵⁷ White Paper for Social Welfare (1997) 16.

This general approach has been reaffirmed in the White Paper for Social Welfare as far as the state's duty to take care of older persons is concerned. It states that every individual has the personal responsibility to provide for his or her own retirement and old age. The state's only role is to provide for the needs of disadvantaged, destitute and frail older persons who required 24-hour care and who do not have the financial resources to meet their own needs.⁴⁵⁸ Failing this, the family is viewed as the core of the support systems of older persons.

A common law reciprocal duty to support each other exists between parents and children. Therefore children have a duty to support their parents.⁴⁵⁹ The parent's need and the child's ability to support are criteria that are taken into consideration.⁴⁶⁰



Our courts have held that a parent relying on support from a child has to prove indigence on the parent's part.⁴⁶¹ It was held in *Oosthuizen v Stanley*⁴⁶² that support includes not only "food and clothing in accordance with the quality and condition of the person to be supported", but also lodging and care in sickness. It will depend on the circumstances of each case whether the parent is "in such a

⁴⁵⁸ At 71.

⁴⁵⁹ The duty of children to support their parents is based on a sense of dutifulness which every child owes its parents (*Voet 25 3 4* cited in *Anthony v Cape Town Municipality* 1967 4 SA 445 (A) 447).

⁴⁶⁰ Van Zyl (2005) *Handbook of the South African Law of Maintenance* 12.

⁴⁶¹ See *Caldwell v Erasmus* 1952 4 SA 43 (T) 50; *Singh v Santam Insurance Co* 1974 4 SA 196 (D) 199 (means test as applied to a parent's claim for support from a child is a stringent one); *Pike v Minister of Defence* 1996 3 SA 127 (CKS) 133.

⁴⁶² 1938 AD 322 at 327.

state of comparative indigency or destitution that a court of law can compel a child to supplement the parent's income.”

According to Gihwala AJ in *Smith v Mutual & Federal Insurance Co Ltd*⁴⁶³, a stringent criterion of need has to be established in order to prove indigence.

To be indigent means to be in extreme need or want whereas to be poor means having few things or nothing. Accordingly, when the plaintiff pleads indigence, it is not sufficient to show that the plaintiff lives on very little or nothing... The plaintiff must prove something more. The plaintiff should prove that there is an extreme need or want for the basic necessities of life.⁴⁶⁴

Indigence is therefore not a synonym for “poverty”. An older person, who lacks income and hence qualifies for the older person's grant, can use the grant to provide for the “basic necessities of life”. Conversely, it is possible that an older person could have some form of income, but that it is not sufficient to provide for basic necessities. Whereas the older person in the first example may be considered as being “poor”, only the older person in the latter example would qualify as “indigent”. The fact that the parent's current situation should be taken in account, rather than the past, makes provision for deterioration in parents' health and their ability to care for themselves. As their health deteriorates, their basic needs increase, with the result that some older persons who previously would not have qualified as “indigent” may become so.

⁴⁶³ 1998 4 SA 626 (C) 631.

⁴⁶⁴ *Smith v Mutual & Federal Insurance Co Ltd* 1998 4 SA 626 (C) 632. In *Van Vuuren v Sam* 1972 2 SA 633 (A) 642 it was held that basic necessities are items such as food, clothing, shelter, medicine and care in times of illness.

Assuming then that it is the family's responsibility to take care of older family members, should they not be able to rely on assistance from the state? Currently the only statutory assistance available to families caring for older persons in the family home is the grant-in-aid available to an older person who is eligible for the older person's grant and who requires regular attendance by another person owing to his or her physical or mental condition.⁴⁶⁵ This arrangement aims to encourage people to stay in their homes as long as possible, but whether this object can be met through a grant that at present only pays R240 per month⁴⁶⁶ is open to discussion.

3.3.4.3 The Aged Persons Act

The Aged Persons Act⁴⁶⁷ regulated the provision of residential care for "aged persons",⁴⁶⁸ particularly in homes for the aged,⁴⁶⁹ from 1967 to 2006.

The Act distinguished between state-run homes and state-subsidised homes.⁴⁷⁰

Residents of state-run homes are the sole financial responsibility of the state and

⁴⁶⁵ Section 12 SAA. See above at 3.3.1.2 for the requirements for the grant-in-aid.

⁴⁶⁶ Department of Social Development "Grant in Aid" <http://www.dsd.gov.za> (accessed 20/07/2009).

⁴⁶⁷ Act 81 of 1967 (as amended by the Aged Persons Amendments Act 100 of 1998).

⁴⁶⁸ An "aged person" for the purposes of the Aged Persons Act was defined as a 65-year and older male or a female of sixty years and older. The same definition for an "older person" is used in the Social Assistance Act 13 of 2004, s 10. The age differentiation in terms of which men and women qualify for the older person's grant led to a challenge in 2005 in the Pretoria High Court. The outcome of this case has become moot, as the Social Assistance Act has been amended by the Social Assistance Amendment Act 6 of 2008 to progressively reduce the qualifying age for men.. See also Kruger "'Come back when you are 65, Sir.' Discrimination in respect of access to social assistance for the elderly" (2006) 10 *LDD* 70. No similar amendments have been made to the Aged Persons Act, or the Older Persons Act 13 of 2006 (see 2.8 above).

⁴⁶⁹ See above at 2.8 for the distinction between residential and domiciliary care. A home for the aged was defined in the Aged Persons Act as "any institution or other place of residence maintained mainly for the accommodation and care of aged or debilitated persons".

therefore do not qualify for any other assistance such as social grants for older persons. State-subsidised homes are usually funded by non-governmental organisations and are as a rule not established as profit-making concerns.⁴⁷¹ The state has a measure of control over the management of state-subsidised homes, in that it regulates the registration of such homes, as well as the management of the homes.⁴⁷²

Those older persons who do not qualify to be accommodated in state-run homes for the aged and who have no family to care for them, are forced to rely on the generosity of their communities and welfare organisations. Many older persons therefore need to be accommodated in state-subsidised old-age homes.

The original aim of the Aged Persons Act, enacted in the apartheid era, was to protect older white persons who were living in private boarding houses in unsatisfactory conditions. The main object of the Act was therefore to provide for the establishment and registration of residential homes that would receive generous subsidies from provincial Social Development departments for providing safe accommodation and care of mainly white older persons.⁴⁷³ According to the *Mothers and Fathers of the Nation Report*, many organisations have abused this arrangement and have since changed the use of the homes

⁴⁷⁰ Section 2.

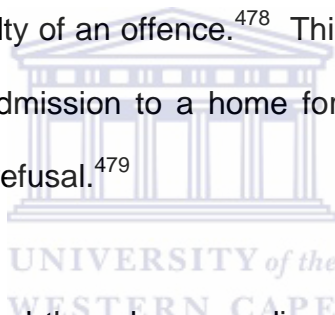
⁴⁷¹ Which distinguishes state-subsidised homes for the aged from retirement villages run by profit-making organisations.

⁴⁷² Sections 2(b) and 2A Aged Persons Act; Olivier "Old age and retirement provision" in Olivier et al (eds) (2004) *Introduction to social security* 282.

⁴⁷³ Draft response to Older Persons Bill by Joint Forum for Policy on Ageing (2005); Olivier "Old age and retirement provision" in Olivier et al (eds) (2004) *Introduction to social security* 282.

built with government loans or sold them.⁴⁷⁴ In addition, unregistered private boarding homes seemed to be on the increase once more,⁴⁷⁵ indicating that the aims of the Aged Persons Act have not been achieved.

Older persons from previously disadvantaged groups had difficulty finding appropriate and affordable residential care.⁴⁷⁶ The need for homes for the aged to reflect broadly the race composition of South Africa was addressed by section 3C of the Act.⁴⁷⁷ Any person who unfairly discriminated directly or indirectly on illegal grounds against an applicant when determining eligibility for admission to a home, would have been guilty of an offence.⁴⁷⁸ This section therefore afforded a person who was refused admission to a home for the aged the opportunity to query the reasons for such refusal.⁴⁷⁹



The Aged Persons Act stated the rules according to which homes for the aged had to be established and maintained. In particular, section 3 of the Act prohibited the running of state-subsidised homes that had not been registered. It also regulated the registration of such homes.

⁴⁷⁴ A condition of the loans viz. that 60% of the residents of homes built with the loans be social pensioners, has therefore been disregarded (Executive Summary *Mothers and Fathers of the Nation Report* (2001) paras 1.2 and 1.6).

⁴⁷⁵ Executive Summary *Mothers and Fathers of the Nation Report* (2001) para 1.2.

⁴⁷⁶ Access to state run facilities that do not charge fees is limited, as there were only seven state run homes for the aged nationally in 2002 (*National Report on the Status of Older Persons* (2002) 39). No current statistics on the number of state run facilities are available, but in the light of the current policy preference for community-based care (see 3.3.4.5 and 4.2 below) it is unlikely that this number has increased significantly since 2002.

⁴⁷⁷ Section 3C was added by the Aged Persons Amendment Act 100 of 1998.

⁴⁷⁸ Section 3C(2).

⁴⁷⁹ Section 3C(4) did not state the remedies available to an applicant who is refused admission and is not satisfied by the reasons given for the refusal, if a reason for refusal is not one of the prohibited grounds for discrimination referred to in s 3C(1).

In old-age homes with more than 10 aged residents, an elected management committee was tasked with monitoring the management of the home.

Section 3B of the Act listed the main duties of the management of an old-age home as:

- Facilitating interaction between the residents of the homes and their families, the public in general and the management committee;
- Providing quality service to the home;
- Providing training opportunities to the staff of the home;
- Applying principles of sound financial management;
- Monitoring activities at the home in order to deal speedily with any incidents of abuse of the residents of the home;
- Consulting the management committee in the appointment of the staff of the home;
- Establishing complaints procedures for the residents and the staff and persons who wish to lodge a complaint on behalf of a resident; and
- Taking all steps that are necessary or expedient for the effective functioning of the home.

Sections 6A to 6C of the Aged Persons Act provided for the protection of older persons against abuse. Section 6A obliged dentists, medical practitioners, social workers or other persons who examined, attended to or dealt with an older person to notify the Director-General of Social Development of suspected abuse or injuries.⁴⁸⁰ Section 6C made provision for a national register of all notifications

⁴⁸⁰ Although mention is made of “any other person who ... deals with” an older person, the main emphasis of s6A is on the obligation of persons dealing with older persons in their professional

of suspected abuse and injuries in terms of section 6A. The abuse of older persons was made an offence by section 6B and any person who abused an older person would have been liable upon conviction to a fine or to imprisonment for a maximum period of five years, or both a fine and imprisonment. A person providing accommodation to an older person in circumstances likely to be injurious to the older person's physical or mental well-being, could have been issued with a summons to appear before a designated body appointed by the Minister of Social Development. On a finding that the allegations against the person were correct, the designated body may either have prohibited the person from accommodating or caring for the older person in question, or from accommodating or caring for any older person for such period, but not exceeding ten, years, as determined by the designated body.⁴⁸¹ Although these provisions appeared to be adequate in preventing alleged or convicted abusers to continue caring for older persons, the incidences of abuse by caregivers reported in the *Mothers and Fathers of the Nation Report* seemed to reflect a different reality.⁴⁸²

capacity to report suspected abuse. For this reason s 26 of the Older Persons Act is a vast improvement as it creates an obligation for "any person" who suspects abuse of an older person, to report such suspected abuse.

⁴⁸¹ Section 6(10) as amended by the Aged Persons Amendment Act 100 of 1998. See Asher and Olivier "Old Age" in Olivier et al (eds) (2003) *Social Security: A legal analysis* 257.

⁴⁸² See e.g. the list of 28 complaints of abuse of older persons in residential homes in the Western Cape alone, reported to the Ministerial Committee on Abuse, Neglect and Ill-treatment of Older Persons – *Mothers and Fathers of the Nation Report* (vol 2) <http://www.polity.org.za/polity/govdocs/reports/welfare/2001/elderprov.htm> (accessed 12/10/2009).

3.3.4.4 Limitations of the Aged Persons Act

The provisions of the Aged Persons Act focused only on residential care with no mention made of older persons staying at home and with families. In reality the majority of South African older persons lived, and still live in communities, with their families or alone.⁴⁸³

Older persons in population groups that by and large were not able to make use of residential care, either because of lack of residential homes in their area, or because they could not afford the available care, were excluded from the statutory protection afforded by the Aged Persons Act that mainly focused on residential care.⁴⁸⁴ Many of the old-age homes and service centres that were available were used and occupied largely by whites.⁴⁸⁵ Attempts to redress this racial disparity, such as section 3C of the Aged Persons Act, were therefore not sufficient.

The *Mothers and Fathers of the Nation Report* recorded a vast number of instances of abuse and neglect of older persons. It seems as if abuse of older persons was prevalent despite the measures to combat abuse contained in the

⁴⁸³ Submission by Action on Elder Abuse South Africa in the Report of the Portfolio Committee on Social Development on Public Hearings on the Older Persons Bill [B68B-2003] <http://www.pmg.org.za/minutes/20050829-older-persons%E2%80%99-bill-hearings> (accessed 10/09/2008).

⁴⁸⁴ According to the *Mothers and Fathers of the Nation Report*, there has been a lack of transformation in homes for the aged, with most homes still situated in white areas, and with only few black residents in these homes (Executive summary *Mothers and Fathers of the Nation Report* (2001), para 1.11).

⁴⁸⁵ See above at 3.3.4.3 for the apartheid-era origins of the Aged Persons Act and residential homes for the aged.

Aged Persons Act, partly because a great deal of the cases of abuse reported occurred in the family home or at pension pay-points, placing them outside the scope of protection provided by the Act. Judging by the prevalence of abuse, neglect and ill-treatment in residential homes,⁴⁸⁶ the Aged Persons Act was unable to protect residents of these homes. This could be as a result of the limited sanctions against abuse in residential homes contained in the Act.⁴⁸⁷

The Committee on Abuse, Neglect and Ill-treatment of Older Persons therefore recommended the enactment of comprehensive new legislation on the status of older persons.

3.3.4.5 The Older Persons Act

3.3.4.5.1 *Rights-based approach*

The main distinguishing factor between the Aged Persons Act and the Older Persons Act (OPA)⁴⁸⁸ is the rights-based approach followed by the latter. The focus of the OPA is therefore on the realisation of older persons' constitutional rights⁴⁸⁹ rather than the regulation and monitoring of residential homes.

⁴⁸⁶ E.g. psychological abuse in the form of restricted contact between residents and their families and theft of the residents' possessions (para 1.4 and 1.10 of the *Mothers and Fathers of the Nation Report*).

⁴⁸⁷ Executive summary *Mothers and Fathers Report* (2001), para 1.3.

⁴⁸⁸ Act 13 of 2006.

⁴⁸⁹ See 3.2 above for a list of constitutional rights applicable to older persons.

The OPA aims to maintain and protect the rights of all older persons.⁴⁹⁰ To ensure that the Act is in line with policy documents, more emphasis is placed on community care for older persons, departing from the prior focus on regulation of residential care.

The preamble to the OPA reiterates the need for existing laws on older persons to change “in order to facilitate accessible, equitable and affordable services to older persons”. This is therefore in line with the essence of what was required by the abovementioned policy documents such as the *Mothers and Fathers of the Nation Report* and the *National Report on the Status of Older Persons*.⁴⁹¹

Chapter 1 of the original Older Persons Bill⁴⁹² followed on from the preamble which stated that it is necessary to “empower older persons to continue to live meaningfully and constructively in a society that recognises them as important sources of enrichment and expertise”, and provided for the development and support of inter-sectoral⁴⁹³ programmes for development of older persons.

⁴⁹⁰ The objects of the OPA are stated in s 2 to be to-

- “(a) maintain and promote the status, well-being, safety and security of older persons;
- (b) maintain and protect the rights of older persons;
- (c) shift the emphasis from institutional care to community-based care in order to ensure that an older person remains in his or her home within the community for as long as possible;
- (d) regulate the registration, establishment and management of services and the establishment and management of residential facilities for older persons; and
- (e) combat the abuse of older persons.”

⁴⁹¹ Report to the Second World Assembly on Ageing, Madrid, Spain (April 2002).

⁴⁹² For an overview of the six year long legislative process to finalise the new comprehensive legislation on older persons and the different versions of the Older Persons Bill 68-2003, see Malherbe “The Older Persons Act: out with the old and in with the older?” (2007) 11 *LDD* 53-84.

⁴⁹³ S 2(1) Older Persons Bill B68-2003 allowed for consultation between the Minister of Social Development and any other relevant Minister in the development of such programmes.

As ambitious as the idea of multi-sectoral programmes for the development of older persons might be, in the end and in versions B 68D-2003 to B 68F-2003 of the Bill, Chapter 1⁴⁹⁴ as it stood was rejected in its entirety. Many of the programmes for the development of older persons reappeared in the guiding principles for provision of services found in section 9 of the OPA, but this appears to be a comparatively relegated position compared to the prominent position given to multi-sectoral programmes in the original Bill. The original Chapter 1 was replaced by provisions that state the objects of the Act, reiterate the rights-based approach to providing for older persons⁴⁹⁵ and stipulate the guidelines for future proceedings, actions and decisions concerning older persons. The

⁴⁹⁴ Chapter 1 of B68-2003 provided as follows:
“Programmes for development of older persons

- 2.(1) The Minister may, in consultation with any other relevant Minister-
- (a) develop programmes contemplated in subsection (2) or cause such programmes to be developed; and
 - (b) support any person who runs programmes contemplated in subsection (2).
- (2) The programmes referred to in subsection (1) are programmes aimed at –
- (a) the recognition of the social, cultural, economic and political contribution of older persons;
 - (b) the participation of older persons in decision-making processes at all levels;
 - (c) the access of older persons to information, education and training;
 - (d) the development of older persons in rural areas;
 - (e) the protection and promotion of the rights of older persons;
 - (f) the establishment of norms and standards for companies selling funeral policies and extending loans to older persons;
 - (g) the utilisation and management of existing facilities for older persons as multi-purpose community centres and the development of an integrated community care and support system;
 - (h) the provision of basic affordable accommodation for older persons;
 - (i) the provision of care and services to older persons in rural areas and in disadvantaged communities;
 - (j) the access of older persons to health, welfare and other care and support systems in order to enable older persons to maintain or regain their optimal level of physical, mental and emotional well-being and live with dignity in the community;
 - (k) the establishment of a national research plan and communication network on ageing;
 - (l) the creation of employment opportunities for older persons;
 - (m) the establishment of recreational opportunities for older persons;
 - (n) the exemption of older persons from the payment of property rates and taxes; and
 - (o) the availability and accessibility of free or subsidised public transport facilities for older persons.”

⁴⁹⁵ Section 4.

emphasis of the OPA had therefore changed from empowering older persons through multi-sectoral programmes to the protection of the rights of older persons.

The constitutional rights of older persons are to be the basis of all future proceedings, actions and decisions concerning older persons, as can be seen from section 5(2). The important guidelines in any such proceedings, actions and decisions are to be

- to respect, promote, protect and fulfil older persons' rights;
- the best interests of the older person concerned;
- respect for the older person's dignity;
- fair and equitable treatment of older persons; and
- the protection of older persons against unfair discrimination.

3.3.4.5.2 *Securing an enabling and supportive environment for older persons*

Chapter 2 of the Act aims to ensure that older persons' communities offer an enabling and supportive environment. As a start, national norms and standards that will determine service levels as well as monitoring systems will be applied to all services provided to older persons.⁴⁹⁶ It is hoped that applying uniform standards nationally would ease the current disparities in services and resources between provinces.

⁴⁹⁶ Section 6.

The inclusion of a provision such as section 7, which enumerates the particular instances where discrimination against older persons are prohibited, underscores the importance of respect of rights to create a supportive environment for older persons.⁴⁹⁷ The difficulty with this provision does not lie in the laudable aims, but in the text itself, which seems rather vague and presents interpretation problems.

It states that:

- Older persons enjoy the rights contemplated in section 9 of the Constitution of the Republic of South Africa and in particular may not be unfairly denied the right to-
- (a) participate in community life in any position appropriate to his or her interests and capabilities;
 - (b) participate in inter-generational programmes;
 - (c) establish and participate in structures and associations for older persons;
 - (d) participate in activities that enhance his or her income-generating capacity;
 - (e) live in an environment catering for his or her changing capacities; and
 - (f) access opportunities that promote his or her optimal level of social, physical, mental and emotional well being.

Assuming that the abovementioned activities and programmes that older persons may not be denied access to actually exist, it is unclear whether this section merely provides protection to older persons as a group against discrimination on the ground of age, or whether it supplements existing protection of individuals who may face discrimination on other prohibited grounds, with specific reference to older persons.

Section 7 must be read in the context of the prohibition of discrimination in terms of section 9 of the Constitution (the “equality clause”), the relevant provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act (“the Equality Act”)⁴⁹⁸ and the preamble to the OPA.⁴⁹⁹ The interpretation of section 7

⁴⁹⁷ Submission on Older Persons Bill by Joint Forum for Policy of Ageing (2005) 7.

⁴⁹⁸ Act 4 of 2000.

is dealt with in more detail below⁵⁰⁰ in the context of older persons' ability to access existing community activities.

3.3.4.5.3 *Financial awards to service providers*

Similar to the subsidy provision in the Aged Persons Act,⁵⁰¹ section 8 provides for the provision of financial awards by the Minister of Social Development to service providers that provide services to older persons. The Minister may prioritise the needs and services for older persons that would receive such awards, as well as determine the conditions under which they would receive the awards.⁵⁰²

To qualify for financial awards, service providers will have to comply with the guidelines for the provision of services stated in section 9. The guidelines aim to create an enabling environment for older persons by:

- (a) Recognising the social, cultural and economic contribution of older persons,⁵⁰³ for example, acknowledgment of the role of older persons as caregivers, particularly of AIDS orphans.⁵⁰⁴
- (b) Promoting participation of older persons in decision-making processes at all levels, thereby giving credit for the accumulated wisdom of older persons.

⁴⁹⁹ The preamble to the OPA requires the State to “create an enabling environment in which the rights in the Bill of Rights must be respected, protected and fulfilled”.

⁵⁰⁰ At 6.4.1.

⁵⁰¹ As well as s 4 of Bill 68 of 2003.

⁵⁰² Section 8(1)(b) and (d). The Minister of Social Development is required to prescribe the penalties for non-compliance with the prescribed conditions (s 8(1)(e)).

⁵⁰³ Section 2(2)(a) of Bill B68 - 2003 also made reference to the “political” contribution of older persons.

⁵⁰⁴ Memorandum on the Objects of the Older Persons Bill, 2003.

- (c) Recognising that all older persons do not have similar needs and that inter-sectoral collaboration should be encouraged.
- (d) Ensuring access of older persons to information, training and education.
- (e) Promoting the development of, and basic care and services for older persons in rural and urban areas.
- (f) Promoting the prevention of exploitation of older persons.⁵⁰⁵
- (g) Promoting respect for older persons and enabling them to live with dignity in their communities.
- (h) In keeping with the guideline above, ensuring that older persons receive priority in the provision of basic services.
- (i) Ensuring rehabilitation⁵⁰⁶ and the provision of assisted devices to older persons.
- (j) Ensuring, as far as is practicable, that services and facilities are accessible to older persons. One would presume that the “services and facilities” referred to here are those that cater for the community at large and not exclusively for older persons, otherwise the phrase “as far as is practicable” would not make sense.

In order to retain the financial awards received from the state, service providers are encouraged by the abovementioned guidelines to comply with the aim of the OPA of building an enabling environment for older persons.

⁵⁰⁵ Particularly by money lenders and companies selling funeral policies as mentioned by name in B 68 - 2003.

⁵⁰⁶ “Rehabilitation” is defined in s 1 “a process by which an older person is enabled to reach and maintain his or her optimal physical, sensory, intellectual, psychiatric or social functional levels, and includes measures to restore functions or compensate for the loss or absence of a function, but excludes medical care.” No definition of “assisted devices” is provided.

3.3.4.5.4 Regulation of community-based care and support services

The one significant breakthrough which distinguishes the OPA from earlier versions of the Older Persons Bill⁵⁰⁷ is that the call for attention to areas of care for older persons other than residential care finally seems to be answered by Chapter 3, which provides for the regulation of community-based care and support services for older persons.

In addition to the general rights of older persons, section 10 specifies the rights of older persons receiving community-based care and support services, the most important being the right to reside at home for as long as possible.⁵⁰⁸ In addition, older persons are afforded the rather more vague rights to “pursue opportunities for the full development of their potential” and to benefit from family and community care and protection “in accordance with society’s system of cultural values.” Although these rights are in line with prior policy statements that designate families and communities as the core support structures for older persons,⁵⁰⁹ reports such as the *Mothers and Fathers of the Nation Report* give such an indictment of the large scale ill-treatment of older persons in South Africa, that “society’s system of cultural values” could hardly be regarded as a benchmark for community-based care and services.

⁵⁰⁷ B68-2003 and B 68B-2003.

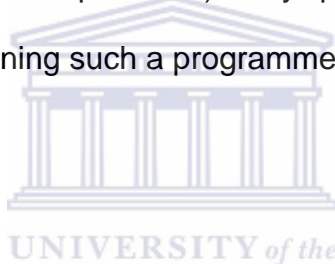
⁵⁰⁸ Section 10(a).

⁵⁰⁹ See above at 3.3.4.2.

Community-based programmes are categorised in section 11 as

- prevention and promotion programmes⁵¹⁰ which aim to ensure that the older person can continue to live independently in his or her community; and
- home-based care⁵¹¹ under which a variety of services are provided to frail older persons⁵¹² in order that they can receive maximum care in the community.⁵¹³

Section 11 not only creates the scope for community-based programmes to be developed, but also creates the likelihood that the Department of Social Development (or any other department) may provide support (financial or otherwise) to the person running such a programme.⁵¹⁴



⁵¹⁰ For programmes to qualify as “prevention and promotion programmes”, their objects should include to: empower older persons economically; create recreational opportunities for older persons; provide information, education and counselling, particularly recognising the role of older persons as carers for AIDS orphans; offer spiritual, cultural, medical, civic and social services; provide needy older persons with nutritionally balanced meals; promote the skills and capacity of older persons to earn a living; provide professional services, including care and rehabilitation to enable older persons to live independently; provide assistance to indigent and vulnerable older persons; transform existing residential facilities to serve as multi-purpose community centres; provide integrated community care for older persons; and inter-generational programmes (s 11(2)(a)(i)).

⁵¹¹ Defined in s 1 as “care provided or services rendered at the place where a frail older person resides, excluding at a residential facility, by a caregiver in order to maintain such frail older person’s maximum level of comfort, including care towards a dignified death.” S 11(3) lists the following examples of home-based care programmes: providing hygienic and physical care for older persons; providing support (including professional support) to carers of frail older persons within the home; rehabilitation programmes; provision of “respite care”, which is defined as a service offered specifically to a frail older person and to a caregiver and which is aimed at the provision of temporary care and relief; providing information to, educating and counselling family members, care-givers and the community regarding ageing and associated conditions; and providing free health care to frail older persons.

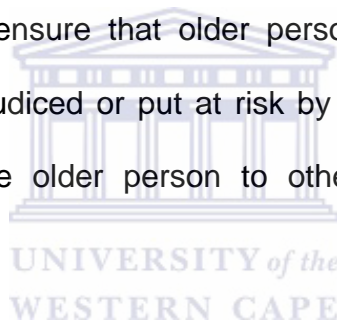
⁵¹² The definition of “frail older person” covers “an older person in need of 24-hour care due to a physical or mental condition which renders him or her incapable of caring for himself or herself” (s 1). This definition corresponds with the requirements for the grant-in-aid referred to above at 3.3.1.2.

⁵¹³ These would be the services that were categorised as domiciliary care above at 2.8.

⁵¹⁴ Section 11(1)(b).

All community-based care and support services have to be registered with the Department of Social Development. Rendering an unregistered community-based care and support service is a criminal offence.⁵¹⁵ This could therefore have the consequence that, for example, a pastor giving spiritual support to an older person without the church or the pastor being registered might be guilty of an offence.⁵¹⁶

Prior to discontinuing a community-based care service, the provider must inform the older persons that would be affected by the stoppage. He or she must also take reasonable steps to ensure that older persons currently benefiting from services would not be prejudiced or put at risk by the stoppage. Steps should also be taken to refer the older person to other persons providing similar services.⁵¹⁷



The Act requires that home-based caregivers must be properly trained and registered.⁵¹⁸ A code of conduct for home-based caregivers will also regulate this industry.⁵¹⁹

⁵¹⁵ Sections 12 and 13.

⁵¹⁶ Offering spiritual services is included amongst the objects of prevention and promotion programmes outlined in s 11(2).

⁵¹⁷ Section 13(4).

⁵¹⁸ Section 14. All social workers and health care providers involved in home-based care for older persons must also be registered (s14(2)).

⁵¹⁹ Section 14(3)(a). At date of writing the code of conduct has not been issued yet. The effect of the code of conduct will only become clear once it is prescribed by the Minister. It is suggested that it should at least provide caregivers with guidelines on the rights of older persons, the most important provisions of the Act and their duties in terms of the Act and its regulations.

3.3.4.5.5 Residential facilities

Respect for the rights of older persons in residential facilities is of the utmost importance and the following rights are listed (in addition to the rights that older persons have in terms of the Bill of Rights⁵²⁰ and section 7⁵²¹). Older person in residential facilities have the right to:

- “(a) appoint a representative to act on his or her behalf;
- (b) have reasonable access to assistance and visitation;
- (c) keep and use personal possessions;
- (d) have access to basic care;
- (e) be informed about the financial status of the residential facility and changes in management;
- (f) participate in social, religious and community activities of his or her choice;
- (g) privacy;
- (h) his or her own physician if he or she can afford it; and
- (i) be given at least 30 days’ notice of a proposed transfer or discharge.”⁵²²

Section 18 prohibits the operation of a residential facility unless such facility has been registered.⁵²³ Anyone who wishes to operate a residential facility has to apply to the Minister of Social Development for the registration of the facility.⁵²⁴ The Minister may refuse the application, or grant conditional⁵²⁵ or temporary⁵²⁶ authority to the applicant to operate the facility. One month’s notice has to be

⁵²⁰ See above at 3.2.

⁵²¹ See above at 3.3.4.5.1(b).

⁵²² Section 16.

⁵²³ With the exception of a private residence where an older person is looked after by a family members (s 18(1)(b)).

⁵²⁴ Section 18(2).

⁵²⁵ Section 18(3)(a).

⁵²⁶ Section 18(3)(b). Temporary registration may not continue for longer than 12 months under the same conditions. Registration certificates are non-transferable (s 18(7)).

given before the Minister may cancel or amend the registration certificate of a residential facility.⁵²⁷

The services that may be provided by residential facilities include:

- ”(a) 24-hour care and support services to frail older persons and older special attention;
- (b) care and supervision services to older persons who are suffering from dementia and related diseases;
- (c) rehabilitation services;
- (d) public education on issues of ageing, including dementia;
- (e) counselling services to residents and family members who need these services;
- (f) implementation and monitoring of outreach programmes;
- (g) provision of beds for the temporary accommodation of older persons at risk;
- (h) respite care services;
- (i) training of volunteer caregivers to deal with frail older persons; and
- (j) sport and recreational activities.⁵²⁸

Section 20, dealing with the establishment of residents' committees for residential facilities, is for all purposes the same as section 3B of the Aged Persons Act.⁵²⁹

Turning to the provisions regarding admission to residential facilities, section 21(1) and (2) is largely a restatement of section 3C of the Aged Persons Act,⁵³⁰

⁵²⁷ Section 18(5). The amendment or cancellation of a registration certificate will take effect on a date at least three months after the date specified in the notice in the case of permanent registration and one month for temporary registration (s 18(6)(b)). Steps have to be taken to ensure that older persons affected by the cancellation of a residential facility's registration or the voluntary closing down by the operator thereof, are accommodated in another residential facility or with persons who "in the opinion of a social worker, are fit and proper persons for accommodating the older person or older persons" (s 18(8)). The operator must provide the Minister with a report on the accommodation of the older persons concerned and hand over all assets bought with government funds to the Department of Social Development (s 19(3)). Contravention of the provisions concerning registration of residential facilities will be an offence (ss 18(9) and 19(4)).

⁵²⁸ Section 17.

⁵²⁹ Barring the renaming of the committee from "management" committee to "residents' committee" and the exclusion of shelters from the requirement to establish a residents' committee. See above at 3.3.4.3 for an outline of the provisions of s 3B of the Aged Persons Act.

⁵³⁰ See above at 3.3.4.3.

but with the addition of subsections prohibiting the admission of an older person to a facility without his or her consent. The detailed provisions for consent required before admission to a residential facility found in section 21 (3) to (7) demonstrate a clear policy decision to protect older persons against forced admission to residential facilities.⁵³¹

The only case where an older person may be admitted into a residential facility without his or her consent is where his or her mental condition renders him or her incapable of giving his or her consent. In such cases, the older person's consent will be substituted by consent given by –

- a person authorised to give the required consent either in terms of a court order or any law;⁵³² or
- in the absence of abovementioned authorised person, the spouse or partner of the older person concerned; or
- in the absence of a spouse or partner, an adult child or sibling of the older person;⁵³³ or
- the Minister of Social Development.⁵³⁴

Where the older person is capable of understanding, he or she must be informed of the intended admission, even if his or her mental condition requires consent to be given by another person.⁵³⁵

⁵³¹ Contravention of this section constitutes an offence (s 21(8)).

⁵³² Section 21(3)(a).

⁵³³ In the order as listed (s 32(3)(b)).

⁵³⁴ Consent by any of these persons may only be given after a medical practitioner has certified that the admission of the older person is a matter of haste to avoid the older person's death or irreversible damage to his or her health (s 23(3)(c)).

⁵³⁵ Section 21(5).

The meaning of section 21(4) is not clear. It requires the operator of a residential facility to “take all reasonable steps to obtain the older person’s consent”. Were it to be interpreted as referring to circumstances where another person has already granted consent for the admission, the older person’s consent can have no legal consequence, as lack of mental capacity by the older person to give such consent is a requirement for another person’s consent. It is unclear why the operator of the residential facility should then be required to take “all reasonable steps” to obtain the older person’s consent. Likewise, it is unclear what measures would be regarded as “reasonable steps” in attempting to obtain consent from a person without the mental capability to give it in the first place.

An alternative interpretation could be that this subsection deals with consent by an older person who is in fact capable of granting consent. As this subsection is surrounded with provisions dealing with consent given by other persons, this would be surprising, all the more so as the operator of the facility is only required to “take reasonable steps” to get the older person’s consent. Would this mean that even though no older person may be admitted to a residential facility without his or her consent, once all “reasonable steps” have been taken to obtain such consent but to no avail, he or she can then be admitted to the facility without his or her consent? It is submitted that the purpose of this section, i.e. to protect older persons against coerced or forced admissions to residential facilities, would not be served by an interpretation of section 21(4) that would dilute the requirement of consent in such a manner.

To protect the residents of residential facilities, section 22 provides for the monitoring of registered residential facilities. There are two groups of persons tasked with monitoring residential facilities: social workers employed by the State who may at any time inspect facilities⁵³⁶; and, social workers or other persons designated by the Director-General who are compelled to monitor facilities if requested to do so by the Director-General.⁵³⁷ Their tasks include:

- a) visiting and monitoring a registered residential facility in order to ensure compliance with the Act;
- b) interviewing any older person cared for in the facility;
- c) enquiring into the well-being of the older person;⁵³⁸
- d) directing any person to provide him or her with any book or document in his or her possession relating to the residential facility;
- e) reporting to the Director-General on the outcome of the inspection; and
- f) reporting to the operator of the residential facility on the findings of the inspection.

A compliance notice may be issued to the operator of the residential facility by the social workers or designated person inspecting the facility. The compliance notice is issued if a provision of this Act is not complied with and remains in force until compliance with the relevant provision has occurred.⁵³⁹ Section 22 does not

⁵³⁶ Although the Human Rights Commission has expressed its concern that there might not be enough social workers to carry out the duties imposed by this section (para 6.8 of the Report of the Portfolio Committee on Social Development on Public hearings on the Older Persons Bill B68B-2003).

⁵³⁷ They will be provided with a certificate issued by the Director-General stating their function i.t.o. this section. Such certificate must be produced upon request of the manager of the residential facility (s 22(2)).

⁵³⁸ Either with or without the assistance of a health care provider.

⁵³⁹ In which case a compliance certificate will be issued.

spell out the effect of a compliance notice. However, section 8 allows the Minister of Social Development to set conditions for receiving financial awards, including compliance measures. Hence, non-compliance with a compliance notice may lead to the suspension or termination of financial awards to service providers.

Another measure to monitor conditions in residential facilities is the reporting requirement in terms of section 23.⁵⁴⁰ Every operator of a registered residential facility has to report annually⁵⁴¹ to the Minister in respect of compliance with the prescribed service standards and the prescribed measures to prevent and combat abuse of older persons. The report also has to cover the provisions of the prescribed service level agreements concluded during that financial year. The Minister is authorised to notify an operator that fails to comply with the reporting duty that if the report is not submitted within 90 days after the date of the notice, the registration of that residential facility may be withdrawn, and to withdraw the registration should the operator not comply within 90 days.

3.3.4.5.6 Protection against abuse and neglect

The measures to protect older persons against abuse and neglect are found in Chapter 5 of the Act. As is outlined below, these provisions go beyond the

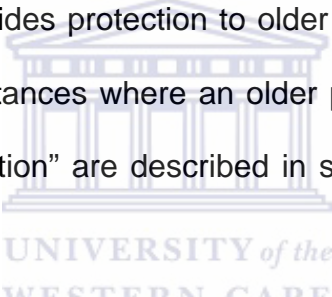
⁵⁴⁰ Section 23. These provisions are similar to s 6D of the Aged Persons Act.

⁵⁴¹ Within 60 days after the end of the financial year for that facility.

protection afforded by sections 6 to 6D of the Aged Persons Act⁵⁴² and can greater definitely be regarded as an advance in the effort to protect older persons.

The provisions of the Older Persons Bill on combating abuse of older persons operate in conjunction with the provisions of the Domestic Violence Act.⁵⁴³ Where the Domestic Violence Act provides greater protection to older persons who face abuse in a domestic relationship than the OPA, the former will apply.

Section 25 of the OPA provides protection to older persons in need of care and protection. The various instances where an older person could be regarded as “in need of care and protection” are described in section 25(5) as cases where the older person

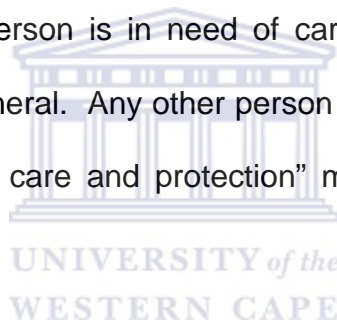
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- “(a) has his or her income, assets or old age grant taken against his or her wishes or who suffers any other economic abuse;
 - (b) has been removed from his or her property against his or her wishes or who has been unlawfully evicted from any property occupied by him or her;
 - (c) has been neglected or abandoned without any visible means of support;
 - (d) lives or works on the streets or begs for a living;
 - (e) abuses or is addicted to a substance and without any support or treatment for such substance abuse or addiction;
 - (f) lives in circumstances likely to cause or to be conducive to seduction, abduction or sexual exploitation;
 - (g) lives in or is exposed to circumstances which may harm that older person physically or mentally; or
 - (h) is in a state of physical, mental or social neglect.”

⁵⁴² See 3.3.4.3 above.

⁵⁴³ Section 24 states that “the provisions of this Act must not be construed as limiting, amending, repealing or otherwise altering any provision of the Domestic Violence Act, 1998 (Act No. 116 of 1998), or as exempting any person from any duty or obligation imposed by that Act or prohibiting any person from complying with any provision of that Act.” The Domestic Violence Act requires the police service or other relevant authority to intervene in cases of suspected abuse.

Hence the term “older person in need of care and protection” includes older persons who have been neglected as well as those who have been victims of abuse.⁵⁴⁴ Abuse is, however, regarded as more serious, and a separate procedure is followed in terms of section 26 in cases where suspected abuse of older persons takes place.⁵⁴⁵

Section 25 places a the duty on certain categories of persons to report cases of older persons in need of care and protection. All cases where a person who is involved with an older person in a professional capacity on personal observation concludes that the older person is in need of care and protection have to be reported to the Director-General. Any other person “who is of the opinion that an older person is in need of care and protection” may report such opinion to a social worker.⁵⁴⁶



All reports of older persons in need of care and protection have to be investigated. Once the report has been substantiated by the investigation, there are a number of options open to the Director-General or social worker concerned.

The actions that may be taken include

- facilitating the removal of the older person in need of care and protection to a hospital or shelter;
- making a report to a police official, thereby initiating the procedure in terms of section 27 to remove the alleged offender from the home or place where the older person resides;

⁵⁴⁴ A definition of abuse of older persons for the purposes of the Older Persons Act follows below.

⁵⁴⁵ The meaning and consequences of “abuse” are discussed more fully below.

⁵⁴⁶ Section 25(2).

- taking the required steps to ensure adequate provision for the basic needs and protection of the older person concerned;⁵⁴⁷ or
- assisting an older person who has been the victim of an offence or crime to lay a complaint at the police.⁵⁴⁸

The definition of “abuse” includes a description of abuse as well as statutory examples of abuse. Abuse of an older person is described as “any conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person”.⁵⁴⁹

Four particular instances of abuse are highlighted in section 30, namely physical, sexual, psychological and economic abuse.⁵⁵⁰ The concept of “physical abuse” is described as “any act or threat of physical violence towards an older person”. The inclusion of the other types of abuse show that abuse of older persons often goes much further than physical harm. Any conduct that violates the sexual integrity of an older person constitutes “sexual abuse”. The protection against psychological abuse⁵⁵¹ is of utmost importance, as many perpetrators of this type of abuse do not regard their actions as abusive. The inclusion of psychological

⁵⁴⁷ Appropriate steps will depend on the circumstances of each older person in need of care and protection.

⁵⁴⁸ Section 25(4).

⁵⁴⁹ Section 30(2).

⁵⁵⁰ For the interpretation of similar provisions in the Domestic Violence Act, see *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality, amicus curiae)* 2005 (1) SACR 359 (CC); *S v Engelbrecht* 2005 2 SACR 41(W).

⁵⁵¹ The examples of psychological abuse of older persons cited in the Act are –

- “(i) repeated insults, ridicule or name calling;
- (ii) repeated threats to cause emotional pain; and
- (iii) repeated invasion of an older person’s privacy, liberty, integrity or security.”

abuse in the definition of abuse makes “any pattern of degrading or humiliating conduct towards an older person” a punishable offence.

The following actions constitute “economic abuse” of an older person in terms of this legislation:

- “(i) the deprivation of economic and financial resources to which an older person is entitled under any law;
- (ii) the unreasonable deprivation of economic and financial resources which the older person requires out of necessity; or
- (iii) the disposal of household effects or other property that belongs to the older person without the older person’s consent.”⁵⁵²

Whenever any person⁵⁵³ suspects that an older person has been abused or suffers from an abuse-related injury, he or she must act on that suspicion and immediately notify the Director-General or a police official of his or her suspicion.⁵⁵⁴ Failure to notify the relevant persons of suspected abuse of older persons constitutes an offence.⁵⁵⁵

Various measures may be taken as a result of the notification of suspected abuse, depending on which party was notified.⁵⁵⁶

- The Director-General must investigate the suspected abuse and if the suspicion is substantiated by the investigation, take any one of the actions listed in section 25(4).

⁵⁵² Section 30(3)(d). This definition of economic abuse corresponds with the definition in s 1 of the Domestic Violence Act.

⁵⁵³ This goes much wider than s 6A of the Aged Persons Act which only obliged dentists, medical practitioners, nurses, social workers or other persons who examine, attend to or deal with an older person to notify the Director-General of the suspected abuse.

⁵⁵⁴ Section 26(1). A person acting in good faith will not be held liable i.r.o. a subsection (1) notification (s 26(2)).

⁵⁵⁵ Section 26(3).

⁵⁵⁶ Section 26(4).

- On receipt of a notification, a police official may refer the case of suspected abuse to the Director-General, in which case the process stated in the previous option will be set in motion.
- The police official is also entitled to initiate the proceedings in terms of section 27, if he or she is satisfied that it will be in the best interests of the older person that the alleged offender is removed from the home or place where the older person resides.

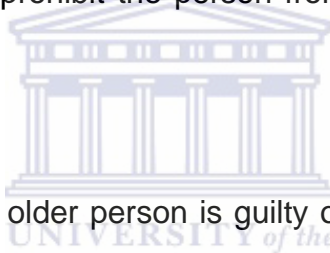
The process according to which a person suspected of abusing an older person can be removed from the home or place where the older person resides is outlined in section 27. The police official to whom suspected abuse is reported must issue a notice⁵⁵⁷ calling upon the alleged abuser to leave the home or place where the older person is staying, as well as requiring the alleged offender to refrain from entering the home or having contact with the older person.⁵⁵⁸ The alleged offender must be notified of a magistrates' court hearing where he or she will have the opportunity to state reasons why the prohibition of entering the premises where the older person stays should not be made permanent. The magistrates' court before which the alleged offender is brought, may summarily inquire into the circumstances that led to the removal of the alleged abuser. After the investigation into the alleged abuse and having heard the alleged offender, the magistrates' court may extend the ban on entering the older person's home or having contact with the older person. The court may also allow the alleged

⁵⁵⁷ Stating the personal details of the alleged abuser (s 27(1)(a)).

⁵⁵⁸ The ban on contact with the older person will be in force until the court hearing specified in s 27(1)(c).

offender conditional access⁵⁵⁹ to the older person or the home or place where the older person stays or make any other order as the court deems fit.⁵⁶⁰

As for dealing with the alleged abuse itself, section 28 deals with the procedure for bringing the alleged abuser before the magistrates' court. Section 29 deals with the procedural aspects of the magistrates' court enquiry into the alleged abuse.⁵⁶¹ If, after the investigation, it appears to the magistrate that the alleged abuse did in fact occur, the magistrate may still allow the person concerned to accommodate and care for the older person, but under such conditions as the magistrate may impose, or prohibit the person from accommodating and caring for older persons.⁵⁶²



Any person who abuses an older person is guilty of an offence⁵⁶³ and would be liable upon conviction to a fine or to imprisonment for a maximum period of five years, or to both a fine and imprisonment.⁵⁶⁴

The abuse of an older person in the commission of any crime or offence will be regarded as an aggravating circumstance for sentencing purposes.⁵⁶⁵ In

⁵⁵⁹ As long as the best interests of the older person are served (s 27(6)(b)).

⁵⁶⁰ Contravention on such a court order or failure to comply with the subsection (1) notice by a police official is an offence (s 27(8)).

⁵⁶¹ The law relating to procedure in criminal trials in magistrates' courts "applies with the necessary changes in respect of subpoenas, the calling and examination of witnesses for the purpose of or at the enquiry, the taking of evidence and the production of documents and other articles thereat, and the payment of allowances to witnesses" (s 29(4)). The submission and examination of reports by social workers or health care providers and the cross-examination of the persons making the reports are also regulated by s 29.

⁵⁶² For a maximum of 10 years (s 29(10)).

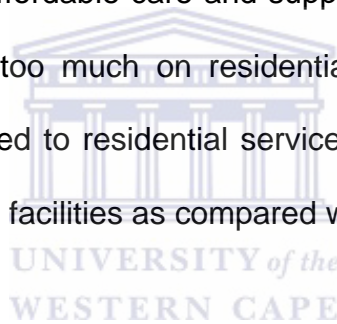
⁵⁶³ Section 30(1).

⁵⁶⁴ Section 33(b).

addition, the Minister is required to keep a register of persons convicted of the abuse of an older person.⁵⁶⁶ A person whose name appears on such a register will be barred from operating or being employed by any residential facility and from providing any community-based care or support service to an older person.⁵⁶⁷

3.3.4.6 Conclusion

The Older Persons Act may have achieved its goal as far as facilitating accessible, equitable and affordable care and support services to older persons, although the focus is still too much on residential services in respect of the number of sections dedicated to residential services and the detailed protection offered to residents of these facilities as compared with other older persons.



The sections setting out how community-based care and support services for older persons are to be regulated in future are the most significant advance made by the OPA. At last there seems to be clear correlation between policies stating that communities and families should shoulder more of the responsibility of taking care of older persons, and the legislation providing for and regulating community-based care and support services. More can be done, however, to bring provision for community-based care and support services on a par with residential services.

⁵⁶⁵ Section 30(4).

⁵⁶⁶ Section 31(1).

⁵⁶⁷ Section 31(2).

3.3.5 Housing for older persons not housed in residential facilities

The limited room in residential facilities for older persons is one of the main reasons for the policy shift to community-based and family care for older persons.⁵⁶⁸ Housing for older persons who do not have any family who can accommodate them and who struggle to afford their own housing⁵⁶⁹ is therefore a key concern for government, particularly in the light of section 26 of the Constitution which guarantees everyone the right of access to adequate housing and requires the state to take reasonable legislative and other measures to achieve the progressive realisation of this right. Adequate housing for older persons is also important in the light of legislation that aims to ensure that older persons remain in their homes within the community as long as possible.⁵⁷⁰ The following is a brief overview of the statutory provision for housing for older persons.⁵⁷¹

The housing subsidy scheme that has been established to provide access to low income groups and indigent persons makes special provision for recipients of the

⁵⁶⁸ See above at 3.3.4.4 for a description of the lack of residential facilities in certain areas and 4.2 for a discussion of government policy regarding care and support of older persons.

⁵⁶⁹ Private retirement villages and other housing options for older persons who can afford their own housing and the related legislation fall outside the scope of this thesis, which focuses on support and care for less well-off older persons.

⁵⁷⁰ S 1 OPA.

⁵⁷¹ An exhaustive analysis of statutory provisions related to housing for older persons falls outside the scope of this thesis, as most of the housing options for older persons do not include care and support services for older persons.

older persons grant.⁵⁷² Beneficiaries of the older person's grant are at least theoretically eligible for the housing subsidy.

The Rental Housing Act 50 of 1999 ensures the proper functioning of the rental housing market, which is a key component of the housing sector. The Act creates methods to protect tenants against unfair practices. Although the Rental Housing Act makes no direct mention of older persons, it provides that the government must ensure that the rental housing market meets the demand for affordable housing for historically disadvantaged and poor persons.⁵⁷³

The Social Housing Act⁵⁷⁴ was enacted to address the "dire need for affordable rental housing for low to medium income households which cannot access rental housing in the open market."⁵⁷⁵ Social housing is defined as

a rental or co-operative housing option for low to medium income households at a level of scale and built form which requires institutionalised management and which is provided by social housing institutions or other delivery agents in approved projects in designated restructuring zones with the benefit of public funding as contemplated in this Act.⁵⁷⁶

Government, at all three levels, and social housing institutions must prioritise the needs of vulnerable groups, including older persons.⁵⁷⁷ Residents are entitled to a clean, healthy and safe environment to afford them "the necessary dignity and

⁵⁷² South Africa Government Information "Housing" <http://www.info.gov.za/aboutsa/housing.htm> (accessed on 09/07/2009).

⁵⁷³ S 2(1)(a) Rental Housing Act 50 of 1999, as amended. For instance, the Minister of Housing is authorised by the Act to introduce a rental subsidy housing programme (s 3(1)).

⁵⁷⁴ Act 16 of 2008.

⁵⁷⁵ Preamble, Social Housing Act.

⁵⁷⁶ Section 1.

⁵⁷⁷ Section 2(1)(a).

privacy”.⁵⁷⁸ Discrimination against residents on any of the grounds set out in section 9 of the Constitution is prohibited by section 2(1)(d).

The Act defines the roles and responsibilities of national government, provincial government and municipalities in the provision of social housing.⁵⁷⁹ A Social Housing Regulatory Authority is created to which all social housing institutions must apply for accreditation in order to receive government subsidies.⁵⁸⁰

The legislation on housing options for older persons outlined above illustrate that the state has given attention to legislative measures to give effect to the right of access to adequate housing. The provisions of the Social Housing Act may, if implemented correctly, provide clean and safe housing for older persons who qualify for social housing. However, many older persons need more than accommodation and in addition require health and social care services. The legislation on care and support services, the OPA, was discussed above.⁵⁸¹ The notion that older persons must live in their communities as long as possible, links the legislation on affordable and safe housing for older persons with the OPA, which inter alia regulates the care and support services provided to older persons in their communities.

⁵⁷⁸ Section 2(1) c).

⁵⁷⁹ Sections 3-5.

⁵⁸⁰ Section 13 read with s 7.

⁵⁸¹ At 3.3.4.5.1.

3.4 CONCLUDING REMARKS

Whilst it is clear that every individual who is in a position to do so is required to make provision for his or her own financial security in old age, the state has a major role to play in the area of retirement provision in terms of its constitutional duty to take reasonable measures to progressively provide access to social security. Firstly, the state has to create an environment that enables individuals to save for their retirement⁵⁸² and protects the rights and interests of fund members.⁵⁸³ More importantly, the state has the constitutional duty to provide access to social assistance,⁵⁸⁴ currently in the form of grants paid, to the majority of older persons who did not have the means to save for their old age.⁵⁸⁵

Financial security in old age will unfortunately have no meaning for an older person who cannot take care of him- or herself or who is the victim of abuse in a residential home for older persons. The state has made it clear that its duty to provide care applies only in the case of indigent and frail older persons who have no family to care for them. According to the state, family members should form the core support structure in caring for older persons. Unfortunately many older persons live with family members who cannot cope with the financial burden of caring for an older person. In many cases, the older person supports the family

⁵⁸² E.g. the tax concessions in terms of the Income Tax Act.

⁵⁸³ E.g. the provisions of the Pension Funds Act regulating the administration of retirement funds and the new minimum benefit requirements. The provision of a dispute resolution forum such as the Pension Fund Adjudicator is also part of the state's role in protecting the interests of fund members.

⁵⁸⁴ S 27(1)(c) of the Constitution.

⁵⁸⁵ The administration of and requirements for older person's grants are regulated by the Social Assistance Act. The administration of grants is currently delegated to the South African Social Security Agency.

with his or her older person's grant. These families are not equipped to care for older family members, which means that support from community organisations are vital in protecting older persons against neglect and in many cases, regrettably, abuse. Once again, community organisations cannot lend the support required without some assistance from the state.⁵⁸⁶

The following chapter will deal with the key issues influencing the interrelationship between the different role players in providing financial security for retirement and protecting and caring for older persons. In particular, the focus will be on the difficulties faced by families and community organisations in providing care for older persons. The degree to which the state can shift the responsibility to care for older persons to other role players will also be investigated. In the context of retirement provision, the various risks involved in an individual saving for retirement will be investigated to establish whether the state is providing sufficient protection against loss of retirement savings. Various problems currently experienced in the provision of state grants to older persons will also be examined.

⁵⁸⁶ The Older Persons Act provides for the regulation of residential facilities and the broadening of the scope of financial assistance to community organisations to include community-based support programmes and home-based care.

CHAPTER 4

THE STATE'S ROLE IN PROMOTING INTERGENERATIONAL SOLIDARITY

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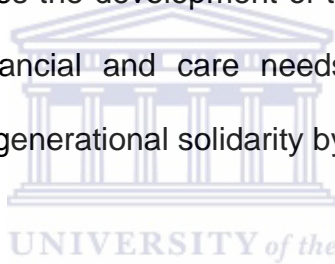
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4.1 INTRODUCTION

Chapter 3 outlined the current legal framework for retirement provision and care of older persons. The focus of this chapter is on intergenerational solidarity as the basis of state policy on the provision of social security to older persons and on the steps taken by the state to promote intergenerational solidarity in South Africa.

This chapter initially examines the development of the state's policy approach to meeting older persons' financial and care needs and, hence, the level of importance attached to intergenerational solidarity by the state in South Africa.



The focus then moves to the older person's grant as the primary expression of intergenerational solidarity in current South African law. The legislation on, and measures undertaken to implement the older person's grant are analysed to determine their impact on intergenerational solidarity.¹ Where obstacles to intergenerational solidarity are identified, suggestions are offered on steps that can be taken to promote intergenerational solidarity in the grant system.

The promotion of intergenerational solidarity is closely related to older persons' right of access to social security and right to dignity. Therefore, this chapter also

¹ Some of the issues referred to in Chapter 3 will therefore not be dealt with in great detail as they have no direct effect on intergenerational solidarity.

deals with the extent to which the current grant administration system can be said to respect, protect, promote and fulfil² older persons' right of access to social security.³ The grant administration system is evaluated against the state's duty to progressively realise older person's right of access to social assistance and the extent to which older persons are protected against actions by the state or other parties that arbitrarily deprive them of their grants is analysed.

4.2 GOVERNMENT POLICY ON INTERGENERATIONAL SOLIDARITY

A chronological overview of developments in government policy as regards the level of state intervention required in social security provision is provided to contextualise the discussion of intergenerational solidarity in this thesis.⁴



4.2.1 Privatisation

During the 1980s the trend in government policy was towards the privatisation of welfare provision, reflecting the view that “the state would act as a safety net only where individuals, communities and the private sector were unable to take on new roles and responsibilities”.⁵ This approach is in line with what is known as

² Section 7(2) of the Constitution, 1996.

³ Section 27(1)(c) and (2).

⁴ The late 1980s were chosen as a starting point to distinguish the policies of the National Party government from those of the post-apartheid government.

⁵ Lund “State restructuring of welfare” (1988) 6 *Transformation* 25.

the “residual model” of social welfare which envisages minimal state intervention in the provision of social welfare services and social security. According to this approach the family and the market are primarily responsible to meet socio-economic needs and state social welfare should only be of a short-term nature to provide assistance in times of crisis.⁶ The reduced state responsibility for welfare would, according to the residual model, free resources for industrial investment, resulting in economic growth, development and modernisation.⁷

4.2.2 Partnership

The National Party government in power in the late 1980s regarded social welfare as a partnership between the state, the private business sector and community and religious organisations.⁸ The approach at that time was geared towards privatisation of social welfare and social security, thereby limiting state responsibility for these services. An example of this aspect of the government’s social policy at this time was the development of old-age homes initially as

⁶ See MacPherson and Midgley (1987) *Comparative social policy and the Third World* 116; Patel (1992) *Restructuring social welfare: Options for South Africa* 18. Patel also criticised the dominant political forces during the 1980s for “tending towards emergency measures” such as “safety nets based on social assistance, private and voluntary solutions and piecemeal reforms” (at 26).

⁷ MacPherson and Midgley (1987) *Comparative social policy and the Third World* 120. Supporters of the residual model, such as Xulu (2005) “In search of a new social welfare system: Is the Basic Income Grant an appropriate policy framework for developing societies? The South African case” (2005) 1 (3) *Ingede Journal of African Scholarship* (available at <http://ingedej.ukzn.ac.za>) agree with the view that welfare should only be available to those individuals who truly need help and are unable to meet their own welfare needs.

⁸ Department of National Health and Population Development (1992) *Points of departure in developing a new social welfare dispensation for the RSA* 2-4. See Patel (1992) *Restructuring Social Welfare* 45; and also the Mouton Committee Report which also had cooperation between the State, retirement fund system, community organisations and family members to assist older persons as its point of departure (Mouton Committee (1992) *Report of the Committee of Enquiry into a retirement Provision System for South Africa* para 3.4).

accommodation and places of care for older white persons.⁹ Even though the development of old-age homes was part of concerted government action to improve the care offered to older white persons, the vast majority of old-age homes were not state-run but merely state-subsidised. As a result the development and regulation of old-age homes was still in line with the government's "partnership" notion.

4.2.3 Change in priorities?

The Mouton Committee of Investigation into a Retirement Provision System for South Africa in its report published in 1992¹⁰ ranked its recommendation that "the State shall assist individuals to meet basic subsistence needs in retirement or old age" above the recommendation that "individuals shall have responsibility for providing for their needs and those of their dependent spouses in retirement, if they wish to have more resources in old age than can be afforded by the State".¹¹

The Committee deliberately chose this order of priority as they recognised the inability of many individuals to make meaningful provision for their own old age.¹²

⁹See above at 3.3.4.3. In line with the partnership model, the community was given primary responsibility for the care of older persons, with the state's only responsibility being assistance to communities that could not independently manage their own social welfare problems and offering financial assistance to welfare organisations (Department of National Health and Population Development (1992) *Points of departure in developing a new social welfare dispensation for the RSA* 3).

¹⁰ Hereafter the "Mouton Committee Report".

¹¹ Mouton Committee Report (1992) para 3.4(b) and (c).

¹² This approach has some elements in common with the "institutional" conception of social welfare, which is regarded as the opposite of the residual model outlined above. According to Patel (1992) *Restructuring social welfare: Options for South Africa* 19 the State plays an integral

They also stressed the importance of the State setting up measures such as tax laws to encourage individuals to provide for their own old age and for employers to create and contribute to retirement funds.¹³ The significance of these statements by the Mouton Committee was that, at least as far as provision for retirement income was concerned, the pitfalls of privatisation of social security, such as social inequalities, were highlighted.¹⁴

4.2.4 White Paper for Social Welfare

The social security system inherited by the post-apartheid government in 1994 was highly advanced, but riddled with obstacles.¹⁵ The system itself was made up of fragmented institutions, “culminating a non-viable, inefficient welfare system and the entrenchment of the subordinate quality of services to the majority of the South African population”.¹⁶ The migrant labour system in place during

role in social welfare provision according to the institutional approach and “state interventionism is seen as a necessary step in meeting needs in a modern industrial society.” According to the institutional view, access to welfare should be available to everyone as a basic right (Xulu (2005) “In search of a new social welfare system: Is the Basic Income Grant an appropriate policy framework for developing societies? The South African case” (2005) 1 (3) *Ingede Journal of African Scholarship* 8). The institutional model regards welfare as “a proper and legitimate system of services and provisions which caters for the population as a whole” (MacPherson and Midgley (1987) *Comparative social policy and the Third World* 117).

¹³ Mouton Committee Report (1992) para 3.4 (d)-(f).

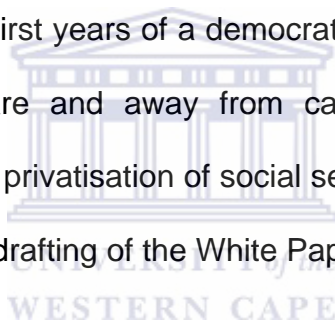
¹⁴ Echoing the criticism against privatisation of social welfare and social security by authors such as Patel (1992) *Restructuring social welfare: Options for South Africa* 47-8; Lund “State restructuring of welfare” (1988) 6 *Transformation* 32.

¹⁵ Makino (2004) *Social security policy reform in post-Apartheid South Africa – a focus on the Basic Income Grant* 6 links the gaps in the post-apartheid social security system to the fragmented system in existence under apartheid as follows: “Although the end of apartheid brought about deracialisation of existing social security provision, nothing has changed with what did not exist in the first place.” See also Seidman Makgetla (2004) *Women and the economy* 15 where she states that “government efforts since 1994 have not sufficed to overcome the backlogs created over centuries of oppressive rule.”

¹⁶ Liffman “Social security as a constitutional imperative” in Olivier et al (eds) (2001) *The extension of social security protection in South Africa* 31. See also Olivier and Kalula “Scope of

apartheid had also created a disparity between the situation in the rural and urban areas as it required male labourers to fluctuate between the 'homelands' and urban areas, and prevented women and children from joining men in the cities,¹⁷ thereby creating a situation of dependency which continued after the demise of apartheid.

It was generally accepted by authors such as Patel¹⁸ that once a democratically elected government came into power, the state would play a greater role in social welfare and social security provision. However, this was not the case and the initial policy direction in the first years of a democratic South Africa was a shift to developmental social welfare and away from cash transfers through social grants.¹⁹ The trend towards privatisation of social security, and particularly social assistance continued in the drafting of the White Paper for Social Welfare.²⁰ The



coverage in Olivier et al (eds) (2003) *Social security: a legal analysis* 127; Department of National Health and Population Development (1992) *Points of Departure in Developing a New Social Welfare Dispensation for the RSA* 19.

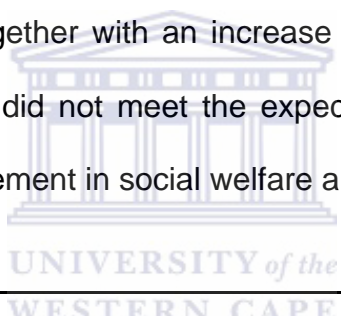
¹⁷ Xulu (2005) "In search of a new social welfare system: Is the Basic Income Grant an appropriate policy framework for developing societies? The South African case" (2005) 1 (3) *Ingede Journal of African Scholarship* 3.

¹⁸ Patel (1992) *Restructuring social welfare: Options for South Africa*.

¹⁹ As evidenced by the change of the relevant department's name from "Department of Welfare" to "Department of Social Development". See Makino (2004) *Social security policy reform in post-Apartheid South Africa – a focus on the Basic Income Grant* 9.

²⁰ GN 1108 in GG 18166 of August 1997 (hereafter White Paper for Social Welfare (1997)). Hassim "Social justice, care and developmental welfare in South Africa: a capabilities perspective" (2008) 34 (2) *Social Dynamics* 108 describes the White Paper as a "policy document produced out of compromise between different interests", which therefore "inevitably embodies numerous tensions that are left to particular programmes to deal with." She views the main tensions as existing between expectations of what social security programmes are capable of and what she describes as "neo-liberal caveats". Principles such as affordability and sustainability of social security programmes would therefore have a major effect on the progressive realisation of social security benefits. Structural adjustment measures such as the Growth, Employment and Redistribution Strategy (GEAR) adopted by the South African government in 1996 have been accused of limiting "the ability of governments to effect the required 'progressive realisation' of socio-economic rights" (Majola "A response to Craig Scott: a South African perspective (1999) 1 (4) *ESR Review* 7. See also Xulu (2005) "In search of a new social welfare system: Is the Basic

vision for social welfare as declared in the White Paper was to facilitate “the development of human capacity and self-reliance within a caring and enabling socio-economic environment”.²¹ These goals were to be achieved “in a collaborative partnership with individuals, organisations in civil society and the private sector in keeping with the values, goals and priorities of the Reconstruction and Development Programme”.²² The references to “self-reliance” and partnerships with the private market and the community in service delivery are both core aspects of the ‘neo-liberal’ approach.²³ The requirements of a global economy are seen as necessitating a reduction in the state’s responsibility for welfare together with an increase in individual responsibility.²⁴ The White Paper therefore did not meet the expectation of a clear policy shift towards greater state involvement in social welfare and social security.²⁵



Income Grant an appropriate policy framework for developing societies? The South African case” 11; Makino (2004) *Social security policy reform in post-Apartheid South Africa – a focus on the Basic Income Grant* 12. Furthermore, Hassim “Social justice, care and developmental welfare in South Africa: a capabilities perspective” (2008) 34 (2) *Social Dynamics* 109 questions whether the White Paper is not couched in too neutral terms leaving the actual implementation to be debated at a later stage where many interested parties who had participated in the drafting of the White Paper would have no or little power over budgetary choices. She also faults the White Paper for being too vague in its description of the precise balance between the different role-players in welfare provisioning.

²¹ White Paper for Social Welfare (1997) Chap 2, para 1. See also Fraser-Moleketi speech at the Institute for Retirement Funds Annual Conference (1999); Makino (2004) *Social security policy reform in post-Apartheid South Africa – a focus on the Basic Income Grant* 9.

²² Preamble, White Paper for Social Welfare (1997). Even the White Paper on Reconstruction and Development (1994) lamented the high level of dependency upon social grants, stating: “It is unfortunately true that many communities and families depend almost entirely on the cash from social grants.” (Ministry of the Office of the President (1994) *White Paper on Reconstruction and Development* para 3.12.3).

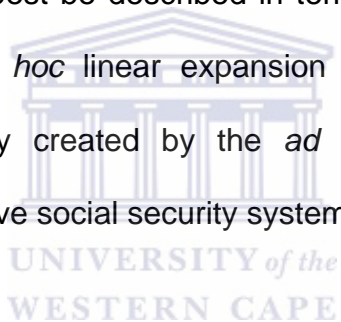
²³ See above at 2,3 on ‘neo-liberalism’ and its impact on social security.

²⁴ Xulu (2005) “In search of a new social welfare system: Is the Basic Income Grant an appropriate policy framework for developing societies? The South African case” 4.

²⁵ The references to “partnership” and “self-reliance” in the White Paper which was drafted by the post-apartheid government are remarkably similar to the basic point of departure for social welfare of the National Party government expressed as: “The social welfare service is based on the partnership model and is intended specifically to support and guide individuals, families and communities experiencing social welfare problems and social welfare needs towards achieving

An indication of the impact of the focus on “partnership” created by the White Paper on government’s policy directions regarding older persons was given by Minister Fraser-Moleketi when she stated in 1999 that “the challenge that we as South Africans face is to very quickly, progressively and dynamically find the right formula to manage our ageing process at individual, family and community levels”.²⁶

Although there has been a policy shift from a purely residual model for social welfare provision, social policy development in South Africa, as in most other developing countries, “can best be described in terms of the incremental model which accounts for an *ad hoc* linear expansion of social services”.²⁷ The inequalities and inefficiency created by the *ad hoc* expansion of services necessitated a comprehensive social security system.



4.2.5 Resistance to expansion of social security

When the Committee of Inquiry into a Comprehensive System of Social Security for South Africa²⁸ released its report *Transforming the present – Protecting the future* in 2002 it met unanticipated resistance from some senior Cabinet

such a degree of independence that they can provide their own living requirements and so raise their quality of life.” (Department of National Health and Population Development (1992) *Points of Departure in Developing a New Social Welfare Dispensation for the RSA* 3).

²⁶ Fraser-Moleketi speech to the Institute for Retirement Funds Annual Conference (1999).

²⁷ MacPherson and Midgley (1987) *Comparative social policy and the Third World* 122. The institutional conception of social welfare giving the state a key role in social welfare provision has therefore not been adopted. Recent examples of *ad hoc* expansion of social assistance are the gradual reduction in qualifying age for the older person’s grant for men from 65 to 60 years of age and the inclusion of permanent residents in the citizenship requirement for the older person’s grant (see 3.3.1.1.1 above).

²⁸ The Taylor Committee, so named after the chairperson of the committee, Vivien Taylor.

members. This was in reaction to the Committee's recommendations of extensions of social security²⁹ which collided with the Cabinet's view that "only the disabled or sick should receive hand-outs, while able-bodied adults should enjoy the opportunity, the dignity and the rewards of work".³⁰ The government raised the unintended consequence of dependency³¹ on the state as a justification for its position.³²

²⁹ The Taylor Committee's emphasis was on short-term "income poverty" measures such as cash transfers through social grants, constituting a clear reversal of the "developmental" trend initiated by the White Paper for Social Welfare. Measures to address "capability poverty" (health, housing etc.) and "asset poverty" (land, credit etc.) could be rolled out in medium-term and long-term programmes once income poverty has been addressed (Makino (2004) *Social security policy reform in post-Apartheid South Africa – a focus on the Basic Income Grant* 19).

³⁰ Government spokesperson Joel Netshitenzhe as quoted by Hassim "Social justice, care and developmental welfare in South Africa: a capabilities perspective" (2008) 34 (2) *Social Dynamics* 111 and Makino (2004) *Social security policy reform in post-Apartheid South Africa – a focus on the Basic Income Grant* 21. According to the BIG Financing Reference Group (2004) *Breaking the Poverty Trap – Financing a BIG in SA* 19 these and similar comments made by government members and spokespersons were "widely interpreted in the media as suggesting a dismissive – or even hostile – approach to the Committee's recommendations, especially on the BIG".

³¹ On the exact meaning of the word "dependency" see the following quote by Makino (2004) *Social security policy reform in post-Apartheid South Africa* 7, fn 5: "The debate around dependency is actually a little more complicated, because being dependent on social grants can mean at least two different things; (1) being discouraged to get out of the situation of living on social grants because grants recipients would lose benefits once they start earning their own income, and (2) being in need of social grants because of poverty or other reasons. When social grants are criticised as "creating dependency," it means the former, thus criticizing a BIG as such simply misses the point. On the other hand, when the RDP states its policy goal is to "minimize the extent of dependency of the State," it means the latter, i.e., it envisages the society where the number of the people who live in poverty and need social grants would be minimized, and this ideal itself would be shared by most supporters of a BIG. Even this usage of the word "dependent/dependency" however connotes rather negative views on social grants that "it is better to do without them", and induces the policy shift away from the social grants provision."

³² Xulu (2005) "In search of a new social welfare system: Is the Basic Income Grant an appropriate policy framework for developing societies? The South African case" 2 and 9. See also Coleman (2003) *Current debates around BIG: the political and socio-economic context*. According to Seidman Makgetla (2004) *Women and the economy* 19 government anti-poverty programmes were generally "hampered by worries about cultivating a culture of dependency" until the early 2000s. The deliberate shift from passive social assistance to active social assistance (which encourages independent participation in community life) has found support from social policy experts in countries such as Belgium and the Netherlands. See Vanderborght (2004) *Universal Income in Belgium and the Netherlands* EUI Working Paper SPS No. 2004/4.

It is not clear where older persons are to fit in this over-generalised view, as all older persons are not “disabled or sick” and the older person’s grant is designed particularly for those older persons who were denied the opportunity to save for their retirement when they could enjoy the “rewards of work”.³³ The view that social security should be reserved only for groups that meet the set suggested eligibility requirements perpetuates the distinction between the “worthy and unworthy” poor³⁴ that has attracted criticism from various quarters.³⁵ The significance of the “opportunity, the dignity and the rewards of work” as opposed to state social assistance as a mechanism to meet basic or consumption needs should also be considered in the context of the high unemployment rate.³⁶ The

³³ See Vanderborcht (2004) *Universal Income in Belgium and the Netherlands* 29 where the rationale for a universal pension for older persons as opposed to a basic income grant for the whole population is set out. See also Baltes (1996) *The many faces of dependency in old age* 4 who regards dependency in old age as socially acceptable as older persons are “coping with the unavoidable shrinking of reserves and capacities in old age”. This she opposes to structural dependency created by the social structures in societies. The ANC itself has recognised older persons as a vulnerable group targeted for additional support. See ANC National Policy Conference Draft Resolution on Targeted Groups (2002).

³⁴ See Xulu (2005) “In search of a new social welfare system: Is the Basic Income Grant an appropriate policy framework for developing societies? The South African case” 11 where the following statement is made in the context of the Basic Income Grant: “The point is to improve the current conditions of the poor without having to deliver a social grant to undeserving people.”

³⁵ Such as Patel (1992) *Restructuring Social Welfare: Options for South Africa* 41. She attributes this attitude towards social security to the influence of “The Poor Law Tradition” with its Calvinist origins. The BIG Financing Reference Group (2004) 31 criticises the view that a universal grant would create “dependency” amongst people who are supposed to be self-reliant, whereas persons who belong to certain vulnerable groups, such as older persons, are regarded as “deserving” poor. They argue that as the older person’s grant is used to support whole families, the notion that the grant is “targeted” to only “deserving” persons, is a fiction.

³⁶ According to the Quarterly Labour Force Survey (QLFS), the official unemployment rate in the second quarter of 2009 was 23.6% (<http://www.statssa.gov.za/publications> (accessed 01/09/2009)). This was based on the number of unemployed persons as a percentage of the labour force. “Unemployed” persons are “persons aged 15 to 65 who did not have a job or business in the seven days prior to the survey interview but had looked for work or taken steps to start a business in the four weeks prior to the interview and were able to take up work within two weeks of the interview” (Lehohla “Sound detail lies at heart of official data” *StatsOnline News Archive* http://www.statssa.gov.za/news_archive/26January2006_1.asp (accessed 16/03/2009)). The high unemployment rate led the BIG Financing Reference Group to the following conclusion: “Given the long-term structural nature of unemployment, the majority of poor South Africans have little prospect of formal employment. Indeed, poverty is deepening precisely because more and

emphasis on individual responsibility for welfare through paying work also disregards the vital contribution made by the activities of many unpaid caregivers and volunteers.³⁷ It is submitted that MacPherson and Midgley³⁸ were correct in arguing that an attack on social security measures that are regarded as 'handouts' is justified, not for the reasons that critics of these benefits recognise, but because those benefits should be available as of *right*.

Despite the aforementioned resistance to the expansion of social security by government, many of the Taylor Committee's recommendations have since been realised. They include the creation of the South African Social Security Agency³⁹ and the highly anticipated new national social insurance system due to be implemented by 2010.⁴⁰ The policy documents⁴¹ driving the reforms required to implement the latter reflect elements of both the institutional⁴² and residual welfare models. The aims of the reforms of the pension system are described as

more people are being excluded from the labour market for increasing periods of time. In this context, to champion the "dignity of work" as a simple alternative [to] social grants is at best misguided and at worst a cruel hoax." ((2004) *Breaking the Poverty Trap* – *Financing a BIG in SA* 30).

³⁷ Vanderborght (2004) *Universal Income in Belgium and the Netherlands* 31; Young "New disciplines of work and welfare" *Dissent* Summer 2000 <http://www.dissentmagazine.org/article/?article=687> (accessed 13/07/2008).

³⁸ MacPherson and Midgley (1987) *Comparative Social Policy and the Third World* 177.

³⁹ I.t.o. the South African Social Security Agency Act 9 of 2004.

⁴⁰ See State of the Nation Address of the President of South Africa, Thabo Mbeki (9 February 2007) <http://www.info.gov.za/speeches/2007> (accessed 18/09/2008) and Budget Speech 2007, Minister of Finance, Trevor A Manuel (14 March 2007) <http://www.info.gov.za/speeches/2007/07022115261001.htm> (accessed 13/07/2009).

⁴¹ Department of Social Development (2007) *Reform of retirement provisions* Discussion document (hereafter DSD discussion document (2007)); National Treasury (2004) *Retirement fund reform: a discussion paper* (hereafter National Treasury (2004) *Discussion paper*); National Treasury (2007) *Social Security and Retirement Reform: Second discussion paper* (hereafter National Treasury (2007) *2nd discussion paper*).

⁴² See above at fn 12.

“directly attacking poverty by reducing income vulnerability while also supporting employment creation”.⁴³

4.2.6 Recent policy developments

Since the beginning of 2007 government policy on social security has increasingly begun to conform to the recommendations by the Taylor Committee. Although the ANC policy on social development still relies on empowering people to take them out of poverty whilst focussing social safety nets on protecting the most vulnerable in society, there is a noticeable shift to more comprehensive social security systems. According to the ANC the eradication of poverty requires “a combination of policies around a social wage, social grants, as well as programmes aimed at engaging people in the reconstruction of our communities”.⁴⁴ It advised government to continue with its plans towards a comprehensive social security system by consolidating and constantly reviewing all social security measures such as the older person's grants.⁴⁵

The ANC still seems to be opposed to a Basic Income Grant⁴⁶ and argues that a comprehensive social security net which includes retirement benefits, social grants, free education and health care, household support, food security and a

⁴³ National Treasury (2007) *2nd discussion paper* 1.

⁴⁴ ANC (2007) *Social Transformation Policy* discussion document 2.

⁴⁵ Ibid.

⁴⁶ Which in their opinion “would neither have the broad or deep impact on poverty eradication nor the broad mobilisation of resources to address diverse aspects of poverty and the well-being of our people” (ANC (2007) *Social Transformation* 3).

range of co-ordinated and focused benefits would be more beneficial. It is, however, in favour of exploring the removal of the means test for older person's grants.⁴⁷

Social solidarity is emphasised by the ANC as one of the building bricks of the envisaged comprehensive social security system.⁴⁸ While the emphasis on social solidarity in general is encouraging, it is submitted that for the reasons discussed above intergenerational solidarity, in particular, deserves greater prominence in future social policy developments.

It is suggested that even though government policy has shifted from the preference for privatisation during the apartheid era, it does not as yet reflect the state's full obligations under the Constitution. The state is required to respect, protect, promote and fulfil the rights in the Bill of Rights.⁴⁹ Section 27(2) qualifies the state's duty to respect, protect, promote and fulfil the right to access to social security by requiring the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right. This means that the state is required to devise a "comprehensive and workable plan" to meet its obligations.⁵⁰ The test for the reasonableness of social security measures is whether they have responded to the needs of particularly vulnerable

⁴⁷ Ibid.

⁴⁸ ANC (2007) *Social Transformation* 3 and 4.

⁴⁹ Section 7(2).

⁵⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at 1189 para 38.

and marginalised people.⁵¹ It is submitted that, as far as older persons are concerned, it is imperative that policy and measures to realise the right of access to social security are for the most part based on intergenerational solidarity, as an expression of the willingness of the working-age generation to support older persons as a particularly vulnerable and marginalised group. Even deliberations on the availability of resources should be informed by a commitment to intergenerational solidarity.⁵²

The test to determine the reasonableness of state measures to give effect to section 27 of the Constitution is whether the measures taken are reasonable and effective in their conception and implementation.⁵³ The importance of intergenerational solidarity as part of social security policy was established above. The next section of this chapter deals with the extent to which the state is giving effect to its obligations in terms of section 27 at the level of implementation of the principal expression of intergenerational solidarity in the current social security system, the older person's grant.

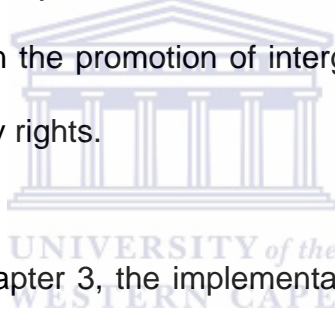
⁵¹ At para 44.

⁵² See above at 3.2.2.3.

⁵³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at 1189 para 42.

4.3 INTERGENERATIONAL SOLIDARITY AND THE OLDER PERSON'S GRANT

The older person's grant system is a large-scale social assistance programme, currently providing assistance to over two million older persons.⁵⁴ It is currently the primary expression of intergenerational solidarity in the South African social security system, as (mainly) working-age taxpayers are funding grants for older persons. It is also a measure taken by the state to give effect to older persons' right of access to social security. Therefore, the older person's grant is the ideal measure of the link between the promotion of intergenerational solidarity and of older persons' social security rights.



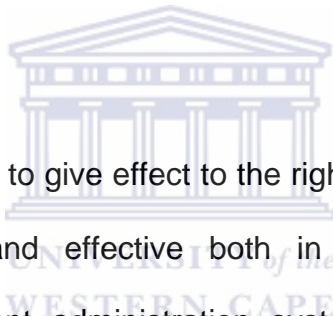
As was stated above in chapter 3, the implementation of the right of access to social security is qualified by factors such as the limitation of the state's obligations to "available resources".⁵⁵ The fundamental question is therefore whether, if the state is taking reasonable measures "within its available resources" to achieve the realisation of older persons' social security rights, it could be justified in shifting the responsibility for providing financially for older persons to private sector institutions, non-governmental organisations, individuals and to families. A more detailed examination of the impact of limited

⁵⁴ 2,210,288 beneficiaries as at 30 September 2007 (SASSA Business Intelligence Unit "Social security statistical report" <http://www.sassa.gov.za> (accessed 09/08/2008)).

⁵⁵ Section 27(2).

funds for the payment of older person's grants on intergenerational solidarity follows below.⁵⁶

Applicants for the older person's grant currently have to comply with a means test. The advantages and disadvantages of means testing in general and the particular means test being utilised therefore deserves further scrutiny.⁵⁷ The section of this chapter dealing with the means test aims to determine firstly, the fairness of the exclusion of potential beneficiaries by the means test and secondly, whether the abolition of the means test would promote intergenerational solidarity.



Measures taken by the state to give effect to the right of access to social security have to be reasonable and effective both in their design and in their implementation.⁵⁸ The grant administration system has been plagued with instances of fraud, corruption and misadministration in the recent past. The extent to which the state is complying with its constitutional obligations toward beneficiaries of the older person's grant under these circumstances is examined below.⁵⁹ It is argued that fraud, corruption and mismanagement in the delivery of the older person's grant should be regarded as obstacles to intergenerational

⁵⁶ At 4.3.1.

⁵⁷ Other constitutional issues attached to the older person's grant have been dealt with above and are not included in the discussion below: for instance, the statutory exclusion of non-citizens from social assistance (at 3.3.1.1.1) and the former differentiation in pensionable age between men and women.(at 2.8 and 3.3.1.1.1).

⁵⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at 1189 para 42.

⁵⁹ At 4.3.3 and 4.3.4.

solidarity as they may have a negative effect on the willingness of taxpayers to fund the system. Measures to combat fraud and corruption and to improve service delivery related to the older person's grant are discussed both in the context of the promotion of intergenerational solidarity and the compliance of the state with its constitutional obligations.

4.3.1 Limited funds for social grants

4.3.1.1 Global cut-back on social spending

In the current era of a global economy and competition among states, doubts about whether states can afford public pensions for older persons are on the increase. Most countries in the world, including the developing countries, have or are considering moving away from public pensions toward privatising at least a portion of the pension system and overhauling the pension structure.⁶⁰ Unfortunately, this new global trend coincides with new needs arising, such as people being dependant on pensions for longer as the average life-span increases, as well as increasing unemployment.

⁶⁰ Munro (1999 "A personal view of social security arrangements for old age and the risks inherent therein"); National Treasury (2007) *2nd discussion paper* 6 and 64; Mouton Committee Report (1992) 15; National Treasury (2007) *Budget Review 2007* "Social Security" 110.

The relatively generous level⁶¹ and scale of South Africa's social grant for older persons system is unique, if not globally, definitely in the developing world.⁶² The financial burden on the state to provide grants for older persons is enormous,⁶³ specifically if seen in the context of the abovementioned global trend to less state expenditure.

4.3.1.2 Factors contributing to high grant costs

At first glance, the monthly grant paid is not that much, but in terms of the average GNP per capita,⁶⁴ the social assistance grants "compare favourably internationally".⁶⁵ The reason for the high grant amount to GDP ratio is twofold:

- South Africa is a relatively poor nation;

⁶¹ Woolard (2003) *Impact of government programmes* 3 finds that the old age pension (older person's grant), at a level of at least more than twice (in 2003) the median per capita income for Africans, can be regarded as generous by international standards. The 2009 budget provides for a monthly maximum older person's grant of R1 010.

⁶² Woolard (2003) *Impact of government programmes* 11; Munro "A personal view of social security arrangements for old age and the risks inherent therein" (1999) 6; Africa Recovery "South Africa tackles social inequities" 1(2001) 4 (4) *Africa Recovery* United Nations (available at <http://www.un.org/ecosocdev/geninfo/afrec/subjindx/144soafr.htm>); Liebenberg "The right to social security: Response" in Brand and Russell (eds) (2002) *Exploring the core content of socio-economic rights: South African and international perspectives* 148; Olivier and Kalula "Scope of coverage" in Olivier (eds) (2003) *Social Security: A Legal Analysis* 127; Matisonn and Seekings "Welfare in Wonderland? The Politics of the Basic Income Grant in South Africa, 1996 – 2002" (2002) 2. The Mouton Committee Report (1992) 14 singled South Africa out as the only developing country in the world providing social assistance to older persons "on a significant scale for even those who have been unemployed for most of their working lives".

⁶³ In 2002 Borhat estimated that the social old age pension reached close to 2 million older individuals and the grant payments made up 63% of the Department of Social Development's total transfer expenditure (Bhorat "Is a universal income grant the answer?" (2002) 26 (2) *SALB* 20). By March 2006 the number of older persons receiving grants had grown to 2,3 million (Department of Social Development (2009) *Annual Report 2008/9* 17).

⁶⁴ GNP (gross national product) per capita is a measure of "the average income of each member of the population, including what they may earn or receive from abroad": RICSAs "Definitions for RICSAs's Poverty Project" http://web.uct.ac.za/depts/ricsa/projects/publicli/poverty/pov_def.htm# Gross national product (GNP) and gross domestic product (GDP) (accessed 02/07/2009).

⁶⁵ Woolard (2003) *Impact of government programmes* 3.

- The grants were initially limited to the white population, making it possible to set the level of the grant at a higher amount.⁶⁶

Additional expenses in delivering older person's grants that also contribute to the total cost of the grant are personnel expenditure, computer costs and transport costs.⁶⁷ These additional expenses may have a significant impact on the resources available to the state to provide beneficiaries with grants. It is submitted that the impact of such additional expenses on the amounts available for grants should be carefully monitored. The state (or in the case of the grants, SASSA) should not be allowed to construct its grant payment structures in such a way as to have a negative effect on its "available resources".⁶⁸ In the context of the argument that limited funds are available for the payment of the older person's grant, only the actual expenditure on grants paid to beneficiaries should therefore be taken into account when measuring the cost of the older person's grant system.

An additional expenditure which has to be taken into account in determining the costs of social grants is the additional expenses faced by the provincial

⁶⁶ Woolard (2003) *Impact of government programmes* 11; BIG Financing Reference Group (2004) *Breaking the Poverty Trap – Financing a BIG in SA* 3.

⁶⁷ Lund "State social benefits in South Africa" (1993) 46 (1) *ISSR* 8.

⁶⁸ I.t.o. s 27(2) of the Constitution the state's duty to provide access to social assistance is limited to measures that can be taken within the available resources. See Lund "State social benefits in South Africa" (1993) 46(1) *ISSR* 8.

departments of Social Development as a result of the litigation by aggrieved grant applicants.⁶⁹

4.3.1.3 Impact of fiscal policy

Government's own fiscal and monetary policy determines the extent of resources available for the payment of grants.⁷⁰ Any discussion regarding the affordability of social grants such as the older person's grant has to take place in the context of the macro-economic policy guideline in South Africa, namely Growth, Employment and Redistribution (GEAR), which has been the main post-apartheid fiscal policy guideline.⁷¹ The policy measures undertaken in the name of GEAR included "fiscal deficit reduction, liberalisation of financial controls and trade regime, privatisation of state enterprises, and the pursuit of 'regulated flexibility' of the labour market".⁷² Of these, restraint of expenditure to reduce the fiscal deficit would have the greatest impact on social grants.⁷³ According to Makino, "the fiscal constraints under the GEAR strategy have effectively defined the

⁶⁹ See below at 4.3.4 for more on the litigation by aggrieved grant applicants against the delays in and mismanagement of the grant application process by the provincial governments.

⁷⁰ Barberton "Paper Tigers? Resources for Socio-Economic Rights" (1999) 2 (1) *ESR Review* 7.

⁷¹ GEAR superseded the Reconstruction and Development Programme (RDP) in 1996.

⁷² Makino (2004) *Social security policy reform in post-Apartheid South Africa – a focus on the Basic Income Grant* 12; Borat "Is a universal income grant the answer?" (2002) 26 (2) *SALB* 19.

⁷³ Although GEAR recognises that cash transfers through social grants play a major role in poverty alleviation, especially in the rural areas (Department of Finance (1996) *Growth Employment and Redistribution – A macroeconomic strategy* 15), its emphasis remains on achieving high economic growth and generation of more jobs (Africa Recovery "South Africa tackles social inequities" (2001) 14 (4) *Africa Recovery* United Nations (available at <http://www.un.org/ecosocdev/geninfo/afrec/subjindx/144soafr.htm>)).

substance of the ‘available resources’, at least in the government’s interpretation”.⁷⁴

The GEAR strategy did not at first achieve the predicted high growth and the consequent increases in jobs.⁷⁵ Since 2003, the government has moved away from the restrictive fiscal environment to a more expansionary fiscal policy and increased social spending.⁷⁶ The current fiscal policy, AsgiSA (Accelerated and Shared Growth Initiative for South Africa), allows for increased infrastructural spending and for measures to move persons from the “second economy” to the “first economy”. The aim of AsgiSA is to halve unemployment and poverty by 2014.⁷⁷ However, AsgiSA has been criticised for being no more than a “wish list” for increased growth without the detailed guidelines found in GEAR.⁷⁸ More fundamentally, the current economic outlook is one of recession at least until 2010, and its impact on spending in terms of AsgiSA is uncertain at this stage.⁷⁹

⁷⁴ (2004) *Social security policy reform in post-apartheid South Africa – a focus on the Basic Income Grant* 12.

⁷⁵ Africa Recovery (2001) “South Africa tackles social inequities”; “What is Asgisa?” <http://www.fin24.com> (accessed on 07/09/2008).

⁷⁶ BIG Financing Reference (2004) “*Breaking the Poverty Trap*” – *Financing a BIG in SA* 4 and 20.

⁷⁷ “Key issues – Accelerated and Shared Growth Initiative for South Africa (AsgiSA)” <http://www.info.gov.za/asgisa/asgisa.htm> (accessed 07/09/2008).

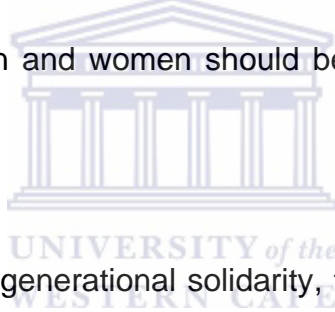
⁷⁸ “What is Asgisa?” <http://www.fin24.com> (accessed 07/09/2008).

⁷⁹ The Minister of Finance, P Gordhan, reiterated the government’s commitment to maintain spending on social protection despite the reduced revenue as a result of the recession and the increased budget deficit in the Medium Term Budget Policy Statement 2009. However, he emphasised that public expenditure will be scrutinised to eliminate wasteful spending in order to “achieve more, with less” <http://www.info.gov.za/speeches/2009/09102715251004.htm> (accessed 12/11/2009).

4.3.1.4 Suggested measures to reduce costs of grants

The high costs of the grants system and how best to reduce these costs have been explored by various committees and task teams since the 1990s.

- The Mouton Committee of Investigation into a Retirement Provision System for South Africa⁸⁰ was in favour of retaining an old age assistance system and even though it was in principle in favour of abolishing the means test, reluctantly concluded that it should be retained in order to limit the cost of such assistance.⁸¹ The Committee also recommended that the qualifying age of men and women should be equalised at 65 as a cost-cutting measure.⁸²



In the context of intergenerational solidarity, the most significant measure to address the increasing unaffordability of grants for older persons suggested by the Mouton Committee was the proposed “all-party agreement” among the different political parties on grant expenditure. The aim with the proposed “all-party agreement” was twofold. Firstly, the limits on how much of the state’s available resources could be spent on

⁸⁰ The Mouton Committee was appointed in 1988 to review the effectiveness of retirement provision system in South Africa. See above at 3.3.2.3.1(b) fn 294.

⁸¹ Mouton Committee Report (1992) 14.

⁸² Mouton Committee Report (1992) 15. See above at 2.8 for an overview of the legal challenge on the constitutionality of the age differentiation in the qualifying age for men and women for grants i.t.o. the Social Assistance Act 13 of 2004. The Social Assistance Amendment Act 6 of 2008 equalises the qualifying age for men and women at 60 and not 65 as the Mouton Committee recommended. It can therefore be concluded that the legislature does not regard increasing the qualifying age as a cost-saving option.

financing assistance to older persons had to be agreed upon. In the second place, agreement had to be reached to keep a tight rein on promises regarding the levels of future benefits payable to older persons.⁸³ To this author's knowledge no such agreement was ever reached, with the result that the expectation that the levels of grants to older persons would continue to increase persists, placing the interests of older persons in competition with those of other groups making demands on limited state funds.

- The Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the Taylor Committee) projected that the costs of the grant could be reduced by utilising the income tax system rather than means tests.⁸⁴ As a last resort to cut the costs of the grant, the Taylor Committee recommended that an increase in retirement age for both men and women to 65 be considered.⁸⁵
- The Second Discussion Paper of the Treasury Task Team proposed the introduction of a “cost effective, basic contributory social security system,

⁸³ It was envisaged that parties would agree that pension levels would not form part of electioneering (Mouton Committee Report (1992) 15; 215-218). A similar arrangement was proposed by the BIG Financing Reference Group in 2004 where the establishment of a government/civil society forum was advocated with the object of considering the practical issues related to a comprehensive social security system (*“Breaking the Poverty Trap” – Financing a BIG in SA* 5).

⁸⁴ See the BIG Financing Reference Group (2004) *“Breaking the Poverty Trap” – Financing a BIG in SA* for detail on the use of various tax-based financing options (such as corporate tax, income tax or an increase in VAT) for recouping the costs of a universal grant.

⁸⁵ In the light of the legislation aimed at the equalisation of the qualifying age for men and women at 60, it is unlikely that such a drastic measure to save costs on the grant system would be considered. See fn 82 above.

to complement the redistributive social grants programmes”.⁸⁶ Together with this proposal, serious consideration has been given to abolishing the means test for the older person’s grant or at least raising the thresholds considerably. Abolishing or relaxing the means test for the older person’s grant would allow the grant to be supplemented by the pension provided through the national social security system.⁸⁷

At first glance, it does not appear as if modifying the means test can be regarded as a cost-saving exercise. However, it is suggested that it is the fact that the older person’s grant currently stands alone in providing benefits to older persons with no or low income that creates the expectation that the grant levels increase in line with inflation.⁸⁸ Enhancing the grant (whether the means test is relaxed or done away with completely) with a basic social insurance type benefit would cause the grant to become exactly what it was intended to be: a safety net and minimum income for those older persons who do not qualify for other

⁸⁶ National Treasury (2007) *2nd Discussion Paper* 8.

⁸⁷ National Treasury (2007) *2nd Discussion Paper* 14; National Treasury (2007) *Budget Review 2007* “Social Security” 115. See 4.3.2 for a discussion of the recommendations for the abolition on amendment of the means test.

⁸⁸ Support for the notion that the means test in its current form is responsible for cost increases can be found in the Taylor Committee Report. In this report it is estimated that the number of people eligible for the older person’s grant will increase by approximately 50% by 2017. Should no changes to the older person’s grant structures be made, this increase in the number of beneficiaries is estimated to increase the annual cost of the grant to almost R30 billion (in 2002 terms). The Taylor Committee Report (2002) 98 blames the inability of the current means test to capture lump sum benefits for this projected cost increase.

benefits. Pressure to increase grant levels should consequently ease off in the longer term.⁸⁹

- The administration of the grant system is one of the major components of expenditure on the older person's grant. For this reason the Treasury Task Team's Second Discussion Paper recommends the consolidated administration of social security benefits with the resultant advantage of "economies of scale in administration".⁹⁰ Another important cost-saving suggestion is that the employment of regional outsourcing of grant payments to service providers should be reconsidered in favour of more modern and cost-effective arrangements.⁹¹ The 2007 Budget provides for R4,1 billion for the administration costs of SASSA, over half of which projected expenditure is for independent payments service provider contracts.⁹² Such a disproportionately large expenditure on the outsourcing of payments clearly necessitates research on how much it would cost not to outsource payments. It is submitted that the Minister of

⁸⁹ COSATU, however, offers a counterargument to those that propose that including more persons under social insurance would address the problem of the "unaffordable" older person's grant. They argue that this view "ignores the fact that only employed workers benefit from social insurance and the continuing chronic levels of poverty in our society which require greater levels of social assistance, not less" (COSATU "Audit of COSATU positions on Social Security, October 2000" <http://www.cosatu.org.za/show.php?include=docs/policy/2000/ssaudit.htm> (accessed 01/07/2009)).

⁹⁰ National Treasury (2007) *2nd Discussion Paper* 16-17; National Treasury (2007) *Budget Review 2007* "Social Security" 115. The efficiency gains from transferring responsibilities for grants to SASSA and strategic improvements in administrative systems are expected to decrease service delivery costs (*Budget Review 2007* 101). See also the proposals of the BIG Financing Reference Group (2004) *"Breaking the Poverty Trap" – Financing a BIG in SA* 27.

⁹¹ National Treasury (2007) *2nd Discussion Paper* 17.

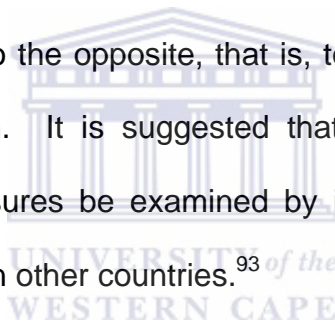
⁹² National Treasury (2007) *Budget Review 2007* "Social Security" 104.

Social Development should reconsider outsourcing of grant payments if there is evidence that it is not the cheapest option.

The proposals of the committees and task teams therefore seem to suggest that the following steps be taken to reduce the costs of the older person's grant:

- raising the qualifying age for both men and women to 65;
- abolishing or modifying the existing means test for the older person's grant and recouping the additional costs through taxes;
- consolidating the administration of older person's grants.

It is unlikely that raising the qualifying age would be considered so soon after legislation was passed to do the opposite, that is, to equalise the qualifying age at 60 for men and women. It is suggested that the feasibility of the other proposed cost-cutting measures be examined by investigating whether similar measures were successful in other countries.⁹³



4.3.1.5 Impact of high grant costs on intergenerational solidarity

Social grants such as the older person's grant are funded through taxes on a solidarity or pay-as-you-go basis. This means that current revenue is utilised to pay current benefits and that there is therefore no direct link between

⁹³ See below at 7.3.3 and 7.3.6 for a description of the Chilean and Swedish systems and the measures undertaken in these systems to reduce administrative costs. Cost-cutting measures also have to be considered carefully in the context of the failure by government to deliver in the field of grant administration, which has been blamed on a shortage of financial resources. See De Beer and Vettori "The enforcement of socio-economic rights" (2007) 3 *PER* 3.

beneficiaries and contributors (taxpayers).⁹⁴ Any non-contributory pay-as-you-go system relies on a healthy tax base and therefore a strong economically active sector of the population. The increase of the mortality rate of the economically active part of the population attributable to the HIV/AIDS pandemic is expected to increase the drain on the already heavily burdened tax base. A reduction in the economically active part of the population⁹⁵ will leave the other generations, namely older persons and children, increasingly vulnerable. Any future policy decisions will consequently have to allow for the impact of HIV/AIDS on the tax base.

As was stated above,⁹⁶ the success of the older person's grant system and, should it become an option in South Africa, a state-run national pension scheme is of necessity linked to macro-economic factors. The state's responsibility in terms of section 27 is limited to what it can achieve within its "available resources". The moment that economic growth slows down and unemployment rises, the burden on the working population increases and less money is available to pension schemes. Even worse consequences of low economic growth are decreases in tax revenue and increases in unemployment compensation. More families will need state assistance with the cost of child-

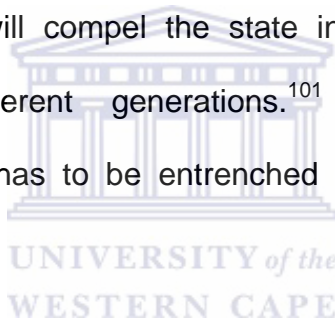
⁹⁴ See above at 2.7 for the distinction between pay-as-you-go and fully funded as funding methods.

⁹⁵ Which is already significantly reduced as a result of the high unemployment rate.

⁹⁶ At 4.3.1.3.

rearing as well, all of which marginalises funding for older person's grants or pension systems as a priority in total public expenditures.⁹⁷

With unemployment figures at their current high (and growing) level,⁹⁸ South Africa's ability to manage an old-age security system relying mainly on public funds, and therefore tax revenue, is severely curtailed.⁹⁹ The government's inability to collect taxes from the large number of South Africans working in the informal economy worsens the burden on the already limited state funds that have to be applied to competing interests.¹⁰⁰ The limited resources available for the older person's grant will compel the state into difficult trade-offs in the relationship between different generations.¹⁰¹ It is submitted that intergenerational solidarity has to be entrenched by legislation to protect the



⁹⁷ See Woolard (2003) *Impact of government programmes using administrative data sets: Social assistance grants* 3 for how the introduction and growth of child grants has limited fiscal capacity to increase pensions for older persons.

⁹⁸ I.t.o. the Quarterly Labour Force Survey (QLFS), the official unemployment rate in the second quarter of 2009 was 23.6% (<http://www.statssa.gov.za/publications> (accessed 01/09/2009)). Note that the expanded definition of unemployment which includes the so-called "discouraged jobseekers" may far exceed the unemployment rate quoted above. See BIG Financing Reference Group (2004) *Breaking the Poverty Trap – Financing a BIG in SA* 10.

⁹⁹ Already in 1999, the then Minister of Welfare and Population Development, Min Fraser-Moleketi warned that South Africa is moving "into a sphere, when social assistance, especially a non contributory scheme, is becoming increasingly unaffordable as dependent populations increase and the tax contributory labour sector demand more benefit for their contributions" and that alternative ways of funding social security must be found (Fraser-Moleketi Speech at the Institute for Retirement Funds Annual Conference (1999)).

¹⁰⁰ The state's constitutional obligation i.t.o. s 27 requires at the minimum provision of basic levels of social security to the most vulnerable groups in South Africa which include not only older persons, but also people living with disabilities and HIV/AIDS, caregivers of poor children and people who are destitute and cannot support themselves and their dependants (Liebenberg "The right to social security: Response" in Brand and Russell (eds) (2002) *Exploring the core content of socio-economic rights: South African and international perspectives* 158.

¹⁰¹ The manner in which other countries have handled the trade-offs between the different generations is one of the issues covered in the comparative overview in Chapter 7.

interests of older persons from being outweighed by other short-term spending priorities such as soccer stadiums.¹⁰²

The large amounts spent on the older person's grant impact greatly on job creation, housing and poverty relief. This, coupled with the high unemployment rate, has driven the development of the proposed national social insurance system. The limited resources available for social assistance for older persons have created the need for the integration of the public grants system and private and occupational retirement provision systems. Only in a truly integrated system would the state be able to continue paying minimum benefits to those older persons who cannot provide for their own retirement.¹⁰³ The state would be in the position to do so as the responsibility for the provision of retirement benefits for all who can afford to contribute to saving for their own retirement would be shifted to other "pillars" of the integrated national retirement funding system.¹⁰⁴

4.3.2 Means tests for older person's grants

Means testing is "used in selective income security programs to determine eligibility based on the income of the prospective recipient. The benefit is

¹⁰² See *Mail & Guardian Online* 21 February 2007 "Good news in budget on tax and spending" <http://www.mg.co.za/article/2007-02-21-good-news-in-budget-on-tax-and-spending> (accessed 01/07/2009).

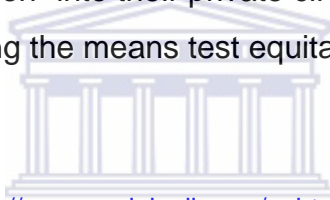
¹⁰³ Mouton Committee Report (1992) para 3.5 and 3.6.

¹⁰⁴ See below at 4.4 and 5.8 for further discussion of the advantages of an integrated retirement funding system..

reduced according to the income level, and there is always a level at which no benefit is granted".¹⁰⁵

The older person's grant is subject to a means test¹⁰⁶ that has been criticised as being unjust, ineffective and socially disruptive by reason of

- it being practically impossible to administer efficiently, as vast manpower has to be employed "to make detailed evaluations of small amounts of income that are likely to come from a variety of sources – formal and informal",¹⁰⁷
- discouraging applicants who dread the stigmatisation and the "degrading inquisitorial investigation" into their private circumstances;¹⁰⁸
- the difficulty in applying the means test equitably and fairly to all.¹⁰⁹



¹⁰⁵ Definition of "means test": <http://www.socialpolicy.ca/m.htm> (accessed 07/02/2009). Another definition given for the term means test is "an investigative process undertaken to determine whether or not an individual or family is eligible to receive certain types of benefits from the government": http://en.wikipedia.org/wiki/Means_test (accessed 02/07/2009).

¹⁰⁶ The means test for the older person's grant is found in Annexure A of GN R898 in GG 31356 of 22 August 2008 (hereafter GN R898). In essence it entails a reduction of the maximum grant payable (multiplied by a factor of 1,3) by 50% of any income received by single persons and 25% of any joint income received by married applicants and their spouses. A person whose total assets are worth more than 40 times the annual maximum grant (or in the case of persons in spousal relationships, joint assets of more than 80 times the annual maximum grant) will be disqualified from receiving the grant. Only an applicant with no income and limited assets will receive the maximum grant. Property owned and occupied by the applicant and his or her spouse is not taken into account for the means test (reg 19(3)(a)). The means test in Annexure A of GN R898 corresponds closely with the previous means test in reg 12 GN R418 in GG 18771 of 31 March 1998, the only differences being that the maximum grant was previously multiplied by a factor of 1,15 for unmarried persons and 1,075 for married persons and the maximum assets that an applicant could own before disqualification was 30 times the annual maximum grant for unmarried, and 60 times the annual maximum grant for married persons. The similarity between the two tests means that much of the criticism leveled against the previous test may apply to the current test.

¹⁰⁷ Asher (2005) *Response to the National Treasury Retirement Fund Reform discussion paper 1*; Asher and Olivier "Retirement and old age" in Olivier (eds) (2003) *Social Security: A Legal Analysis* 249 lists various types of income that have to be taken into account by those administering the means test, such as income from renting of rooms and odd jobs, as well as income from subsistence farming. The cost of administering the means test has to be balanced against the relatively small saving in expenditure by the state by applying the means test. See Lund "State social benefits in South Africa" (1993) 46 *ISSR* 6-7.

¹⁰⁸ Midgley (1984) *Social security, inequality and the Third World* 89.

- the particularly unfair disqualification of those applicants earning an income just over the threshold set by the test, particularly as additional expenses related to increased medical and care costs are not taken into account;¹¹⁰
- the test penalising those who are honest and rewarding those that cheat the system;¹¹¹
- the poverty trap: accumulating any personal wealth could lead to a loss of the right to an older person's grant, acting as an disincentive for low-income earners to save for their retirement.¹¹² Although retirement fund members on average receive far greater monthly benefits than recipients of the older person's grant, the pension received by low-income earners might just serve to disqualify them from receiving the state grant. All that they therefore achieved through saving for their retirement is to disqualify themselves from receiving the older person's grant.¹¹³ The means test therefore encourages some pensioners to sell or give away their assets in

¹⁰⁹ Munro (1999) "A personal view of social security arrangements for old age and the risks inherent therein" 7.

¹¹⁰ Other reasons why the means test is regarded as being inequitable are that a higher rate of "tax" is applied to poorer people (the means test is seen as imposing a 50% "tax" on non-grant income at a very low level, which is significantly higher than income tax rates) and that the means test does not take non-cash income into account (Asher (2005) *Response to the National Treasury Retirement Fund Reform discussion paper* 1; Munro (1999) "A personal view of social security arrangements for old age and the risks inherent therein" 7; National Treasury (2007) *2nd discussion paper* 4). Asher and Olivier (2003) "Retirement and old age" 249 point out that older persons who are adequately supported by their family members but who do not reflect any cash income on their means test would be entitled to the grant i.t.o. the current means test.

¹¹¹ Munro (1999) "A personal view of social security arrangements for old age and the risks inherent therein" 7. The Social Assistance Act 13 of 2004 (SAA) seems to provide for sanctions against knowingly giving false information on the means test: s 21 provides that an elderly applicant who furnishes information that to his or her knowledge is untrue or misleading in any material respect or makes a false representation, in order that he or she or another person may obtain social assistance to which they are not entitled, or may obtain more social assistance than to which they are entitled, such as person will be guilty of an offence. The penalties for this offence are imprisonment (unlikely to be utilised against an older person) and/or a fine and therefore do not seem to be much of a deterrent against giving false information on a means test. In the words of Asher and Olivier (2003) "Retirement and old age" 249, "the means test cannot be enforced, and unenforceable law is bad law."

¹¹² Asher and Olivier (2003) "Retirement and old age" 249; Mpedi "Administration and institutional framework" in Olivier (eds) (2003) *Social Security: A Legal Analysis* 163; Van der Berg (2002) *Issues in South African social security* 32; National Treasury (2007) *2nd discussion paper* 3; National Treasury (2007) *Budget Review 2007* "Social Security" 112.

¹¹³ Mouton Committee Report (1992) para 2.3.

order to qualify for the grant, even though this is discouraged by legislation.¹¹⁴ This could also possibly explain the widespread conversion from pension funds to provident funds over the last decade, as the receipt of a pension is regarded as income that disqualifies the recipient from the state grant. The same does not apply to lump sum benefits and therefore the means test “is not effective in capturing lump sum proceeds from retirement funds”.¹¹⁵ The perception exists among many poor people that it is better to receive a lump sum which can be spent, leaving the pensioner without any income, consequently enabling him or her to qualify in terms of the means test for the older person’s grant.

As a result of the abovementioned difficulties experienced with means testing, benefits subjected to means testing often fail to reach the needy, particularly individuals whose income exceeds the threshold set by the test by a small margin, but who face significant medical and care costs. Whether the application of a means test to the older person’s grant should be maintained is therefore an issue of significant interest in the debate on intergenerational solidarity.

The usual argument in favour of means testing the older person’s grant is that “greater grants can be paid to the more needy smaller number who qualify”.¹¹⁶

¹¹⁴ In terms of reg 19(5) of GN R898 in GG 31356 of 22 August 2008 efforts by applicants to impoverish themselves by relinquishing assets would be thwarted, as such assets will be taken into account for the means test, together with any assets donated by the applicant or his or her spouse. However, the regulation presupposes that the Agency will gain knowledge of the disposal of assets and consequently, abuse of the means test may continue in cases where the disposal of the assets can be successfully concealed.

¹¹⁵ Taylor Committee Report (2002) 98.

¹¹⁶ Munro (1999) “A personal view of social security arrangements for old age and the risks inherent therein” 7. The Mouton Committee also reluctantly concluded that it would be better to provide a higher level of assistance to fewer (but deserving) persons than to provide the lower level of assistance that would be affordable should assistance be made available to all (Mouton

The abovementioned criticisms of means testing in general and the means test for the older person's grant in particular, arguably outweigh the main advantage of the means test, which is to target potential beneficiaries more accurately.

In order to determine whether the means test could potentially be abolished, the text of the Bill of Rights has to be considered. Section 27(1)(c) provides for the right of access to social assistance to all persons who are "unable to support themselves and their dependants". It could be argued that this provision supports the retention of some test to determine the level to which the applicant is unable to support him/herself and his or her dependants and that a universal older person's grant would strictly speaking not qualify as social assistance.¹¹⁷ A universal grant would, however, still qualify as "social security" in general, for which section 27(1)(c) does not have a requirement of proof that applicants are unable to support themselves and their dependants. Section 27(1)(c) also does not necessarily require a means test for social assistance, as any method of targeting persons "unable to support themselves and their dependants" would qualify. The strictly categorical approach to social assistance currently applied, whereby only older persons, people with disabilities, war veterans and people raising children can receive benefits, already targets groups of people that are

Committee Report (1992) 14). See also ASSA (2005) *Comment on National Treasury's discussion paper on Pension Fund Reform from a social security perspective* 1.

¹¹⁷ Liebenberg (2002) "The right to social security: Response" in Brand and Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* 155 distinguishes between a restricted interpretation of "unable to support themselves and their dependants" which only includes those whose inability to provide for themselves and their dependents stem from their physical or mental situation, and the broader interpretation which also refers to persons who are unable to find employment or generate sufficient income through other activities. She suggests that the broad interpretation is more appropriate in light of the high levels of unemployment and poverty in South Africa.

considered to be unable to support themselves and their dependants. More fundamentally, the Bill of Rights lays down a floor, not a ceiling, of rights. Section 27(1)(c) requires assistance to those who cannot support themselves, but does not prohibit casting the net more widely. It is therefore submitted that abolishing the means test for the older person's grant would not go against section 27(1)(c) of the Constitution.

Asher¹¹⁸ advocates abolishing the means test for the older person's grant and recouping the cost of a universal pension to older persons by making such a pension taxable as well as through the savings in administration.¹¹⁹ His call for abolishing the means test is joined by other calls for a review of the relationship between the means test and the older person's grant.¹²⁰ The Taylor Committee also recommended abolishing the means test for the older person's grant and recouping costs via the income tax system.¹²¹

¹¹⁸ He counters the case made by opponents of abolishing the means test, that payments would be made to wealthier persons as well, by arguing that wealthier persons are already receiving substantial tax concessions (Asher (2005) *Response to the National Treasury Retirement Fund Reform discussion paper* 1-2). See also Asher (2003) "Retirement and old age" 249 for additional arguments for abolishing the means test for the older person's grant, such as that the expenditure saved by the state through targeting by way of a means test is relatively small.

¹¹⁹ These are the same arguments made by advocates for a basic income grant (BIG) for all South Africans. See BIG Coalition (2001) quoted in Makino (2004) *Social security policy reform in post Apartheid South Africa* 8 where it is argued that a universal grant "would diminish the administrative burden and opportunities for corruption that are often associated with means tested grants". See also Asher and Olivier "Retirement and old age" in Olivier (eds) (2003) *Social Security: A Legal Analysis* 249.

¹²⁰ See National Treasury (2004) *Retirement fund reform: a discussion paper* (hereafter National Treasury (2004) *Discussion Paper*) 17. Although the Mouton Committee was, in principle, in favour of abolishing the means testing of old age grants, they concluded that it was not possible (at that stage) due to the cost implications and they therefore recommended that the means test be amended (Mouton Committee Report (1992) 14).

¹²¹ Depending on whether the Committee's other recommendations, e.g. greater taxation of lump sum retirement benefits, are followed (Taylor Committee Report (2002) 98).

The Treasury Task Team initially merely recommended an amended means test¹²² allowing more low-income earners to receive a retirement benefit in addition to the grant. The suggested amended means test offers a solution midway between calls to abolish the means test¹²³ and the perceived threat to the financial viability of the grant system should the means test be abolished.

The second discussion paper by the Treasury recommended removing the means test for the older person's grant or at least amending it by shifting the threshold amounts out, thereby enabling poorer beneficiaries of retirement benefits to receive the grant.¹²⁴

One of the recommendations by the Actuarial Society of South Africa (ASSA) was to abolish the means test and to reduce the tax rebate given to older persons by the amount of the grant to recoup the costs of doing away with the means test. As a result, higher income pensioners will lose the rebate, but gain access to the grant. Lower income pensioners will now have access to the grant without having to provide information for the means test, thereby avoiding the associated stigmatisation. ASSA proposes that this arrangement will even have

¹²² A reduction of the grant by R0,50 for each R1 of income earned over R10 000 per year (National Treasury (2004) *Discussion Paper* 31).

¹²³ Advocates for abolishing the means test, such as Munro, are convinced that merely amending and simplifying the means test is doomed to failure (Munro (1999) "A personal view of social security arrangements for old age and the risks inherent therein" 7).

¹²⁴ National Treasury (2007) *2nd discussion paper* 3 and 14. The cost of shifting the threshold of the means test out is estimated at about R4 billion a year (National Treasury (2007) *Budget Review 2007* "Social Security" 115).

advantages for the state in the reduction of administrative costs and decreased losses through fraud.¹²⁵

In conclusion, there are two opposing arguments at play in the decision whether to continue with, amend, or abolish the means test for the older person's grant: on the one hand it is argued that the limited financial resources available for the payment of the older person's grant¹²⁶ necessitates persistence with the means test, whereas the quest to exclude as few older persons as possible from the financial protection afforded by the older person's grant demands the abolition or amendment of the means test. However, the argument that the limited funds available for social grants necessitate a means test does not take the possibility raised above that the "loss" resulting from the abolition of the means test can be recovered through taxation and/or savings in administration costs into account.

It is also submitted that the abolition of a means test for the older person's grant makes sense in the context of intergenerational solidarity. In terms of intergenerational solidarity benefits are payable to older persons to pay the dues for the contributions made by the older generation for the working age generation's wellbeing when they were children and the older generation the taxpayers and caregivers. To impose a means test for the older person's grant,

¹²⁵ ASSA (2005) *Comment of National Treasury's discussion paper on Pension Fund Reform from a social security perspective* 3. The BIG Financing Reference Group (2004) *"Breaking the Poverty Trap" – Financing a BIG in SA* 27 also proposes that a universal grant has the advantage of doing away with the need for the costly (and potentially corrupt) bureaucracy that has to administer the means test.

¹²⁶ Discussed above at 4.3.1.

would be tantamount to taking the contribution of relatively more well-off persons of the older generation for granted and would hence be contrary to the notion of intergenerational solidarity.

4.3.3 Fraud, corruption and bribery in application for and payment of older person's grant

The losses incurred by the Department of Social Development as a result of grant fraud are estimated at R1.5 billion per annum,¹²⁷ and in the past have led to delivery failures in the grants systems of some provinces.¹²⁸ The impact of fraud and corruption on the grants administration is an example of a problem that affects both the state's ability to comply with its constitutional obligations in terms of section 27 of the Constitution and intergenerational solidarity. The expenditure on grants is budgeted for on an annual basis and as a result, the money lost due to fraud and corruption linked to grants may mean that there is less money to be spent on the intended beneficiaries, thereby infringing their right of access to social security. The alternative is that the state has to budget for additional fraud-related expenditure which leads to an increase in grant costs.¹²⁹

¹²⁷ PMG "Social grants anti-fraud campaign: Special Investigation Unit briefing" (30 August 2006) <http://www.pmg.org.za/minutes/20060829-social-grants-anti-fraud-campaign-special-investigation-unit-briefing> (accessed 12/04/2009). . In *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and others* 2001 4 SA 1184 (SCA) 1197, para 15 the monthly cost of unentitled beneficiaries was estimated to be R65 million. See also at 1194 para 7.

¹²⁸The budgetary constraints caused by high levels of fraud and corruption caused the MEC for Welfare in the Eastern Cape to order the cessation of payments of backlogs in 1997 (circular dated 26 September 1997, quoted in *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 (W) 528. See below at 4.3.4.2.

¹²⁹ The impact of high grant costs on intergenerational solidarity was discussed above at 4.3.1.

As far as the effect of fraud, corruption and bribery on intergenerational solidarity is concerned, reports of grants being paid to persons other than legitimate and needy beneficiaries do serious damage to the solidarity by tax payers that the grant system depends upon.¹³⁰ The following paragraphs highlight instances of fraud, corruption and bribery in the grant administration system and evaluate the measures taken to combat fraud and corruption in the light of the constitutional obligation of the state to ensure progressive realisation of the right of access to social security.

4.3.3.1 Instances of fraud, corruption and bribery

Three types of fraudulent behaviour occur during the application process:

- Applicants knowingly provide false information during the application procedure in order to receive grants.
- Applicants who are not entitled to grants bribe officials to assist them in receiving grants.
- Corrupt officials assist applicants (and sometimes themselves) to obtain grants that they are not entitled to.

Fraud by applicants for the grant takes place mainly through false information provided regarding the applicant's income and assets, or, in the case of non-citizens, false South African identity documents. Instances of applicants younger than the qualifying ages of 60 and 65 for women and men respectively providing

¹³⁰ See 2.3 above where it is explained that intergenerational solidarity implies that the older generation benefiting from solidarity would not make unnecessary (or in this context fraudulent) claims that will burden the solidarity-based system.

falsified proof of age have also been reported.¹³¹ In terms of the Social Assistance Act (SAA), it constitutes a criminal offence to knowingly provide information which is untrue or misleading in any material respect or to make a false representation in order to receive a grant to which one is not entitled to or to receive or to receive more social assistance than one is entitled to.¹³² As was stated above,¹³³ the penalties attached to conviction for this particular statutory criminal offence do not serve as a sufficient deterrent to making fraudulent applications. A far more successful deterrent is the requirement that all grant money that is paid to a beneficiary who is not entitled to the grant should be repaid.¹³⁴

Less than accurate targeting of recipients of these grants could be one of the reasons for the abuse of the grant, for example where older persons who do not qualify in terms of the means test still manage to get a grant. According to the *Mothers and Fathers of the Nation Report*, the independent administration of social grants by the “homelands” before 1993 meant that the means test for the old age pension¹³⁵ was not applied consistently. For instance, in the Transkei the old age pension was seen as a measure to assist desperate people living in

¹³¹ Department of Social Development press release “Forty government officials to appear in court for defrauding the social grant system” www.info.gov.za/speeches/2005/05110210451002.htm (accessed 16/08/2009).

¹³² Section 21(1).

¹³³ See fn 111 above.

¹³⁴ Section 17 SAA 13 of 2004 (see above at 3.3.1.1.5) See 4.3.3.2.4 for successes in recovering grant money fraudulently obtained.

¹³⁵ The older person’s grant was previously called the state old age pension.

poverty and no means test was administered.¹³⁶ “Fraudulent” beneficiaries were therefore tolerated because of poverty. When the “homelands” were dissolved and their grants administration was incorporated in the national system, many older persons found themselves in the situation that they were receiving grants that they were not entitled to. Their grants were subsequently cancelled without any poverty-relief actions to counter the impact of the stoppage of the grant.¹³⁷

Strong attention has been drawn in the media to the vast numbers of corrupt officials that have defrauded the grant system for their own financial gain.¹³⁸ It has been reported that some beneficiaries in the Eastern Cape were also registered on the Government Employees Pension Fund, indicating that they were government employees but still receiving grants.¹³⁹

4.3.3.2 Measures to combat fraud and corruption

The Department of Social Development has shown a strong commitment to combatting the problem of fraud and corruption in the grant administration

¹³⁶ *Mothers and Fathers of the Nation: the Forgotten People* (2001) <http://www.polity.org.za/html/govdocs/reports/welfare/2001/elder.html?rebookmark=1> (accessed 23/06/2008).

¹³⁷ See below at 4.3.4 for a detailed discussion on the mismanagement of grants.

¹³⁸ “Grant fraud: 34 arrests” *Citizen News* 24 January 2007 <http://www.citizen.co.za> (accessed 17/08/2009); “19 officials nabbed on fraud, theft charges” *Dispatch Online* 11 April 2003 <http://www.dispatch.co.za/2003/04/11/easterncape/FRAUD.HTM> (accessed on 17/08/2009).

¹³⁹ Joseph (2005) *Resorting to the courts: litigation and the crisis in the administration of social grants in the Eastern Cape* 29.

system¹⁴⁰ and has taken the following steps as part of a national Anti-Fraud Campaign:

4.3.3.2.1 *Amnesty process*

The amnesty process was initiated to enable those who were guilty of defrauding the grants system and corrupt grant officials to give themselves up in return for amnesty from prosecution.¹⁴¹ The process was coupled with a public awareness campaign and an anti-fraud hotline.

4.3.3.2.2 *The role of the Social Security Agency in combatting fraud and corruption*



The South African Social Security Agency (SASSA)¹⁴² was created in part to administer grants as an independent agency which could distance itself from the fraud and corruption perpetrated in and against the Department of Social

¹⁴⁰ Minister Skweyiya expressed the commitment of the Department of Social Development to root out corruption and irregularities in the social grant system and to take action against “unscrupulous operators targeting benefits meant for the poor” (DSD press release “Forty government officials to appear in court for defrauding the social grant system” www.info.gov.za/speeches/2005/05110210451002.htm (accessed 16/08/2009)).

¹⁴¹ “Come clean or face drastic action, Bisho warns grant fraudsters” *The Herald* 30 March 2005 <http://www.theherald.co.za/herald/2005/03/30> (accessed 16/08/2009).

¹⁴² Created in terms of the South African Social Security Agency Act 9 of 2004 (SASSA Act), but most of its tasks are outlined in the SAA.

Development.¹⁴³ SASSA is armed with an Inspectorate to ensure that fraud and corruption is eliminated.¹⁴⁴ The role of the Inspectorate is to

- conduct investigations into social assistance frameworks and systems;
- execute internal financial audits and audits on SASSA to determine whether it complies with regulatory and policy measures and instruments;
- investigate incidences of fraud, corruption and mismanagement by SASSA; and
- take necessary steps to combat the abuse of social assistance.¹⁴⁵

The Inspectorate is able to identify fraud and corruption either through the investigations conducted, or in the course of the internal audits of SASSA.¹⁴⁶

4.3.3.2.3 *Provision of accurate data pertaining to applicants*

SASSA is dependant on reliable data from other government departments, for example accurate identity numbers from the Department of Home Affairs, in order to ensure that grants are awarded to the correct beneficiaries. In terms of section 22 of the SAA, SASSA is entitled to obtain information on grant applicants or beneficiaries from any organ of state or financial institution. The database of the national electronic and information system, SOCPEN,¹⁴⁷ is

¹⁴³ SASSA does not report to the national Department of Social Development, but rather to the Minister of Social Development directly (PMG Minutes of the Social Development Portfolio Committee of 16 August 2006 <http://www.pmg.org.za> (accessed 10/09/2008)).

¹⁴⁴ Section 4(1)(c) SASSA Act provides for a “compliance and fraud mechanism” such as the Inspectorate to maintain the integrity of the social security system. S 3(c) of the SAA lists the creation of the Inspectorate as one of the main aims with the legislation.

¹⁴⁵ Section 27(1) SAA.

¹⁴⁶ Ibid.

¹⁴⁷ SOCPEN stands for Social Pension System (PMG (2002) “Auditor-General’s Report on provincial social grants: Department Response” <http://www.pmg.org.za/report/20020213-auditor->

checked against the population register on a monthly basis.¹⁴⁸ However, the accuracy of the data still depends on whether provinces report deaths timeously to the national register.¹⁴⁹ It is therefore possible that delays in the reports of deaths can occur, enabling fraudulent withdrawal of the grant until it officially lapses. The current lack of integrity of the data received from other departments can be linked to many of the cases of grant fraud and SASSA is at present in the process of cleaning up unreliable data.¹⁵⁰ However, stand-alone data correction on the side of SASSA and the Department of Social Development would not prove to be adequate and will require improvements to the information systems of the Department of Home Affairs as well. Some provinces have reported significant reductions in the numbers of cases of social grant frauds through continuous data clean-up.¹⁵¹



[general%E2%80%99s-report-provincial-department-social-grants-departm](#) (accessed 02/07/2009). The Transvaal Provincial Administration developed and implemented the SOCPEN system in 1987. In 1994 the process to amalgamate all provincial payment systems was initiated and in 1996 SOCPEN 5 became the national system on which beneficiaries' details are stored (PMG "Cash Paymaster Services Presentation" (2001) <http://www.pmg.org.za/docs/appendices/010830CPM.htm> (accessed 01/07/2009); *Ngxuza and others v Secretary, Department of Welfare, Eastern Cape* 2000 (12) BCLR 1322 (E) 1324).

¹⁴⁸ See *Maluleke v The Northern Province Member of the Executive Council for Health and Welfare* [1999] 4 All SA 407 (T) where the SOCPEN 5 data check in December 1997 uncovered some 94 806 potentially illegal grant beneficiaries in the Northern Province. See also *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2000 (12) BCLR 1322 (E) 1324 where the amalgamation of the different databases into SOCPEN 5 revealed a number of incorrect records, duplication of payments and ineligible beneficiaries.

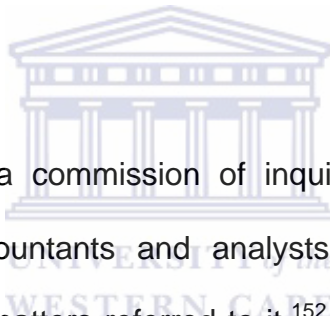
¹⁴⁹ PMG Minutes of the Social Development Portfolio Committee on 30 August 2006 <http://www.pmg.org.za> (accessed 10/09/2008); Joseph (2005) *Resorting to the courts: litigation and the crisis in the administration of social grants in the Eastern Cape* 29.

¹⁵⁰ PMG Minutes of the Social Development Portfolio Committee of 30 August 2006 <http://www.pmg.org.za> (accessed 10/09/2008).

¹⁵¹ See e.g. Speech by Premier of the Northern Cape Province – <http://www.northern-cape.gov.za> (accessed 06/12/2007).

4.3.3.2.4 *The Special Investigation Unit*

The Special Investigation Unit (SIU) is an independent body sub-contracted by the Department of Social Development to investigate corruption and incidents of maladministration. The President referred the investigation to the SIU by Proclamation R18 of 2005 on 6 April 2005 with the brief to investigate corrupt government officials responsible for the administration and payment of grants, as well as beneficiaries of social grants unlawfully receiving benefits. This investigation formed part of the broader Anti-Fraud campaign of the Department of Social Development.



The SIU acts similarly to a commission of inquiry and its team of forensic investigators, lawyers, accountants and analysts conducted multidisciplinary forensic investigations into matters referred to it.¹⁵² It has the power to institute civil legal action to recover illegal benefits, prepare disciplinary hearings of public officials and although its members have no power of arrest, they work closely with the SAPS and the National Prosecuting Authority to secure arrests and criminal convictions when they uncover evidence of a crime.¹⁵³ The cooperation between the Department of Social Development (DSD) and the SIU has enhanced the department's capacity to fight corruption. Although the SIU requires constant cooperation from other departments and agencies, for example

¹⁵² SIU presentation to the Social Development Portfolio Committee (30 August 2006) on Social Grant Investigation <http://www.pmg.org.za/minutes/20060829-social-grants-anti-fraud-campaign-special-investigation-unit-briefing> (accessed 12/04/2009).

¹⁵³ PMG Minutes of the Social Development Portfolio Committee of 30 August 2006 www.pmg.org.za (accessed 10/09/2008).

the DSD providing it with access to its databases, it remains an independent and objective agency.

The following is a summary of the key objectives of the SIU investigation as well as its achievements:¹⁵⁴

The initial focus of the investigation was to identify and remove illegal grant beneficiaries, starting with public servants.¹⁵⁵ One of the key aims of the investigation was to deter fraud through prosecutions, which has led to the voluntary lapsing of grants that were fraudulently obtained, indicating some success with deterrence.¹⁵⁶ The investigation identified certain systemic gaps in the grants administration that have enabled irregular beneficiaries to receive grants, for example inadequate system checks in registration and non-compliance with standard operating procedures.¹⁵⁷ 846 prosecutions of public servants who were charged with fraud or receiving benefits, to which they were not entitled, resulting from misrepresentation about their income or employment status or failure to disclose change in their financial circumstances, were finalised

¹⁵⁴ See SIU presentation to the Social Development Portfolio Committee (30 August 2006) on Social Grant Investigation <http://www.pmg.org.za/minutes/20060829-social-grants-anti-fraud-campaign-special-investigation-unit-briefing> (accessed 12/04/2009).

¹⁵⁵ Of the 43 705 public servants identified on the SocPen database, 21588 were found to be irregular beneficiaries (SIU presentation <http://www.pmg.org.za/minutes/20060829-social-grants-anti-fraud-campaign-special-investigation-unit-briefing> (accessed 12/04/2009)).

¹⁵⁶ See e.g. press release by Department of Social Development 1 November 2005 “Forty government officials to appear in court for defrauding the social grant system” <http://www.info.gov.za/speeches/2005/05110210451002.htm> (accessed 16/08/2009) where it was reported that in KwaZulu-Natal many of the officials involved had voluntarily cancelled their grant claims since the implementation of the investigations.

¹⁵⁷ SASSA has been addressing these systemic gaps (see SIU presentation <http://www.pmg.org.za/minutes/20060829-social-grants-anti-fraud-campaign-special-nvestigation-unit-briefing> (accessed 12/04/2009)).

with a 91% success rate. In addition, the public officials who received irregular benefits have been referred to their own departments for disciplinary processes. The SIU has taken steps to recover illegal benefits from those who are willing to start repaying.¹⁵⁸ The aim of the recovery process has been to take the profit out of defrauding the system.¹⁵⁹

4.3.3.3 Evaluation of measures to combat fraud

As was stated above, the solidarity by tax payers with legitimate and needy grant beneficiaries which underpins the grant system presupposes measures to ensure that other persons do not unlawfully benefit from the system. On the whole, the measures to combat fraud in the grants system can be regarded as a positive step towards maintaining the integrity of the system and saving money for expenditure on legitimate beneficiaries. However, it is submitted that some aspects of the campaign against grant fraud still require some attention.

An evaluation of the success of the anti-fraud campaign has to take into account that some of the instances of fraud against the grant system are committed by desperate people. In order for the measures to combat fraud to be successful in

¹⁵⁸ In most cases the person convicted of unlawfully benefiting from the grants system (debtor) is required to sign an acknowledgement of debt stating the amount and repayment period that the debtor is willing to pay and can afford.

¹⁵⁹ Department of Social Development 1 November 2005 “Forty government officials to appear in court for defrauding the social grant system” <http://www.info.gov.za/speeches/2005/05110210451002.htm> (accessed 16/08/2009).

the long term, they cannot be implemented in isolation without addressing the reasons why people attempt to receive grants that they are not entitled to.

The anti-fraud campaign has shown significant short-term successes such as identifying and prosecuting fraudulent applicants, beneficiaries and officials.¹⁶⁰

Once the anti-fraud campaign and investigations have run their course, measures will have to be implemented to deter fraudulent behaviour on a continuous basis.

SASSA must take care that efforts to clear up irregular beneficiaries are not regressive and consequently contrary to the requirement of progressive realisation of the right to social assistance contained in section 27(2) of the Constitution.¹⁶¹ An example of measures that should be avoided is the 1996 re-registration of grant beneficiaries that led to many older persons, who were in fact entitled to benefits, losing them due to errors during the re-registration process.¹⁶²

¹⁶⁰ According to the Social Cluster 2 Media Briefing, Parliament, Cape Town, 15 February 2007, more than 200 000 grants held by non-public servants have been cancelled or have lapsed through non-collection since the investigation commenced. Roughly 6 000 public servants have started to repay the R 5 million they owe. In addition, 2000 public servants are facing disciplinary action by their departments (<http://www.welfare.gov.za/media/2007/cluster.htm> (accessed 06/12/2007)).

¹⁶¹ Liebenberg "The right to social security: Response" in Brand and Russell (eds) (2002) *Exploring the core content of socio-economic rights: South African and international perspectives* 158.

¹⁶² The exclusion of beneficiaries as a result of the re-registration process has been one of the main causes of the litigation regarding social grants against provincial governments. See below at 4.3.4 under "Mismanagement of social grants". See also *Bacela v MEC of Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 for the adverse consequences to older persons grant beneficiaries when a blanket cessation of arrear payments once the cancelled grants are reinstated, is declared.

4.3.4 Mismanagement of social grants

4.3.4.1 Introduction

Older person's grants are tax-funded and can be seen as one of the clearest expressions of intergenerational solidarity currently to be found in South Africa. Working-age tax-payers are prepared to fund the grant system, of course with the understanding that similar benefits would be available to them, should they qualify, when they reach retirement age.¹⁶³ Pieters' definition of social security as "the body of arrangements shaping solidarity with people facing a lack of earnings or particular costs"¹⁶⁴ links the grant administration system (as the appropriate 'body of arrangements') with the degree of solidarity shared with grant beneficiaries. Grant officials act as an administrative conduit in promoting intergenerational solidarity. Mismanagement of grants can therefore lead to mistrust of the grant system, thereby undermining intergenerational solidarity.

The object of any reform of the management of state grants for older persons is to discover the balance between the needs and constitutional rights of the elderly population and the capacity of the administration to deliver the constitutionally mandated services to the beneficiaries of the system. The leading problem with the administration of grants for older persons may not necessarily be fraud and corruption or ill-treatment of older persons by grant officials.¹⁶⁵ In many cases

¹⁶³ See above at 1.2 and 2.3 for detailed descriptions of intergenerational solidarity.

¹⁶⁴ Pieters (1993) *Introduction into the basic principles of social security* 2.

¹⁶⁵ As discussed above at 4.3.3.

mere inefficiency and mismanagement can be equally damaging,¹⁶⁶ and unfortunately the grants delivery system in South Africa is fraught with administrative problems.¹⁶⁷

Section 27(2) of the Constitution requires the state to take reasonable legislative *and other* measures to ensure the progressive realisation of the right of access to social security. It was held in the *Grootboom* case that the reasonableness of measures to progressively realise socio-economic rights is not assessed merely on the design of the measures, but also on the implementation.¹⁶⁸ Changes to the administration of grants are therefore required to deal with mismanagement and bring the grants system in line with constitutional requirements.

State systems such as the social grant system experience the disadvantage caused by the scale and complexity of the administration of such systems. Some instances of administrative errors are therefore to be expected.¹⁶⁹ However, it is the nature and level of legislative and administrative steps taken to remedy such

¹⁶⁶ E.g. the Transkei pensioners who were dropped from the provincial welfare roles in 2000. Africa Recovery (2001) "South Africa tackles social inequities" 14 (4) *Africa Recovery* United Nations (available at <http://www.un.org/ecosocdev/geninfo/afrec/subjindx/144soafr.htm>) .

¹⁶⁷ Liebenberg "The right to social security: Response" in Brand and Russell (eds) (2002) *Exploring the core content of socio-economic rights: South African and international perspectives* 153.

¹⁶⁸ 2000 (11) BCLR 1169 (CC) 1172.

¹⁶⁹ According to the *Mothers and Fathers of the Nation Report*, there were a number of instances recorded where provinces paid grants to beneficiaries not qualifying for a grant (e.g. the payment of grants without subjecting them to a means test in the Transkei). In these instances neither the grant beneficiaries nor the officials involved in processing the application or paying the benefit had the intention to defraud the grant system. The erroneous grant payments were due mainly to mismanagement and uninformed decisions by grant officials. See *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuzza and others* 2001 4 SA 1184 (SCA) 1194 para 7, where erroneous payments were ascribed to inaccurate claimant records caused by the fragmented system in existence before 1994 which tasked six different administrations with the responsibility for social grants.

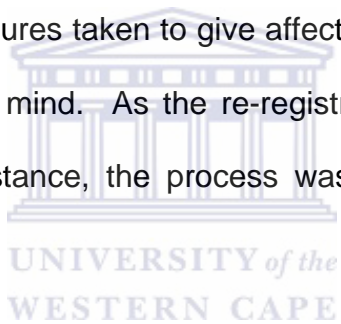
errors that distinguishes an inefficient grants system from one that can meet its constitutional obligations.

4.3.4.2 Unlawful suspension of grants

As was stated above in the context of measures to eliminate grant fraud, the government's methods in dealing with "ghost beneficiaries" and other persons receiving grants that they do not qualify for seem to contribute to the woes of legitimate grant beneficiaries. The need for clean-up measures is not in dispute, merely the measures taken to ensure that the list of actual beneficiaries corresponded with the database of person who comply with the statutory requirements for grants. The desperate position many deserving grant beneficiaries found themselves in after "cleanup" measures such as re-registration were implemented to rid the system of "ghost beneficiaries,"¹⁷⁰ serves as an example of the dangers of an over-zealous reaction to instances of fraud. In many cases a moratorium on the processing of new applications and seeing to

¹⁷⁰ Liebenberg "The right to social security: Response" in Brand and Russell (eds) (2002) *Exploring the core content of socio-economic rights: South African and international perspectives* 153. The re-registration process was initiated to clean up incorrect and out-of-date data on the system and to ensure that each beneficiary had a 13-digit identity number (PMG "Cash Paymaster Services Presentation" (2001) <http://www.pmg.org.za/docs/appendices/010830CPM.htm> (accessed 01/07/2009)). The intention with the re-registration process was therefore to ensure that the information on record for beneficiaries was complete, to bring duplication of payments to an end and to establish the eligibility of beneficiaries for grants (*Ngxuzza and Others v Secretary, Department of Welfare, Eastern Cape* 2000(12) BCLR 1322 (E) 1324; *Maluleke v The Northern Province Member of the Executive Council for Health and Welfare* [1999] 4 All SA 407 (T)). The adverse consequences of re-registration were seemingly not foreseen by the then Minister of Social Development, Min Skweyiya, who envisaged that the re-registration was "to be properly managed in a humane way with due regard for the rights of beneficiaries and the requirements of administrative justice". (Skweyiya *Social Development Budget Vote 2001*, NCOP <http://www.info.gov.za/speeches/2001/0106707945a1005.htm> (accessed 02/07/2009)). This was however not to be the case.

arrear payments was imposed together with the re-registration process.¹⁷¹ Beneficiaries whose grants were suspended were not able to meet their and their dependants' basic needs such as rent, electricity, burial policy payments, school fees and food.¹⁷² The Constitutional Court held in *Grootboom*¹⁷³ that the measures that the state takes in realising socio-economic rights such as the right of access to social security, should be evaluated according to whether the needs of the "most vulnerable" members of society are met. Previous grant recipients who had to re-register for their grants have been referred to as "most lacking in protective and assertive armour".¹⁷⁴ The right of access to social security and the reasonableness of measures taken to give effect to the right should therefore be interpreted with them in mind. As the re-registration process affected their right to access social assistance, the process was clearly unreasonable and, therefore, unconstitutional.



The issue of arbitrary suspension of older person's grants was central to the case

¹⁷¹ *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and Others* 2001 4 SA 1184 (SCA) 1194, para 8.

¹⁷² Evidence led in *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape* 2000(12) BCLR 1322 (E) revealed that up to 2000 previous beneficiaries in the Eastern Cape had complained that their grants were terminated as a result of the re-registration process (at 1325) and that the beneficiary list had shrunk with close to one hundred thousand people (at 1326). The Auditor-General's finding for the Eastern Cape for 2003/04 drew attention to the lack of control over social security files which led to the periodic unavailability of identity documents and the inability to confirm the existence of eligible beneficiaries (Joseph (2005) *Resorting to the courts: litigation and the crisis in the administration of social grants in the Eastern Cape* 32). This situation led to eligible beneficiaries having their grants cancelled as they were believed to be dead. In the Northern Province 92 046 benefits were suspended in 1998 (*Maluleke v The Northern Province Council for Health and Welfare* [1999] 4 All SA 407 (T) 412).

¹⁷³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

¹⁷⁴ *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and others* 2001 4 SA 1184 (SCA) 1195 para 11.

of *Bacela v MEC for Welfare (Eastern Cape Provincial Government)*.¹⁷⁵ The applicant was granted an old age pension in terms of the 1992 SAA and its regulations and was promised an amount in arrear grant payments. In response to the high levels of corruption, fraud and abuse of the social security system in the province and the resultant budgetary constraints for the department, the respondent issued a circular ordering that backdated payments would no longer be possible.¹⁷⁶ Mpati J held that the respondent was bound by the Social Assistance regulations to pay grants and back-payments to entitled beneficiaries. Her decision to suspend arrear payments was therefore unlawful and the applicant was declared to be entitled to payment of her arrear pension.¹⁷⁷

The case of *Rangani v Superintendent-General, Dept of Health and Welfare, Northern Province*¹⁷⁸ confirmed that the Northern Province (now Limpopo) experienced similar problems to the Eastern Cape. The background facts regarding the problems experienced in this province with grant payments provide some insight into the deterioration of the service provided by provincial grant administrations.

After the respondent was appointed as Superintendent-General in the Department of Health and Welfare in the Northern Province in 1995, he attempted to address the chaos in the grant payment system. The cause of the

¹⁷⁵ [1998] 1 All SA 525 (W).

¹⁷⁶ At 528.

¹⁷⁷ At 529.

¹⁷⁸ 1999 4 SA 385 (T).

chaotic situation was the existence of seven different administrations dealing with pensions and grants in the province,¹⁷⁹ resulting in widespread fraud, corruption and improper payments. He introduced various measures such as SOCPEN 5, the national computer system,¹⁸⁰ in an attempt to eliminate fraud and to retrieve information destroyed by officials. According to SOCPEN, as many as 94 806 “beneficiary” records appeared irregular.¹⁸¹ The respondent concluded that the only way to clear up the irregular records was to suspend all benefits and to require beneficiaries to apply for the reinstatement of benefits. Although the respondent had instructed officials to take a number of steps to notify beneficiaries of the suspension of their grants,¹⁸² most beneficiaries received no notice of the termination of their grants and their entitlement to re-register for their grants. Errors arose in the process of reinstatement¹⁸³ and many beneficiaries who in fact qualified for grants had their grants terminated. The system to eradicate fraudulent and ghost beneficiaries therefore led to hardship for beneficiaries who were in fact entitled to grants, but whose benefits had been unilaterally terminated.

The court held that the applicant had a right to receive the benefit that was

¹⁷⁹ At that time there were 17 different grant administrations nationally (at 388) and seven in the Northern Province, namely Lebowa, Gazankulu, Venda, the Transvaal Provincial Administration, the Administration of the House of Assembly, the Administration of the House of Delegates, and the Administration of the House of Representatives (at 389D).

¹⁸⁰ See fn 147 above.

¹⁸¹ According to the respondent, non-existent and “ghost” beneficiaries were costing the state between R14million and R28million per month (at 388E).

¹⁸² Such as radio announcements and announcements at pay points that beneficiaries of suspended grants were entitled to re-register and that arrears would be paid to them if their grants were reinstated (at 388).

¹⁸³ Such as extensive “down-time” on the computer system (at 389B).

granted to her until it was lawfully terminated. As her grant was terminated without a prior hearing, the *audi alterem partem* rule was not applied *in casu*, nor was the requirement of procedurally fair administrative action in terms of section 33(1) of the Constitution followed.¹⁸⁴

Similar circumstances led to the case of *Maluleke v MEC, Health and Welfare, Northern Province*.¹⁸⁵ Social grants were suspended to root out the 92 046 alleged “ghost beneficiaries” in the province.¹⁸⁶ The department viewed the blanket suspension of grants and subsequent reinstatement of grants solely for deserving beneficiaries as the only method to identify fraudulent beneficiaries and to address the serious financial losses. The applicant approached the court for an order declaring the cancellation of her grant unlawful, as well as leave to institute a class action on behalf of other beneficiaries whose grants have been cancelled under similar circumstances. The court held that the suspension of the applicant’s grant was unlawful.¹⁸⁷ However, it was held that a class action was not available in terms of section 38 of the Constitution, as Southwood J found it difficult to imagine how “the suspension of payment of any benefits payable in terms of the various Acts referred to could be an infringement of a right in the Bill

¹⁸⁴ At 394.

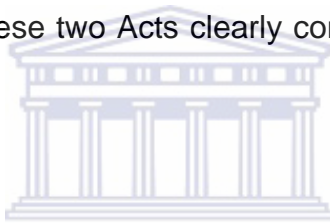
¹⁸⁵ [1999] 4 All SA 407 (T).

¹⁸⁶ The estimated number of fraudulent beneficiaries differs from the number of irregular beneficiaries cited in the *Rangani* case (see fn 181 above) and was later reduced to between 30 000 and 60 000, but the cost of the fraudulent benefit was still estimated between R14 million and R28 million per month (at 412).

¹⁸⁷ I.t.o. the Gazankulu Social Pensions Act 7 of 1976 and not the Social Assistance Act. The Gazankulu Act did not deal with the suspension of grants (*Maluleke v MEC, Health and Welfare, Northern Province* [1999] 2 All SA 407 (T) 413).

of Rights”.¹⁸⁸

Plasket¹⁸⁹ argues that Southwood J erroneously held that no fundamental right had been infringed *in casu* as it is obvious that both the right to just administrative action and the right to access to social assistance are violated when the grants for the aged are cancelled without authority as occurred in *Maluleke*.¹⁹⁰ It is submitted that Plasket’s criticism of the judgment is justified. Since both the Gazankulu Social Pensions Act¹⁹¹ and the Social Assistance Act¹⁹² were enacted to implement the right of access to social security, the suspension of grants paid in terms of these two Acts clearly constitutes an infringement of a basic right.



The view that the suspension of grants infringes upon beneficiaries’ constitutional rights finds support in a number of judgments. Froneman J in *Ngxuza and others v Secretary, Dept of Welfare, Eastern Cape*¹⁹³ found that the suspension of grant without a hearing was unlawful and definitely infringed the applicants’ constitutional rights to just administrative action and may also have infringed the right to access to social security.

The case of *Bushula v Permanent Secretary, Department of Welfare, Eastern*

¹⁸⁸ At 414. Overruled in *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and others* 2001 4 SA 1184 (SCA) 1200 para 19.

¹⁸⁹ Plasket “Standing, welfare rights and administrative justice” (2000) 117 SALJ 647.

¹⁹⁰ At 652-653.

¹⁹¹ Act 7 of 1976.

¹⁹² Act 59 of 1992.

¹⁹³ 2002 (12) BCLR 1322 (E) 1330.

*Cape and Another*¹⁹⁴ is yet another example of the termination of grants without any notice of or reasons for the cancellation. The applicant was also not afforded any opportunity to be heard before his grant was terminated, but was merely verbally advised by a clerk that his grant has been cancelled. The cancellation of his grant was the result of a decision in 1996 to review all disability grants.¹⁹⁵ The department had attempted to notify grant recipients of the review of grants by distributing pamphlets and through the print media and radio broadcasts. It was held that these generalised attempts to notify grant recipients did not qualify as proper notice to the applicant.¹⁹⁶ The cancellation of his grant was held to be unlawful because his right to a proper hearing was infringed.¹⁹⁷ The respondent was ordered to reinstate the applicant's grant and to pay him the amount that he would have received had the unlawful cancellation not occurred. Following the *Bushula* judgment, the Eastern Cape Welfare department's reaction to the *Bushula* judgment was merely to note that it has "taken note of the judgment and the valuable guidance given in it in respect of the suspension and/or cancellation of disability grants" and that officials "have been instructed to act accordingly".¹⁹⁸ It is clear from subsequent litigation against the department¹⁹⁹ that the procedure

¹⁹⁴ 2000 (7) BCLR 728 (E).

¹⁹⁵ At 730. As a large number of grants had to be reviewed, the department did not regard it as practicable to give individual notice to each of the beneficiaries whose grants were to be reviewed (at 734).

¹⁹⁶ At 734 A-B.

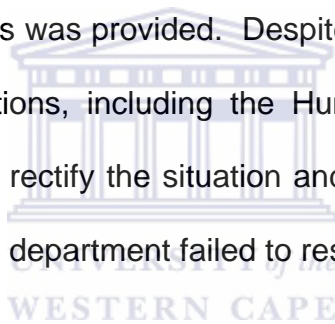
¹⁹⁷ At 734-5.

¹⁹⁸ *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and Others* 2002 (12) BCLR 1322 (E) 1326.

¹⁹⁹ *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape* 2000 (12) BCLR 1322 (E) and *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others* 2001 4 SA 1184 (SCA); *Njongi v MEC for Social Development, Eastern Cape Province* Unreported case no 1281/04; *Ntame v MEC, Dept of Social Development, Eastern Cape* [2005] 2 All SA 535 (SE); *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC),

to reinstate deserving beneficiaries was not proceeding according to plan.²⁰⁰

The landmark case of *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape and Others*²⁰¹ followed on the *Bushula* judgment and was yet another example of “victims of official excess, bureaucratic misdirection and unlawful administrative methods”²⁰² seeking redress from the courts after their grants had been unilaterally and without notice been terminated. The applicants’ disability grants were revoked as a result of the re-registration process embarked upon to verify the particulars of all beneficiaries, but no notice of or reasons for the termination of their grants was provided. Despite the many efforts by various non-governmental organisations, including the Human Rights Commission, to persuade the department to rectify the situation and implement a fair procedure when terminating grants, the department failed to respond.²⁰³ The court found the



where Yacoob J expressed surprise in the lack of proactive measures to reinstate cancelled grants. According to him he would have expected that the Provincial Government would have accepted “both that their procedure had been wrong and that all grants improperly cancelled ought to be fully reinstated in the sense ordered in *Bushula*. All affected people ought to have been placed in the position in which they would have been absent the unlawful administrative decision” (at para 16). Unfortunately, this had not happened and the Provincial Government had rather “failed dismally in its constitutional obligations” (at para 18).

²⁰⁰ This was despite media releases in which the Department had promised to re-evaluate all cancellations and to use ‘mobile task teams’ to reinstate all grants that were mistakenly suspended (*Daily Dispatch* “Grants to be re-evaluated” 29 November 2001 <http://www.dispatch.co.za/2001/11/29/easterncape/PEGRANTS.HTM> (accessed 27/10/2008). It was also reported that during 2000/01 the Department had prioritised the re-instatement of grants erroneously removed from the system as well as the timeous processing of social grant payment Joseph (2005) *Resorting to the courts: litigation and the crisis in the administration of social grants in the Eastern Cape* 27.

²⁰¹ 2002 (12) BCLR 1322 (E); 2001 2 SA 609 (E). Other cases on the unlawful suspension and termination of grants include *Njongi v MEC for Social Development, Eastern Cape Province* Unreported case 1281/04 SE; *Ntame v MEC for Social Development, Eastern Cape*; *Mnyaka v MEC, Dept of Social Development, Eastern Cape* [2005] 2 All SA 535 (SE).

²⁰² *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and others* 2001 4 SA 1184 (SCA) 1195, para 11.

²⁰³ *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape* 2002 (12) BCLR 1322 (E) 1326. See also *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v*

suspension of the grants unlawful and ordered that the grants be reinstated and that arrear payments be made.²⁰⁴

This case may be only one in a long line of judgments finding the provincial government's suspension of grants unlawful. It is, however, significant because of the link made between fundamental rights and solidarity. The concept of solidarity and the damage that is inflicted upon it by unlawful termination of grants was central to Froneman J's conclusion that the courts have the constitutional duty to prevent the unlawful deprivation of socio-economic rights "by way of administrative stealth".²⁰⁵ He classified the right to access to social security as one of the "rights which give expression to the 'oneness of community' that Steve Biko spoke of as at the heart of black culture" and concluded that the department had been sadly lacking in the "oneness of community" with grant beneficiaries.²⁰⁶ In other words, fulfilment of the right of access to social security is unlikely where solidarity with grant beneficiaries is lacking.

Froneman J also granted the successful applicants leave to institute a class action on behalf of the many other beneficiaries whose grants were unlawfully

Ngxuza and others 2001 4 SA 1184 (SCA) 119 2001 4 SA 1184 (SCA) 1195 par 10; *Vumazonke v MEC for Social Development, Eastern Cape* 2005 6 SA 229 (SECLD) 240 par [18].

²⁰⁴ *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape* 2002 (12) BCLR 1322 (E) 1337.

²⁰⁵ At 1334.

²⁰⁶ *Ibid.*

suspended.²⁰⁷ On appeal it was confirmed that the circumstances were indeed suitable for a class action.²⁰⁸

In *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuzza and others* (“the Ngxuzza appeal case”) Cameron JA accepted that many grants may have been paid in error and that steps to remedy the situation were required. However, he criticised the methods chosen to correct the erroneous payments as being “extreme and the consequences for large numbers of needy people savage”.²⁰⁹ The failure to differentiate between beneficiaries defrauding the system and deserving beneficiaries when requiring them to re-register left many persons who “were manifestly not ghosts” destitute.²¹⁰ The need for measures to verify and update pensioner records was not in question, but the methods chosen to undertake this task were found to be “undifferentiatingly harsh” and unlawful.²¹¹ The scathing criticism against the provincial department was therefore not reserved only for the unlawful conduct by the department against the applicants, but particularly for the lack of response to the applicants’

²⁰⁷ Described as “many tens of thousands of Eastern Cape disability grantees” in a similar situation to the successful applicants (*Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuzza and others* 2001 4 SA 1184 (SCA) 1190 par 1). The respondents objected to the class action and argued that practicalities and scarce resources would make it impossible for the courts and the public administration to handle cases involving thousands of persons. Froneman J answered this objection by stating that it is in the power of the department to avoid this type of litigation by acting within the principle of legality (*Ngxuzza and Others v Secretary, Department of Welfare, Eastern Cape* 2002 (12) BCLR 1322 (E) 1333).

²⁰⁸ The detailed requirements for instituting a class action fall outside the scope of this work. See Plasket “Standing, welfare rights and administrative justice” (2000) 117 SALJ 647.

²⁰⁹ 2001 4 SA 1184 (SCA) 1194, para 7.

²¹⁰ *Ibid.*

²¹¹ 1195, para 9. Cameron JA criticised the provincial authorities for their failure to expedite the re-registration process and referred to the countless “unfulfilled undertakings, broken promises, missed meetings, administrative buck-passing, manifest lack of capacity and at times gross ineptitude.” (1195 para 8).

needs and the subsequent use of legal processes to impede the applicants' claims against it. The department's approach to the class action by beneficiaries was described by Cameron JA as

contradictory, cynical, expedient and obstructionist. It conducted the case as though it were at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere.²¹²

From the series of cases discussed above it can be concluded that the unlawful suspension or termination of grants, albeit to rectify payments made in error, not only infringes the rights of beneficiaries, but erodes solidarity with deserving grant beneficiaries.²¹³ There can be no solidarity with grant beneficiaries if the very department tasked with administering the grants seems to be "at war"²¹⁴ with the beneficiaries. It is therefore in the interest of continued solidarity with grant beneficiaries, and older persons in particular, that the courts use their constitutional mandate to enforce social security rights.²¹⁵

²¹² Para 15.

²¹³ Particularly when the unlawful action is directed against entitled beneficiaries as well as "the bogus" (*Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and others* 2001 4 SA 1184 (SCA) 1197 para 15).

²¹⁴ *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and others* 2001 4 SA 1184 (SCA) 1197 para 15. In 2002 President Mbeki expressed his indignation about the "cruel and irresponsible manner" in which civil servants delayed back payment of old age grants unlawfully suspended for up to two years *Daily Dispatch* "R2bn cash boost for pensioners", 15 February 2002 <http://www.dispatch.co.za/2002/02/15/easterncape/AAALEAD.HTM>.(accessed 27/10/2008).

²¹⁵ The remedies available to grant beneficiaries whose social security rights have been infringed are discussed below at 4.3.4..

4.3.4.3 Measures to address mismanagement of grants

Mismanagement of grants does not only include erroneous payments made to undeserving recipients as discussed above, but also tardy processing of grant applications or failure to pay grants to deserving grant beneficiaries, including older persons. The provincial departments that were previously responsible for grant applications and payments stated a number of justifications for mismanagement.

The SOCPEN computer system²¹⁶ and errors at pay points have been among the major contributing factors to non-payment of grants.²¹⁷ A recurrent problem is computer records indicating two persons with the same initials and surname receiving a grant. This irregularity is usually only resolved when the correct beneficiary produces identification.²¹⁸ The validity of grants and the amounts that particular beneficiaries were entitled to in some provinces could not always be

²¹⁶ See fn 147 above. See also *Maluleke v The Northern Province Member of the Executive Council for Health and Welfare* [1999] 4 All SA 407 (T) 412 where the re-registration of beneficiaries was delayed by “down time” on the computer system. In some instances it was not the computer system itself that was at fault, but rather the data punched into the computer. In *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525, the initial delay in the processing of the grant application was caused by an incorrect reference number being allocated to the applicant and entered into the computer.

²¹⁷ Payment contractors have blamed incorrect data regarding the numbers of beneficiaries at given pay points for the situation where no provision has been made for payment for a number of the older persons arriving to collect grants on the SOCPEN computer system. See “AllPay blames govt dept for pension crisis” *Dispatch Online* 16 January 2003 <http://www.dispatch.co.za/2003/01/16/easterncape/AAAALLPAY.HTM> (accessed 28/10/2008); *The Herald* “Minister tasks top team to probe pension payouts” http://www.theherald.co.za/herald/2003/01/16/news/n10_16012003.htm (accessed 28/10/2008).

²¹⁸ As was the case in *Maluleke v The Northern Province Member of the Executive Council for Health and Welfare* [1999] 4 All SA 407 (T).

confirmed as all grant types were not always captured on SOCPEN.²¹⁹

As early as 2001, the Minister for Social Development described the SOCPEN system as antiquated and, recognising that it was inadequate to provide the information required for efficient service delivery, reported that plans were underfoot to revise the SOCPEN system.²²⁰ The South African Social Security Agency Act of 2004 requires SASSA to establish a national data base of all applicants for and beneficiaries of social assistance. Such data base should be capable of collecting, collating, maintaining and administer the information necessary for the payment of social security.²²¹ Based on the criticism levelled at the SOCPEN system, it is clear that an overhaul of the current system or steps to replace it with another data base that can meet the requirements set by legislation such as the South African Social Security Agency Act are required.²²² SASSA is in the process of introducing a new payment management system to promote uniformity and “address issues of inefficiency”.²²³

In many rural areas the lack of access to technology meant that applications had to be capture manually and information then sent to other service points, leading to severe delays. SASSA has since installed low-cost energy-saving computer

²¹⁹ Joseph (2005) *Resorting to the courts: litigation and the crisis in the administration of social grants in the Eastern Cape* 29 and 33.

²²⁰ Skweyiya *Development Budget Vote 2001* www.info.gov.za/speeches/2001/010607945a1005.htm (accessed 02/07/2009).

²²¹ S 4(1)(b) SASSA Act 9 of 2004.

²²² An efficient data base is also required to enable administrators to provide the information required by the Promotion of Administrative Justice Act 3 of 2000.

²²³ SASSA (2008) *Strategic Plan 2008/09 – 2010/11* 18.

systems in a number of rural SASSA offices with a significant reduction in the turn-around time for grant applications.²²⁴

The effects of the amalgamation of the 14 different social security systems under the apartheid system²²⁵ have also been blamed in the past for delays in the processing of grant applications. Although the provincial departments may have had to deal with inherited problems, SASSA aims to put processes and procedures in place “to promote uniformity and standardisation”.²²⁶

The absence of a proper communication strategy for conveying decisions on grant applications has notably contributed to litigation against provincial governments.²²⁷ The rural nature of many provinces exacerbated the problems experienced with communication with grant applicants and beneficiaries.²²⁸ SASSA has responded to this problem by introducing the Integrated Community Registrations Outreach Programme (ICROP) to reach remote areas.²²⁹

However, it seems that judges in social assistance-related cases regarded the

²²⁴ See Omni “SASSA cuts costs and improves service delivery in rural areas with Novell and Useful Multiplier” <http://www.omni-ts.com/success/linux-desktops-government.html> (accessed 20/08/2009).

²²⁵ In *MEC, Department of Welfare v Kate* [2006] 2 All SA 455 (SCA) 460 para 10, it was recognised that the Eastern Cape provincial grant administration had to deal with a number of inherited administrative problems at the same time as the expansion of the social assistance system.

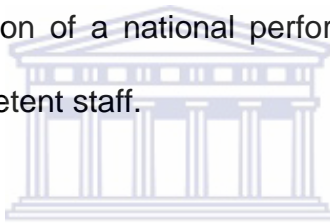
²²⁶ SASSA (2008) *Strategic Plan 2008/09 – 2010/11* 18.

²²⁷ Joseph (2005) *Resorting to the courts: Litigation and the crisis in the administration of social grants in the Eastern Cape* 5. See below at 4.3.4.4 for more on the statutory and constitutional obligation to provide grant applicants with reasons for denying their applications and the litigation against provincial departments that failed to comply with this obligation.

²²⁸ Joseph (2005) *Resorting to the courts: Litigation and the crisis in the administration of social grants in the Eastern Cape* 5.

²²⁹ SASSA (2008) *Strategic Plan 2008/09 – 2010/11* 17.

main contributing factor to mismanagement to be “laziness and incompetence”²³⁰ on the part of provincial Social Development departments. Even some politicians admitted that the litigation against provincial governments can be attributed to the fact that “arrogant staff dragged their feet in processing the grant applications.”²³¹ Severe staff shortages in some provinces have also contributed to mismanagement of application procedures.²³² The constant changing of MEC’s for Social Development in provinces such as the Eastern Cape created a leadership crisis and hampered the department’s ability to engage with the problems that it faces.²³³ These human resources issues have been addressed by SASSA by the introduction of a national performance management plan to address the issue of incompetent staff.



To deal with grant processing delays, SASSA has launched the Improved Grant Application Process (IGAP) with the aim to process applications and provide applications with feedback within one day.²³⁴

It is submitted that the steps taken by SASSA to improve service delivery and

²³⁰ *Jayiya v MEC for Welfare, Eastern Cape and Another* [2003] 2 All SA 223(SCA) para 18. See also *Mbanga v Member of the Executive Council for Welfare and Another* 2001 (8) BCLR 821 (SE) 830 where Leach remarked that “Public servants are, as their very name implies, there to serve the public: not to sit inert and immobile, doing little apart from drawing their salaries and pensions.”

²³¹ MEC for Social Development, Eastern Cape, quoted in “New MEC promises to crack down on lazy staff” *The Herald* 1 March 2005 http://www.theherald.co.za/herald/2005/03/01/news/n04_01032005.htm (accessed 27/10/2008).

²³² Joseph (2005) *Resorting to the courts: Litigation and the crisis in the administration of social grants in the Eastern Cape* 3 and 35.

²³³ Joseph (2005) *Resorting to the courts* 36.

²³⁴ SASSA (2008) *Strategic Plan 2008/09 – 2010/11* 17. The programme has already been implemented in Mpumalanga, the Eastern Cape, the Western Cape and KwaZulu-Natal.

thereby access to social assistance for older persons constitute reasonable measures in terms of section 27 of the Constitution. The improvement in service delivery in the grants system can be regarded as a response to “the needs of those most desperate”²³⁵ and, hence, as a reasonable measure to give effect to the right of access to social security.

4.3.4.4 Administrative justice requirements

In terms of section 33(1) of the Constitution everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It is therefore imperative that the rules for eligibility for grants and the termination thereof are reasonable and fair.²³⁶ The Promotion of Administrative Justice Act (PAJA)²³⁷ was enacted to give effect to the right to fair and reasonable administrative action in general. The SAA and its regulations also give effect to the right to fair administrative action specifically during application for and

²³⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 44.

²³⁶ Liebenberg “The right to social security: Response” in Brand and Russell (eds) (2002) *Exploring the core content of socio-economic rights: South African and international perspectives* 157. In *Bacela v MEC for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 it was submitted on behalf of the applicant that the MEC’s decision not to backdate grant payments adversely affected not only the applicant, but “a large number of other people in the Eastern Cape” (at 527). Although the applicant’s case was based mainly upon the respondent infringing the applicant’s right of access to social security, it was argued that the adverse decision infringed on the right to fair administrative action and the right to dignity as well. The court concluded that the respondent’s actions were unlawful and for that reason it was not necessary to consider the issue whether the applicant’s constitutional rights were infringed (at 529). See also *Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 (7) BCLR 728 (E) where Van Rensburg J stated that a grant, “once granted, confers upon the beneficiary the right to receive that grant until it is lawfully terminated in terms of the Act and the regulations. In my judgment such right cannot be validly terminated without the rules of natural justice and the right to fair administrative action, including the right to be heard, being observed” (at 732-3).

²³⁷ Act 3 of 2000.

payment of grants. The SAA therefore has direct application to administrative action taken during the application process and payment of grants and, where it is silent, PAJA applies.²³⁸

4.3.4.4.1 *Notification of outcome of grant application*

Various rights stem from section 33 of the Constitution. An applicant for an older person's grant has the right to be notified of the outcome of the application and in the case of rejection, the reasons for disqualification.²³⁹ In terms of regulation 13(1)²⁴⁰ the applicant is entitled to be notified of the outcome of the application within three months of the date of the application.

In terms of PAJA, failure to take action and, therefore, failure to make a decision, is one of the grounds for judicial review.²⁴¹ Where an administrator is obliged to make a decision and fails to do so and there is no prescribed period within which the administrator has to make the decision, the person affected can apply for judicial review on the basis of an unreasonable delay in making the decision.²⁴² Where the applicable legislation prescribes a period within which the decision is to be made and the administrator failed to make a decision before that period expired, the person affected can institute proceedings for judicial review of the

²³⁸ The relationship between the SAA and PAJA is dealt with in more detail at 4.3.4.4.2 below.

²³⁹ S 14(3) SAA.

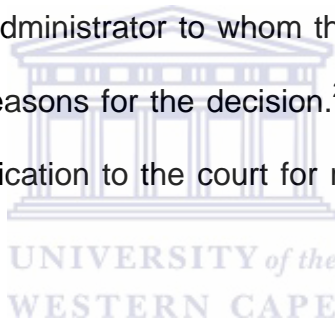
²⁴⁰ GN R898 in GG 31356 of 22 August 2008. The written notice of rejection of the application must contain the reasons for the refusal and inform the applicant of his or her right to appeal the decision (reg 13(4)).

²⁴¹ S 6(2)(g) PAJA.

²⁴² S 6(3)(a) PAJA.

failure to make the decision.²⁴³ A grant applicant can only institute proceedings once the three months provided for in regulation 13 has expired.

In addition, section 5(1) of PAJA allows any person whose rights have been materially and adversely affected by administrative action²⁴⁴ and who has not been given reasons for the action, to request that written reasons for the action be provided by the administrator.²⁴⁵ Such request should be made “within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action”. After receipt of the request, the administrator to whom the request was made has 90 days to provide adequate reasons for the decision.²⁴⁶ Thereafter the aggrieved applicant can lodge an application to the court for relief in terms of section 5 of PAJA.



Section 5(2) PAJA should not be interpreted to mean that the aggrieved applicant may not approach a court before the 90-day period has lapsed, as it merely states the time frame within which the administrator has to gather the necessary information to present the applicant with the reason for refusal. Depending on the circumstances of each case, failure by the administrator to provide reasons for the decision within 90 days may lead to the presumption that the decision was

²⁴³ S 6(3)(b) PAJA.

²⁴⁴ Which includes making, suspending or refusing to make an award (s 1(i) read with s 1(v) PAJA).

²⁴⁵ Previously the request for reasons would have to be made to the Permanent Secretary of the provincial Department of Social Development, but would now be directed to SASSA as administrator.

²⁴⁶ S 5(2) PAJA.

taken without good reason.²⁴⁷ An administrator who is approached to provide reasons for a decision is required to act in accordance with the values and principles set out in section 195 of the Constitution when complying with the request. These values and principles include the obligation to promote transparency by providing the person requesting the reasons with timely and accurate information.²⁴⁸ An administrator can therefore not “with impunity wait until the 90-day period has all but expired” before providing the requested reasons, but should rather furnish the reasons as soon as they are available.²⁴⁹ Much of the litigation against the provincial Social Development departments was a result of the absence of reasons for non-approval of grant applications.²⁵⁰

4.3.4.4.2 *Judicial review of administrative action*

In the light of the above statutory requirements and the constitutional right to “lawful, reasonable and procedurally fair” administrative action,²⁵¹ the conduct of or lack of response by provincial governments in handling grant applications has been held to be unlawful and unconstitutional. The cases discussed below were selected for their description of the obligations of the provincial departments with regard to the administration of social grants and because they reveal the

²⁴⁷ *Sikutshwa v MEC for Social Development, EC Province & another* [2005] JOL 14413 (Tk) para 70-77.

²⁴⁸ Section 195(g).

²⁴⁹ *Obiter* remarks by Goosen AJ in *Sikutshwa v MEC for Social Development, EC Province & another* [2005] OL 14413 (Tk) para 77.

²⁵⁰ E.g. *Sikutshwa v MEC for Social Development, EC Province & another* [2005] JOL 14413 (Tk). See the discussion below at 4.3.4.4.2.

²⁵¹ Section 33 of the Constitution.

approach of many provincial grant administrations to grant applicants.

The case of *Vumazonke and others v MEC for Social Development, Eastern Cape*²⁵² serves as an example of the growing impatience of the courts with the unsatisfactory performance of the “unrepentant” social assistance administration in the Eastern Cape Province.²⁵³ This case was only one of a number where the applicants had applied for social assistance and had either received no response or had to wait an unreasonably long period for a response.²⁵⁴ When Ms Vumazonke finally received a response from the department, it was only to inform her that her application was unsuccessful, as a medical officer had recommended that her application be refused. This, in itself, did not constitute an adequate reason for the refusal of the grant²⁵⁵ and provided her with no basis for the only internal remedy available to her, which is to appeal to the Minister. As she had received no reasons for the refusal of her application, the 90-day period to lodge an appeal had not begun to run yet and she was free to appeal.

²⁵² 2005 6 SA 229 (SE).

²⁵³ At paras 2 and 10.

²⁵⁴ Plasket J stated that the “depressing tales of misery and privation contained in an ever-increasing volume of cases that clog their Motion Court rolls, in which applicants complain about administrative torpor in the processing of their applications for social assistance was a common phenomenon that the Judges in the Eastern Cape Division were getting accustomed to (at para 2). See also *Mahambehlala v MEC for Welfare, Eastern Cape, and another* 2002 1 SA 342 (SE). By the latter part of 2005, there were almost 2000 cases related to the provincial government’s failure to implement the provisions of the Social Assistance Act and “the conspicuous and endemic failure” by the department to take reasonable measures to make the grant system effective on the roll of the High Court (*MEC Department of Welfare v Kate* [2006] 2 All SA 455 (SCA) paras 3 and 5).

²⁵⁵ 2005 6 SA 229 (SE) 243 para 32. The response from the department would have constituted a reason for refusal if it had informed the applicant of the basis upon which the medical officer had come to the conclusion that the applicant did not qualify for a disability grant. See also *Sikutshwa v MEC for Social Development, EC Province & another* [2005] JOL 14413 (Tk) para 33.

In the case of the other applicants in the *Vumazonke* case, no response to their applications had been forthcoming. They therefore approached the court for an order compelling the respondent to take the decision to grant or refuse the applications. Even though at the time no legislation prescribed a time period within which the applications had to be processed, it was held that there had been an unreasonable delay in taking the decisions.²⁵⁶ Where part of an official's function is to take a decision and the official fails to exercise his or her powers, a court may compel the defaulting official to take a decision.²⁵⁷ The court ordered the respondent or any other duly authorised official in her department to consider and decide upon the applicants' grant applications.²⁵⁸

The Supreme Court of Appeal in *MEC, Department of Welfare v Kate*²⁵⁹ provided some guidelines on what would constitute a reasonable time for the grant administration to process and approve or reject an application. Depending on the circumstances, whether or not an unreasonable delay occurred in the processing of a grant would depend upon "the nature of the particular application, the enquiries that need to be made, the volume of similar applications that need

²⁵⁶ Mainly based on the department's own undertaking to take decisions within three months from the application date (2005 6 SA 229 (SE) 245 para 39). See also *Mahambehala v MEC for Welfare, Eastern Cape, and another* 2002 1 SA 342 (SE) where the then Regional Director of the Department of Welfare in Port Elizabeth argued that the turn-around time for deciding upon an application should "ideally" be three months, but a longer period taken to come to a decision is not necessarily unreasonable (at 348). Leach J held that under the circumstances, "common sense tells one that in a case such as this where no unduly intricate investigations have to be made, a period of three months would normally be more than sufficient to take an administrative decision (at 351). The Constitutional Court found that, depending on the circumstance of the case, three months can be regarded as a reasonable period within which a grant ought to be approved (*Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC), fn 3).

²⁵⁷ At 244 para 35. However, the court may not compel the official to decide in a particular way.

²⁵⁸ At 246-247 para 44.

²⁵⁹ [2006] 2 All SA 455 (SCA).

to be dealt with, the administrative capacity that is available for processing such applications, and other matters of that nature”.²⁶⁰ The court that is tasked with determining whether a delay in processing a grant is unreasonable is required to take into account the difficulties that the grant administration has to overcome.²⁶¹

Only once the internal remedy provided by the SAA, namely the appeal procedure, has been exhausted, may the aggrieved older person institute proceedings in a court of law or a tribunal for an administrative review in terms of PAJA.²⁶² PAJA was enacted to give effect to the constitutional right to procedurally fair administration and to codify the common law principles of natural justice.²⁶³ Section 3 of PAJA requires administrative action which “materially and adversely affects the rights and legitimate expectations of any person” to be procedurally fair. “Administrative action” includes not only any decision taken, but also failure to take a decision,²⁶⁴ by any organ of state when performing a public function in terms of any legislation, “which adversely affects

²⁶⁰ *MEC, Department of Welfare v Kate* [2006] 2 All SA 455 (SCA) 459 para 10. The Constitutional Court added another factor, the urgency with which the application is to be finished, specifically where the applicant is a poor woman with little education (*Njongi v MEC for Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC) para 6).

²⁶¹ *MEC, Department of Welfare v Kate* [2006] 2 All SA 455 (SCA) 460 para 10.

²⁶² Section 7(2)(a) PAJA read with s 6. The only exception to this rule would be if the court or tribunal approached by the complainant is of the view that it would be in the interests of justice to allow the complainant to proceed with the review before exhausting the applicable internal remedy (s 7(2)(c) PAJA). See *Ntame v MEC, Dept of Social Development, Eastern Cape* [2005] 2 All SA 535 (SE) where the applicant sought to be exempted from the obligation of exhausting internal remedies before approaching the court for an administrative review. *In casu* PAJA was found not to be applicable. It was held that an order i.t.o. s 7(2) was in any case not required, as s 7(2) “merely defers the right of access to court until any internal remedy provided by any law has been exhausted, or the time period for utilising that internal remedy has expired”. The section does not oust the jurisdiction of the courts until the applicant has exhausted the internal remedy (para 30).

²⁶³ PAJA preamble.

²⁶⁴ See *Vumazonke and others v MEC for Social Development, Eastern Cape* 2005 6 SA 229 (SE) 245 para 37.

the rights of any person and which has a direct, external legal effect”.²⁶⁵ Any action taken by staff members of SASSA or the Department of Social Development while performing their tasks in terms of the SAA may therefore be open to review proceedings in terms of PAJA.

The requirements for procedurally fair administrative action set by PAJA entitle a person affected by administrative action to

- “(a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) a reasonable opportunity to make representations;
- (c) a clear statement of the administrative action;
- (d) adequate notice of any right of review or internal appeal, where applicable; and
- (e) adequate notice of the right to request reasons in terms of section 5.”²⁶⁶

Any older person who is denied a reasonable opportunity to make representations regarding his or her grant application or payment or who is not given adequate notice of his or her right to request reasons for a decision by an official, will therefore be entitled to institute proceedings in a court of law for an administrative review based on the procedurally unfair administrative action.²⁶⁷

²⁶⁵Section 1(i)(a) PAJA.

²⁶⁶Section 3(2)(b) PAJA. S 5 allows any person whose rights have been adversely affected by administrative action, to request the reasons for such administrative action.

²⁶⁷In the case of *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* 2000 (7) BCLR 728 (E), grants were cancelled without notice or hearing. The court held that the cancellation was unlawful and procedurally unfair. It has to be noted that even though the *Bushula* judgment occurred before PAJA was in force, the judgment was still based on the right to fair administrative action, including the right to be heard and the rules of natural justice. In *Njongi v MEC for Social Development, Eastern Cape Province* Unreported case no 1281/04 SE payment of the applicant's grant was suspended and she applied for an administrative review in terms of PAJA. Unfortunately her cause of action arose before PAJA came into force and therefore it did not apply. An administrative review in terms of the common law was therefore the appropriate action (para 3).

An administrator may, however, in certain circumstances decide that it is reasonable and justifiable not to comply with all of the abovementioned requirements²⁶⁸ and may use this decision as a defence where an older person institutes proceedings for an administrative review. It is therefore theoretically possible that an older person whose grant is suspended as a result of a re-registration process, would on review not succeed in having the suspension overturned,²⁶⁹ as SASSA could claim that re-registration is required to promote an efficient administration and hence reasonable and justifiable under the circumstances.

The grounds for judicial review of administrative actions are set out in section 6(2) of PAJA. The following grounds for judicial review are pertinent to grant applicants and beneficiaries:²⁷⁰

- the administrator's actions were biased or could reasonably be suspected of bias,²⁷¹
- the procedures prescribed by the empowering provision and its regulations²⁷² were not complied with,²⁷³

²⁶⁸ Sections 3(4)(a) and 5(4)(a) PAJA. Statutory examples of the factors that would assist the administrator in deciding whether departure from the requirements for fair administrative action or to furnish reasons is reasonable and justified are listed in ss 3(4)(b) and 5(4)(b) and include "the need to promote an efficient administration and good governance".(ss 3(4)(b)(v) and 5(4)(b)(vi)).

²⁶⁹ An order setting aside the offending administrative action is one of the remedies in proceedings for judicial review listed in s 8(1) PAJA. Other remedies include: court orders directing the administrator to give reasons for the administrative action; directing the administrator to act in accordance with the court order; prohibiting the administrator to act in the offending manner; setting aside the administrative action and referring it back to the relevant administrator; ordering the administrator (or any other party) to compensate the aggrieved person; declaratory orders; orders granting temporary relief; and, cost orders.

²⁷⁰ The grounds for review may overlap in some instances. See *Ntame v MEC, Dept of Social Development, Eastern Cape* [2005] 2 All SA 535 (SE) 548 para 35.

²⁷¹ Section 6(2)(a)(iii) PAJA.

²⁷² Section 14(3) SAA and reg 13(1) GN R898 in GG 31356 of 22 August 2008.

²⁷³ Section 6(2)(b) PAJA.

- the procedure followed in the grant application or payment of the grant was unfair;²⁷⁴
- the payment of a grant is suspended arbitrarily;²⁷⁵
- the grants official's actions are not authorised by the empowering provision;²⁷⁶
- the rejection or delay in processing a grant application or the suspension or termination of a grant
 - “...(ii) is not rationally connected to
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;”²⁷⁷
- SASSA failed to make a timeous decision regarding an application for an older person's grant;²⁷⁸
- the refusal to approve a grant, or the suspension or withdrawal of an existing older person's grant was so unreasonable that no reasonable person would have exercised his or her power or performed his or her function in that manner;²⁷⁹ or
- the withdrawal or suspension of the grant was unconstitutional or unlawful.²⁸⁰

An application for administrative review should clearly identify which ground for review the application is based on and which provisions of PAJA are relied on.²⁸¹

The internal remedies in terms of the SAA have to be exhausted before an

²⁷⁴ Section 6(2)(c) PAJA. The application for judicial review of administrative action in *Ntame v MEC, Dept of Social Development, Eastern Cape* [2005] 2 All SA 535 (SE) was based on an administrative act (the unilateral withdrawal of a grant) performed in a procedurally unfair manner.

²⁷⁵ Section 6(2)(e)(vi) PAJA.

²⁷⁶ Section 6(2)(f)(i) PAJA.

²⁷⁷ Section 6(2)(f)(ii) PAJA.

²⁷⁸ Section 6(2)(g) PAJA. See e.g. *Vumazonke and others v MEC, Social Development, Eastern Cape and others* 2005 6 SA 229 (SE) 245 para 37, 246 para 39.

²⁷⁹ Section 6(2)(h) PAJA.

²⁸⁰ Section 6(2)(i) PAJA.

²⁸¹ See *Cele v SASSA* Unreported case no. 7940/07 D&CLD para 48 where Wallis AJ cautioned against a “check box” approach to s 6 of PAJA, whereby every conceivable ground for administrative review is listed in applications for fear of omitting any relevant ground.

application in terms of PAJA can be made. The relationship between the remedies in terms of the SAA and PAJA was illustrated in *Njongi v MEC for Social Development, Eastern Cape Province*.²⁸² The applicant's grant had been terminated without any explanation and she was merely informed that she had to reapply for the grant.²⁸³ She did so and her grant payment resumed. She claimed that the amount of "back-pay" she had received for the time her grant was not paid was not enough and she instituted a claim for the remainder of her back-pay. The question was whether the applicant should simply have lodged a claim in the magistrate's court for money owed to her in terms of sections 2 and 3 of the 1992 Social Assistance Act²⁸⁴ and whether she was entitled to combine a claim for a money payment with a review application in the High Court. Although it had become "common practice" to combine a claim for money with a review application where an administrative action had led to the money claim, Jones J issued a warning that the process could be abused "by disguising what is really only a money claim as an administrative review".²⁸⁵ There will be no abuse of the process if the particular administrative action has to be set aside in order for

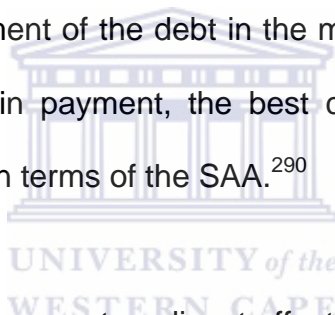
²⁸² Unreported case 1281/04 SE.

²⁸³ When this matter reached the Constitutional Court, the court expressed its regret that Mrs Njongi "was not the only victim compelled mercilessly to suffer the pain, misery and indignity of non-payment" and that there were "literally tens of thousands of others" suffering the same fate (*Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC), para 5).

²⁸⁴ As was argued by the respondent in *Njongi v MEC for Social Development, Eastern Cape* Unreported case 1281/04 SE (see para 7).

²⁸⁵ *Njongi v MEC for Social Development, Eastern Cape* Unreported case 1281/04 SE para 6. See, however, *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) 160 para 31 where Froneman J reacted as follows to the concern expressed by his colleagues on the abuse of motion proceedings in order to obtain financial compensation: "On reconsideration, however, it seems to me that our irritation at the use of proceedings not customarily geared to such ends has to give way to the fact that it has proved to be a relatively cheap and efficient way of finalising litigation... It is, of course, not the ideal way of ensuring an efficient and accountable public administration. But until the provincial administration starts getting that right the courts have to do what the Constitution demands of them, even if that means inflated motion court rolls."

a claim in money to arise.²⁸⁶ It was held that the decision to cancel a grant without notice or a hearing constitutes irregular administrative action which is subject to review. Until this decision is taken on review and corrected, it will stand. A money claim in the magistrate's court would therefore be met with the valid defence that no money is payable to the applicant as the grant had been terminated.²⁸⁷ It can therefore be concluded that in the case of unlawful cancellation of a grant, the grant beneficiary would be well-advised to first apply to have the cancellation set aside on review and then proceed with the money claim in the magistrate's court.²⁸⁸ Review is therefore necessary as a precondition to the enforcement of the debt in the magistrate's court.²⁸⁹ In other instances, such as delays in payment, the best course would be to proceed directly with a money claim in terms of the SAA.²⁹⁰



The question arises whether a grant applicant affected by an unreasonable delay in the processing of his or her application may be entitled to remedies in addition to a money claim in terms of the SAA and the various PAJA remedies. In particular, the courts have had to consider to which extent “constitutional remedies” can be used in circumstances where other remedies are not available.

²⁸⁶ *Njongi v MEC for Social Development, Eastern Cape* Unreported case 1281/04 SE para 6. Even if the respondent concedes that the cessation of the grant payment was unlawful, said cessation is still administrative action which is subject to review (para 7).

²⁸⁷ Para 8.

²⁸⁸ This view was confirmed by the Constitutional Court in *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC), para 47.

²⁸⁹ *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (6) BCLR 571 (CC), para 51. Where government admits that its administrative decisions are subject to challenge, it should not be necessary for each such decision to be set aside by a court before the underlying debt can be enforced (para 56).

²⁹⁰ *Mfubu v MEC of the Department of Welfare, Eastern Cape Province* [2005] JOL 13874 (SE) at 7 and 8.

In *Mahambehlala v MEC for Welfare, Eastern Cape, and another*,²⁹¹ it was held that taking eight months to process a grant application was an unreasonable delay in approving the grant²⁹² and therefore an unlawful and unreasonable infringement of the applicant's right to just administrative action in terms of section 33 (1) of the Constitution. A common-law review would have been available to the applicant as a result of the failure by the department to consider the application.²⁹³ The court could, however, not order the department to pay the back pay owed to the applicant in terms of the common law.²⁹⁴ As the common-law remedies were held to be insufficient to address the effects of the delay of the applicant's grant and it was held to be "unrealistic to expect her to institute a separate action to claim damages",²⁹⁵ the court felt compelled to forge "constitutional relief" to enforce the applicant's right to just administrative action.²⁹⁶ Leach J regarded placing the applicant in the position she would have been in, had her right to lawful and reasonable administrative action not been infringed, as appropriate relief. He held that the applicant was entitled to a lump sum payment of the amount she would have been entitled to, had her grant been

²⁹¹ 2002 1 SA 342 (SE).

²⁹² It was ruled that three months was sufficient time to process a grant application (at 351-352).

²⁹³ At 353.

²⁹⁴ It was held that even if the court could substitute its decision for that of the second respondent, the Director-General for Welfare, Eastern Cape, it was not clear how "it could do so with retrospective effect, particularly as the second respondent has no power under the regulations to approve a grant retrospectively" (at 354).

²⁹⁵ At 355.

²⁹⁶ I.t.o. s 38 of the Constitution which entitles the courts to grant appropriate relief for the infringement of a fundamental right read together with s 172(1) which allows courts to make any order that is just and equitable. *Contra*, see Ackermann J's criticism of constitutional damages as "appropriate relief" in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) paras 71 – 72.

approved within a reasonable time.²⁹⁷

In a similar case, *Mbanga v Member of the Executive Council for Welfare and Another*,²⁹⁸ Leach J reiterated that he regards three months to be a reasonable time limit within which a decision on a grant application should be taken. The thirty-two month delay in approving the grant in casu was therefore an unreasonable delay which infringed the applicant's constitutional right to "lawful and reasonable" administrative action.²⁹⁹ Leach J expressed his concern over the fact that such delays were not isolated incidents and that they rather "appear merely to be the tip of the iceberg".³⁰⁰ He found that the inefficiency of public servants not only constituted abuse of the human rights of others, but also caused considerable sums to be paid from the public purse.³⁰¹ He therefore, as in *Mahambehlala*, awarded the applicant interest for the months he was without the grant he should have had as "appropriate" relief in terms of section 38 of the Constitution.³⁰²

An different approach to "constitutional damages" was taken by the Supreme Court of Appeal in *Jayiya v MEC for Welfare, Eastern Cape Provincial*

²⁹⁷ *Mahambehlala v MEC for Welfare, Eastern Cape and another* 2002 1 SA 342 (SE) 356. This amounts to payment of back pay, plus interest on the arrears.

²⁹⁸ 2001 (8) BCLR 821 (SE).

²⁹⁹ At 829.

³⁰⁰ *Ibid.*

³⁰¹ He remarked on the intolerable state of affairs that "as long as administrative inefficiency continues to plague this province, public funds are going to continue to be wasted solely because public officials do not do the work which they are being paid to do" (at 830).

³⁰² At 830.

Government and another,³⁰³ where Conradie JA was critical of the development of “constitutional relief” by the High Court in *Mahambehlala*. The main reason for the different approach was that PAJA³⁰⁴ provided the applicant with statutory remedies and that “constitutional relief” was therefore not the appropriate remedy.³⁰⁵

Understandably, the decision in *Jayiya* elicited a reaction from the High Court in the Eastern Cape, as *Jayiya* frustrated its efforts to “ensure compliance on the part of the provincial government with its constitutional duties of efficient and accountable public administration”.³⁰⁶ In *Kate v MEC for Welfare, Eastern Cape Province*³⁰⁷ the facts of the case fitted the pattern of the numerous applications for administrative review to the High Court in the Eastern Cape³⁰⁸ – a grant applicant who had to wait three years for her grant to be awarded and who only received partial payment of the “back pay” due to her.³⁰⁹ The court was approached for a review of the respondent’s conduct as well as for a claim for the

³⁰³ [2003] 2 All SA 223 (SCA).

³⁰⁴ Which was not applicable in *Mahambehlala*, as it was not yet in force during the applicant’s grant application .

³⁰⁵ [2003] 2 All SA 223 (SCA) 228 para 9. As long as the remedies provided by PAJA are “constitutionally unobjectionable” they must be used. It has to be noted that the comments made in *Jayiya* on the correctness of the constitutional damages awarded in *Mahambehlala* were only obiter.

³⁰⁶ *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) 146, paras 1 and 4.

³⁰⁷ 2005 1 SA 141 (SE).

³⁰⁸ Froneman J referred to the “persistent and huge problem with the administration of social grants” in the Eastern Cape (at 148, para 5).

³⁰⁹ With no explanation offered for the length of the application process or for non-payment of a significant part of the amount she was entitled to (at 159, para 28).

outstanding payment plus interest due to her.³¹⁰ It was submitted on her behalf that the unreasonable delay in the processing of her grant deprived her of her right of access to social security during the period of the delay and that she is therefore entitled to compensation.

In determining whether the respondent was liable for constitutional damages as a result of the belated approval of the applicant's grant, Froneman J reaffirmed the duty of courts to devise new means of enforcing fundamental rights that were not recognised in terms of the common law.³¹¹ In doing so, courts have to recognise the practical difficulties experienced by the new executive and administration in providing for fundamental rights. The courts should be wary of moving into areas that fall outside their domain due to the constitutional separation of powers.³¹² However, this consideration for the role of the administration and the constraints posed by separation of powers do not mean that the courts cannot create new remedies "simply because they did not exist under the common law".³¹³ As the

³¹⁰ The respondent paid the back pay owing to her, but refused to pay interest (at 148 para 2. The reason why the case was not decided on the basis of PAJA was that the applicant did not apply for judicial review of the respondent's action within 180 days as required by PAJA (s 7(1)).

³¹¹ At 152, para 16. Froneman J did consider the remedies afforded by PAJA, but see fn 304 for the reason why it was not applied *in casu*. It is submitted that the internal remedy available under the SAA (the appeal process) was also not available to the applicant, as the administrative action was a delay in notifying the applicant of the outcome of the application. Until the applicant heard from the department, she had nothing on which to base an appeal on.

³¹² *Ibid.* See *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) para 113 where it was held that the courts should pay due regard to the roles of the legislature and the executive, but that "when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation". Froneman J's views as expressed in *Kate v MEC* are therefore supported by the Constitutional Court.

³¹³ *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) 152 para 16. At 160 para 31 Froneman J states that the Constitution and PAJA "provide for the granting of just and equitable relief, unencumbered by the possible technical niceties of relief under common-law review, a system not premised on a constitutionally entrenched fundamental right to lawful

common law did not provide for financial redress for damages resulting from the improper exercise of public powers by state officials, the courts in the Eastern Cape merely complied with their constitutional duties by forging new remedies as they did in *Mahambehlala v MEC for Welfare, Eastern Cape, and another*.³¹⁴

The MEC for Welfare appealed against Froneman J's decision that Kate was entitled to "constitutional damages" for the belated approval of her grant application.³¹⁵ Nugent JA found that the approach in the court a quo and in *Mahambehlala* was too narrow, as the focus was mainly on the breach of the section 33 right to lawful and procedurally fair administrative action. He held that through the denial of a grant applicant's right to fair administrative action, his or her right of access to social assistance is also denied, as the realisation of the latter depends upon the following of an effective process. The denial of the substantive right of access to social assistance therefore should be the focus of a claim under these circumstances.³¹⁶ It was held that the remedy of *mandamus* was not sufficient under the circumstances to protect Kate's rights³¹⁷ and she was awarded constitutional damages as compensation for the breach of her

administrative action". He also stated that even if PAJA was applicable, the remedies would have been similar. A court can set aside administrative action i.t.o. s 8(1)(c)(ii)(bb) and "in exceptional cases" award compensation. The infringement of basic rights *in casu*, constitutes an "exceptional case" (at 155, para 20).

³¹⁴ 2002 1 SA 342 (SE).

³¹⁵ One of the reasons for granting leave to appeal was to allow the issues that were raised in *Jayiya* to be reconsidered in order to lessen the uncertainty regarding the suitability of "constitutional damages" as a remedy for the breach of grant applicants' rights (*MEC, Department of Welfare v Kate* [2006] 2 All SA 455 (SCA) 462 para 18).

³¹⁶ *MEC, Department of Welfare v Kate* [2006] 2 All SA 455 (SCA) 464 para 22.

³¹⁷ *Mandamus* as a remedy is only effective where it is possible to act swiftly to prevent a breach by a public official of a constitutional or statutory duty. It was held that due to her circumstances, "it is most unlikely that Kate had the capacity or the means that were required to act swiftly once the delay set in and it would be quite unrealistic to expect the remedy to have been effective in her hands" (467 para 31).

rights.³¹⁸

The same approach was followed in *Ntame v MEC, Department of Social Development, Eastern Cape*,³¹⁹ where appropriate relief had to be found for the unlawful suspension of the applicant's grant. The grant was only reinstated thirty months later. Plasket J found that it would be insufficient merely to hold that the administrative act in question - the stoppage of the grant - was inconsistent with the Constitution. In order to provide the applicant with "proper, adequate, fair and effective" relief for the violation of her right to just administrative action, he ordered the respondent to pay the amount owing to the applicant in terms of the Social Assistance Act plus interest on that amount.³²⁰

The Constitutional Court had occasion to consider the issue in question, which is the right of grant recipients to lawful administration action when their grants are cancelled in *Njongi v MEC, Department of Welfare, Eastern Cape*.³²¹ The constitutional issues the Constitutional Court had to consider were the

³¹⁸ At 467 paras 31 and 33.

³¹⁹ [2005] 2 All SA 535 (SE).

³²⁰ At 550 para 41. The relevant provisions of PAJA were not applicable as the cause of action arose before PAJA came into force (at 542 para 14).

³²¹ 2008 (6) BCLR 571 (CC), Another issue that stood to be determined was whether the state could rely on extinctive prescription of its obligation towards grant recipients in order to avoid paying their grants. The South Eastern Cape High Court held in *Njongi v MEC for Social Development, Eastern Cape Province* Unreported case no 1281/04 that prescription does not run against a person claiming arrear grant payments as long as the unlawful administrative action (the decision not to pay the grant) continues. The MEC for Social Development was successful in appeal to the Full Court of the Eastern Cape where it was found that prescription can run in favour of a provincial government in such circumstances, even where the administrative action concerned had not yet been set aside (*MEC for Welfare v Njongi* Case 62/06, Eastern Cape High Court, unreported). Ms Njongi appealed to the Constitutional Court. The Constitutional Court had to determine when the state is entitled to rely on the defense of prescription and held that prescription had not started to run on the arrears as the applicant's grant had not yet been reinstated in full (2008 (6) BCLR 571 (CC), para 58).

consequences of unlawful administrative action in relation to the administration of social assistance and whether the Provincial government had complied with the constitutional obligation imposed by section 27 of the Constitution.³²² In similar vein to the judgment of the Supreme Court of Appeal in *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and others*³²³ the social standing of the people who were deprived of their grants as a result of “the bewildering conduct of the Provincial Government” was central to the finding by the Constitutional Court that the denial of their grants was unconstitutional and unlawful. They were described as “the poorest people in our society” and therefore the unlawful denial of their grants was “unthinkably cruel and utterly at odds with the constitutional vision to the achievement of which that Government ought to have been committed”.³²⁴ Yacoob J remarked that the “unarguably unlawful”³²⁵ administrative decision to cancel the grant has caused “untold misery and suffering”.³²⁶ The apathy with which the provincial government regarded its obligations arising out of court judgments was singled out for criticism.³²⁷ The Constitutional Court set aside the orders of the court a quo and declared the administrative action of the department in terminating the applicant’s social grant to be invalid and set it aside. It ordered that the applicant’s grant be reinstated and the department to pay her the amount in back pay still owed, plus interest on

³²² At para 41. It was argued on behalf of the applicant that her claim was not merely based on a debt which can prescribe, but also a violation of her fundamental rights to access social security and to fair administrative action.

³²³ 2001 4 SA 1184 (SCA) para 9.

³²⁴ *Njongi v MEC for Social Development, Eastern Cape Province* 2008 (6) BCLR 571 (CC), para 17. See also para 66 where Yacoob J draws attention to the extent of the applicant’s poverty and disability and the perverse aims of the government in opposing the applicant’s claim.

³²⁵ At para 71.

³²⁶ At para 46.

³²⁷ At para 84.

that amount, as well as all her costs. It is submitted that the views expressed in this judgment indicate the seriousness with which the Constitutional Court regards infringements of the right of access to social assistance and the right to just administrative action. The *Njongi* judgment is therefore a turning point illustrating the Constitutional Court's willingness to address unlawful actions by the executive branch of government.

Despite the right of access to social assistance in terms of section 27 of the Constitution and the right to administrative justice³²⁸ and the state's duty to take steps to fulfil these rights, it was shown above that courts have been inundated with applications to compel provincial governments (the Eastern Cape in particular) to comply with their obligations. As can be seen from the quotation below, government officials ignoring court orders undermine the rule of law.

In a constitutional democracy based on the rule of law final and definitive court orders must be complied with by private citizen and the state alike. Without that fundamental commitment constitutional democracy and the rule of law cannot survive in the long run. The reality is as stark as that.³²⁹

The courts have a constitutional obligation to ensure that the exercise of public power conforms to the principle of legality.³³⁰ The Constitution provides that everyone has the right to administrative action that is lawful, reasonable and fair.³³¹ The values that the public administration is obliged to adhere to and

³²⁸ I.t.o. s 33 of the Constitution.

³²⁹ *Magidimisi NO v The Premier of the Eastern Cape and Others* Case 2180/04 Bisho High Court par 1.

³³⁰ *Pharmaceutical Manufacturers Association of SA & Others; In re: Ex Parte President of the RSA* 2000 (3) BCLR 241 (CC) paras 20 and 39; *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape* 2000(12) BCLR 1322 (E) 1326.

³³¹ Section 33(1) of the Constitution, 1996.

promote are found in section 195 of the Constitution. Most importantly, section 195(1)(e) requires public servants to respond to people's needs. When delays in grant applications occur due to mismanagement, there clearly is a failure to respond to the needs of grant applicants. In addition, section 195(1)(f) states that the public administration must be accountable. The courts are empowered by the Constitution to ensure the accountability of the exercise of power by the public administration.³³² The persons in charge of the grant administration in the provinces can therefore be held accountable for the mismanagement of grants. Where officials of the grant administration ignore court orders against their departments, they flout the abovementioned obligations that the Constitution imposes upon them.³³³



A greater reason for concern is the spate of litigation against the Eastern Cape provincial government regarding its failure to comply with court orders made in favour of grant applicants.³³⁴ The judiciary's remedial power in cases where

³³² Sections 34 (the right of access to courts) and 165(5) (court orders binding on organs of state).

³³³ Joseph (2005) *Resorting to the courts: Litigation and the crisis in the administration of social grants in the Eastern Cape* 52. The reason why the common law cannot provide sufficient guidance on remedies for the failure of government departments to comply with court orders, is precisely because the courts have not needed to decide on the matter, as government departments have until recently complied with orders issued by courts of law. It is only recently that "the attitude of State departments towards courts' orders has changed" leading to the alarming increase in applications before the courts (*Mjeni v Minister of Health and Welfare, Eastern Cape 2000 4 SA 446* (TkH) 452 B-C).

³³⁴ According to Jafta J in *Mjeni v Minister of Health and Welfare, Eastern Cape 2000 4 SA 446* (TkH) 452 C, the number of applications before the Court where the applicant seeks a remedy that would force the respondent to comply with prior court orders has risen "at an alarming rate". The problem of the excessive litigation caused by mismanagement of grants is unfortunately compounded by dubious lawsuits against the provincial Social Development Departments (and, recently, SASSA) by unscrupulous attorneys. See *MEC, Department of Welfare v Kate* [2006] 2 All SA 455 (SCA) 458; *Cele v The South African Social Security Agency and 22 related cases* Unreported 7940/07 Durban and Coast Local Division, paras 14 and 24. Similar sentiments were

grant applicants' rights in general and older persons in particular, have been violated is analysed in the section below.

4.3.4.4.3 Failure to comply with court orders

A recent example of this trend of ignoring of, or failure to comply with, court orders by government officials is the case of *Magidimisi NO v The Premier of the Eastern Cape and Others*.³³⁵ In this case the premier of the Eastern Cape, the MEC for Finance, the MEC for Social Development as well as the head of Department of Social Development were served with notices by the Bisho High Court compelling them to rectify flaws in the administration of social grants in the province after the provincial government failed to make payments as ordered by courts to welfare litigants who won court orders against the province.

expressed in other cases such as *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (TkH) where the court a quo made a qualified order for costs based on its finding that the appellant's attorney had abused the court process by instituting 139 separate, but similar, applications, whereas one application with 139 applicants would have sufficed (450 F). Other cases where the injudicious use of a computer-generated precedent by attorneys without considering the real thrust or true facts of the applicant's complaint was criticized include *Sikutshwa v MEC for Social Development, EC Province & another* [2005] JOL 14413 (Tk) at 4; *Nyumbana v MEC of the Department of Welfare, Eastern Cape Province* [2005] JOL 13882 (SE) at 7; *Mfubu v MEC of the Department of Welfare, Eastern Cape Province* [2005] JOL 13874 (SE) at 5 where reference was made of "the somewhat slipshod way in which the claim was formulated". The Constitutional Court in *Njongi v MEC for Social Development, Eastern Cape* 2008 (6) BCLR 571 (CC), elected not to involve itself in the claim on behalf of the Department that it has to face many spurious claims, but rather chose to focus on the claim in hand which was clearly not a spurious claim (para 89).

³³⁵ Case 2180/04 Bisho High Court. Other cases where the failure of provincial officials of the Department of Social Development to give heed to court orders were at issue, include *Mjeni v The Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (TkH); *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE); *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another* [2003] 2 All SA 223 (SCA); *MEC, Department of Welfare v Kate* [2006] 2 All SA 455 (SCA).

Magadamisi appeared as the representative of his mother's estate³³⁶ in order to recoup the money owed to her after she had successfully sued to have her outstanding disability grants paid to her. She unfortunately did not live to see the benefits paid to her.

Froneman J stated that it was common cause that the Eastern Cape Provincial administration had in a number of instances not complied with court orders to pay money to successful litigants.³³⁷ His impression was that the respondents were under a "misapprehension as to the nature and extent of their constitutional duty to obey and give effect to court orders".³³⁸ He was also not impressed by the fact that the premier and the MECs felt wronged by what they saw as incorrect perceptions "also amongst members of the judiciary" about the alleged lack of performance by the provincial government and its causes.³³⁹ According to him their general defence illustrated their "fundamental misconception" of their obligation to comply with court orders.³⁴⁰ Instead of addressing the central complaint relating to non-compliance with court orders,³⁴¹ their response centred on general excuses for bad performance such as the legacy of apartheid institutions dealing with social assistance; the increase of the number of

³³⁶ He also acted as the representative of 59 other judgment creditors in similar circumstances. His application was also made in the public interest, as he regarded it in the public interest that the respondents' failure to obey court orders against them be addressed (para 9).

³³⁷ Para 5.

³³⁸ Para 7.

³³⁹ Ibid.

³⁴⁰ Para 10.

³⁴¹ Froneman J regards the lack of any description of the process of payments of debts out of provincial finances as a "curious and telling omission" (para 12).

applications for social assistance; and the communication problems existing in the application process.³⁴²

The judge regarded the province's response on the papers as "misconceived and wrong".³⁴³ He added that "[o]n the face of it, the response appears to be arrogant and even callous".³⁴⁴

As the rule of law is one of the founding values of the Constitution and as a result everyone, including the state, is bound by the law and court orders, Froneman J then examined the constitutional and statutory duties of each of the respondents with regards to the responsibility to ensure that court orders regarding the payment of social grants were obeyed. He came to the conclusion that each of the first four respondents "bears the constitutional duty to act in accordance with the rule of law, which in the context of this application means that they must ensure that court orders made against the province are paid".³⁴⁵ Their failure to comply with this duty was caused by their fundamental misconception of their duty to protect, uphold and enhance the rule of law³⁴⁶ as well as the lack of

³⁴² Para 11. Reference was also made to the potential improvement of the situation brought about by the creation of SASSA. Froneman J expressed his hope that the national agency would in fact bring about such improvements, but indicated that this did not address the central complaint in the case, which was the then failure of the provincial government to comply with court orders.

³⁴³ Para 17. One example of this was the persistent use of the department's own calculations of amounts owed, instead of the exact amounts as ordered by the courts (para 15).

³⁴⁴ Para 17. See e.g. counsel for the respondents' argument that the order sought in casu is "neither necessary nor necessarily effective." (para 5).

³⁴⁵ Para 24.

³⁴⁶ The reasons for non-compliance with court orders included: being under the impression that the judgments against the department were wrongly granted; that the grants were assessed by

processes for dealing with judgments against the province for payment of money.³⁴⁷

Froneman J ruled that the respondents' "persistent and lengthy"³⁴⁸ failure to ensure that the province complies with the previous court orders constituted an ongoing violation of their duties under the Constitution and that the provincial government has a legal obligation to satisfy the payments of the orders.³⁴⁹ He ordered the respondents to take administrative steps to ensure compliance with his order within 14 days. He also ordered that the respondents deliver a full written report to the registrar of the Bisho High Court within 21 days to show how they would give effect to his order. This was in line with what the judge regarded as the court's competence to retain a supervisory role over the process of compliance with its order.³⁵⁰ Should the respondents fail to comply within the stated times the applicant could seek further relief from the High Court.³⁵¹

the time the judicial process had run its course; and cases where the department "preferred to follow its own assessment rather than comply with the exact terms of the court order" (para 15).

³⁴⁷ Ibid.

³⁴⁸ Para 33.

³⁴⁹ In *Vumazonke v MEC for Social Development, Eastern Cape* 2005 6 SA 229 (SECLD) 236 para 9 Plasket J justified judicial involvement in the relations between provincial departments and grant beneficiaries as follows: "Judges have criticised the performance of the Department of Social Development, not because they see themselves as super-ombudsmen or wish to involve themselves in politics, but because the administrative failings of the department have consequences that bring its performance within the heartland of the judicial function: those failings infringe or threaten the fundamental rights of large numbers of people to have access to social assistance, to just administrative action and to human dignity."

³⁵⁰ *Magdamisi* para 32. This type of remedy where the court orders an organ of state to report on its progress in complying with the court order is called a structural interdict. State compliance with its duty to provide socio-economic rights can be enforced effectively via a structural interdict, mainly because the state is obliged to report to the court on its progress in implementing the terms of the court order. A structural interdict also states the time frame within which the court order has to be complied with (De Beer and Vettori "The enforcement of socio-economic rights" (2007) 3 *PER* 10. One advantage of the court's supervisory role is that the court gains a better understanding of the problems that the province experience in complying with their duties. See

Froneman J described the balance between the respondents' duty to take reasonable measures to give effect to the applicant's rights and the court's obligation to ensure that they do so, as follows:

In this case the constitutional duty of the respondents was to give effect to the fundamental right of the applicant and others to social security and assistance under section 27 of the Constitution, by properly administering the provisions of the Social Assistance Act. This includes reasonable measures to make the system effective. The constitutional duty of the courts in this regard is not to tell the respondents how to do this, but merely to ensure that they do take reasonable measures to make the system effective. In this manner the respondents (representing the province), as well as the courts, are enjoined to ensure the realisation of the same goal, albeit in different ways. The respondents do not have a choice but to administer the administration of grants in a reasonable manner making the system effective. The courts have no choice but to give redress when this is not done. And after the courts have made a final pronouncement on the issue in accordance with legal procedures, the respondents have no constitutional choice to disregard the courts' judgments. If they nevertheless do, the courts in turn have no constitutional choice other than to ensure as far as possible that practical effect is given to those judgments.³⁵²

In *Mjeni v The Minister of Health and Welfare, Eastern Cape*,³⁵³ the court had to consider whether disobedience of a court order by the state through its officials could lead to an order of contempt of court. In particular, the court had to determine whether contempt of court proceedings were appropriate to enforce an

also Pieterse "Coming to terms with judicial enforcement of socio-economic rights" 2004 *SAJHR* 414 for the advantages of supervisory jurisdiction.

³⁵¹ Para 39. The "further relief" sought by the applicant would quite likely include contempt of court proceedings.

³⁵² Para 26.

³⁵³ 2000 4 SA 446 (TkH). The respondent had been ordered to pay the applicant's costs for an application for the reinstatement of the applicant's old age grant. The respondent failed to pay within the required period. The applicant then lodged an application that the respondent be ordered to pay costs and failing that, the respondent be ordered to appear in court to show cause for holding her in contempt of court for failing to comply with the order to pay costs. In the court a quo the costs awarded to the applicant were reduced, as the court found that the applicant's attorney had abused the Court process by instituting 139 similar applications, whereas one application with 139 applicants would have sufficed. The appellant appealed against the reduction in costs, and the respondent lodged a cross-appeal against the contempt of court order.

order for payment of money, and what was the impact of section 3 of the State Liability Act,³⁵⁴ which prohibits the execution of judgment against the state.³⁵⁵

The Minister of a government department is cited as the nominal defendant or respondent in litigation against the department.³⁵⁶ Execution of judgment against a provincial department or the state is prohibited in terms of the State Liability Act in order to prevent the disruption which execution against state assets would cause.³⁵⁷ The same therefore goes for the Minister or MEC who serves as nominal defendant or respondent.³⁵⁸

A long line of judicial authority supports the view that an order for the payment of money cannot be enforced by means of committal for contempt.³⁵⁹ Jafta J in *Mjeni v Minister of Health and Welfare, Eastern Cape*³⁶⁰ distinguished the previous decisions from the matter at hand, on the basis that none of the previous decisions had dealt with the state as the judgment debtor, and that the previous cases emphasised the fact that the successful party had other modes of

³⁵⁴ Act 20 of 1957.

³⁵⁵ In general, when a judgment debtor fails to comply with a judgment debt payable in money, the judgment creditor can rely on execution of judgment, whereby the debtor's property is attached and sold to pay the debt. As a consequence of the State Liability Act, the state as judgment debtor proves the exception to this rule.

³⁵⁶ S 2(1) State Liability Act 20 of 1957.

³⁵⁷ S 3. See *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another* [2003] 2 All SA 223 (SCA) 230 para 16 where Conradie JA calls attention to the fact that the legislators of 1957 could not have foreseen that the time might come "that the state or a Province might not promptly comply with an order of court".

³⁵⁸ "Minister" is to be interpreted to include the Member of the Executive Council (MEC) of a province as well (s 2(2)).

³⁵⁹ As does s 1 of the Abolition of Civil Imprisonment Act 2 of 1997, although no reference was made to this provision in *Mjeni*.

³⁶⁰ *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (Tkh).

execution than committal for contempt of court at its disposal.³⁶¹ A party who succeeds in a claim against the state does not have such “other modes of execution” at his or her disposal, as the State Liability Act precludes him or her from executing against state property. Application of the common-law rule excluding contempt of court proceedings against judgment debtors to cases where the state is the judgment debtor would mean that the judgment would be unenforceable. As a consequence, “the State could just ignore such judgements with complete impunity”.³⁶² This would be contrary to the state’s constitutional duty to comply with orders or decisions issued by the courts.³⁶³ As deliberate non-compliance with court orders has a negative impact on the dignity and effectiveness of the courts, it constitutes a breach of that constitutional duty.³⁶⁴

Jafta J also held that the prohibition of “execution, attachment or like process” against a nominal respondent in the State Liability Act, does not include arrest for contempt of court. The intention with the State Liability Act was not to place ministers of state above the law, but only to “prohibit attachment and/or execution against the personal property of the Minister cited or that of the State”.³⁶⁵ He therefore concluded that Ministers of state and other public officials such as

³⁶¹ At 451.

³⁶² At 454A. See also *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) 157 para 22.

³⁶³ S 165 (5) Constitution, 1996. The state is also obliged to use legislative and other measures to “assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts” (s 165(4)). Where the government ignores court orders to pay social grants, it is acting contrary to s 165(4) and therefore unconstitutionally.

³⁶⁴ *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (TkH) 452G.

³⁶⁵ At 455F.

MECs of departments can be declared in contempt of court.³⁶⁶ Due to the limitations imposed by the State Liability Act this was the only means available to the court to enforce judgments.

The *Mjeni* judgment opened the door for individual public responsibility for public officials dealing with the grants administration for their actions or omissions.³⁶⁷ However, in the subsequent judgment in *Jayiya v MEC for Welfare, Eastern Cape and Another*,³⁶⁸ the approach in *Mjeni* was abandoned for a more conservative interpretation of the court's ability to fashion remedies to successful applicants. The Supreme Court of Appeal had to determine the most appropriate sanction against the respondents³⁶⁹ for their failure to comply with a court order directing them to pay a lump-sum back payment plus interest on that amount.³⁷⁰

³⁶⁶ At 455G. *In casu* the facts did not show that the respondent was aware of the existence of the court order and had deliberately disobeyed it and contempt of court proceedings could therefore not succeed (at 454G).

³⁶⁷ In *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) the effect of the *Mjeni* judgment on the personal accountability of public officials was summarised as follows: "Where they acted wrongly the poor and disabled applicants could be compensated by being paid what they should have received in the first place. And if, nevertheless, the State failed to comply with the court order of payment, the possibility of committal for contempt of court, or at least a declaration to that effect, could help individual public officials to pay heed to their constitutional public duties" (at 149 para 11).

³⁶⁸ [2003] 2 All SA 223 (SCA).

³⁶⁹ The respondents were the MEC for Welfare, Eastern Cape Provincial Government and the Permanent Secretary: Welfare of the Eastern Cape Provincial Government. The applicant sought an order that the first respondent make the lump sum and interest payment, but the court a quo made the order against the second respondent (at 227 para 4). The fact that the second respondent never should have been cited, contributed to the Supreme Court of Appeal's finding that the contempt application could not succeed (at 229 para 14). In *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) only the MEC for Welfare was cited, presumably in reaction to the finding in *Jayiya*. See *Kate v MEC for the Department of Welfare, Eastern Cape* at 150, para 12.

³⁷⁰ The Supreme Court of Appeal held that the court a quo should not have made the order for "constitutional damages" in the form of the interest on the lump sum payable. "Constitutional damages" are only payable where no common law or statutory remedy is available. The inference can be drawn that as the order for "constitutional damages" was not appropriate under the circumstances, the respondents' failure to pay does not constitute contempt of court.

One of the important issues was whether incarcerating the second respondent for contempt of court was the appropriate remedy.

Conradie JA referred to the State Liability Act and stated that section 3 outlaws the issue of “execution, attachment or like process” against nominal respondents in proceedings against a government department.³⁷¹ In terms of the Abolition of Civil Imprisonment Act,³⁷² the respondent was protected against incarceration for the non-payment of a debt. The Supreme Court of Appeal considered the attempts by the High Courts in the province to develop the common law in such a way as to address the “wholesale non-compliance with court orders”.³⁷³ It also recognised that the object of taking disputes to court is to provide successful litigants with the opportunity of having their rights enforced. However, it disagreed that the common law should evolve to create remedies in conflict with statutory law, which would have been the case if the respondent was jailed for contempt of court in conflict with the State Liability Act. Thus, apart from the fact that the wrong respondent was cited for contempt of court³⁷⁴ and the application could not succeed on the facts, the Supreme Court of Appeal was also in principle opposed to holding nominal respondents liable for contempt of court.³⁷⁵

³⁷⁰ The applicant should have sought her remedy in terms of PAJA (at 228 para 9). The inference can be drawn that as the order for “constitutional damages” was not appropriate under the circumstances, the respondents’ failure to pay does not constitute contempt of court.

³⁷¹ At 230 para 16.

³⁷² Act 2 of 1977, s 1.

³⁷³ *Jayiya v MEC for Welfare, Eastern Cape Provincial Government and another* [2003] 2 All SA 223 (SCA) 230 para 17.

³⁷⁴ See fn 369 above. See also *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) 157, where Froneman J expressed the view that the decision in *Jayiya* should be read in the context of the particular facts of the case.

³⁷⁵ *Jayiya v MEC for Welfare* [2003] 2 All SA 223 (SCA) 231 para 18.

One interpretation of the *Jayiya* judgment could be that it pronounces that individual public officials cannot be sued for wrongful administrative acts, that the state is not obliged to comply with orders to pay money; and that the courts are not capable of enforcing court orders sounding in money against state officials.³⁷⁶

This was the interpretation the department chose in dealing with court orders against it. Froneman J in *Kate v MEC for the Department of Welfare, Eastern Cape* disagreed that this was the only possible reading of *Jayiya*.³⁷⁷ He considered that section 38 of the Constitution empowers any court to grant “appropriate relief” when dealing with infringements of the Bill of Rights. In addition, section 172 (1) of the Constitution provides that when deciding a constitutional matter, a court “must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency”.³⁷⁸ The court may make any order that is just and equitable and appropriate.³⁷⁹

³⁷⁶ De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 15 summarise the post- *Jayiya* situation as follows: “The practical consequence of this judgment is that successful litigants with court orders sounding in money against the state in their favour, faced with a state organ that ignores the court orders can neither successfully have state officials who were responsible for implementing the order, but failed to do so, imprisoned for contempt of court, nor attach state property in execution of the debts owing to them.”

³⁷⁷ 2005 1 SA 141 (SE) 152 para 15. At 158, para 26, he expressed his concern that the decision in *Jayiya* would be abused by public officials as an excuse not to comply with court orders. Much of Froneman J’s judgment consisted of a reaction to the *Jayiya* judgment.

³⁷⁸ Courts are constitutionally mandated to determine whether state policy and actions are inconsistent with the Constitution. In *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 99 it was stated that “[w]here state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.” Although the courts should show due regard to the role of the legislature and executive, they may - and are sometimes even obliged to - make orders that affect policy (para 113).

³⁷⁹ Trengove “Judicial remedies for violations of socio-economic rights” (1999) 1 (4) *ESR Review* 8.

Courts therefore have wide remedial powers as long as the remedies are appropriate in the circumstances.³⁸⁰ Court orders against the state are binding, as section 165(5) of the Constitution provides that court orders bind “all persons to whom and organs of state to which it applies”. In terms of section 239 of the Constitution an individual functionary is included in the definition of “organ of state”. Hence, public state functionaries can be held individually accountable in a court of law for how they exercise their power.³⁸¹

It is important to note that the State Liability Act read with the Abolition of Civil Imprisonment Act only protects a state official from being liable for contempt of court in cases of money orders. Where the court orders the state official to do something or refrain from doing something and the official fails to do so, he or she is liable to be committed for contempt of court and “there is nothing in *Jayiya* that suggests the contrary”.³⁸²

Froneman J was of the view that a strict reading of *Jayiya*, that section 3 of the State Liability Act forbids even an order calling upon state functionaries to explain

³⁸⁰ *Minister of Health v TAC* 2002 5 SA 721 (CC) para 113; *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19. The inquiry into the appropriateness of relief should be guided by “the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case” (*Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 45). The courts are not merely granted the power to fashion new orders to ensure compliance with orders, but they actually have the power to decide exactly what the offending party needs to do to remedy the situation (De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 8 fn 28).

³⁸¹ *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) 154, para 19.

³⁸² *MEC, Department of Welfare v Kate* [2006] 2 All SA 455 (SCA) 467, para 30.

why they have not complied with court orders and why they consequently should not be held in contempt of court, would render section 3 unconstitutional, as it would place such public officials above the law.³⁸³ The consequence of a strict reading of *Jayiya* would be that the state could not be held accountable for its actions. At the most, *Jayiya* serves as authority that public officials “cannot be held guilty of the crime of contempt of court for non-compliance with a money judgment”.³⁸⁴ Any other reading would lead to a constitutional crisis between the judiciary and the state.

Froneman J considered another option to ensure compliance with court orders, such as, an order declaring the offending public official in contempt of court without criminal sanction. Such a declaration of contempt could co-exist with the rule forbidding the conviction of a person for a retrospectively created offence.³⁸⁵

³⁸³ *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE) 156-7, paras 21 and 22. At 157-8, para 25, Froneman J states that “[i]f the interpretation of s 3 of the State Liability Act in *Jayiya* means that the Government is not bound to comply with court orders sounding in money, or that the courts cannot devise other legal means to ensure compliance with court orders, then there is no possible way that I can think of how s 3 of the State Liability Act, if interpreted in this manner, can serve the rule of law and the Constitution”. Froneman J has been supported in *Sikutshwa v MEC for Social Development, EC Province & another* [2005] OL 14413 (Tk) paras 53 and 55. See also *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (TkH) 454A.

³⁸⁴ At 157, para 23. This view was also confirmed on appeal in *MEC, Department of Welfare v Kate* [2006] 2 All SA 455 (SCA) 462 para 19. The Supreme Court of Appeal found that many of the statements made in *Jayiya* were obiter. Unfortunately, the Supreme Court of Appeal declined to revisit the *Jayiya* decision where it was not material to the *Kate* case, as “to add to the non-binding statements that were made in that case and in the court below will only add to any uncertainty” (462, para 19).

³⁸⁵ At 157, paras 21 and 22.

State officials would merely be required to state why they have not complied with the court orders and how they intend to comply with them.³⁸⁶

The matter of whether a state official could indeed be held in contempt of court was settled in *MEC, Department of Welfare v Kate*³⁸⁷ where the Supreme Court of Appeal unanimously held that “there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act and fails to do so is liable to be committed for contempt”.

When social security rights are infringed, it therefore becomes the judiciary’s concern.³⁸⁸ Once the courts have determined that the relevant policy is unconstitutional, government has to give effect to the court orders “whether or not they affect its policy and has to find the resources to do so”.³⁸⁹

Court orders should be flexible and allow the executive a margin of discretion to adapt and change policies where it considers it appropriate to do so whilst still complying with the court orders.³⁹⁰ However, this should not entail deferring to the executive to such extent that the court orders are “so vague that respondents

³⁸⁶ De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 16 question whether even such a declaratory order would serve any practical purpose, as it is possible that the responsible state official would still do nothing even after the declaratory order.

³⁸⁷ [2006] 2 All SA 455 (SCA) 467 at para 30.

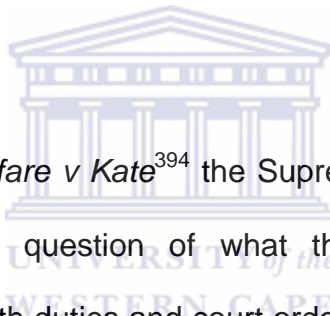
³⁸⁸ *Vumazonke v MEC for Social Development, Eastern Cape* 2005 6 SA 229 (SE) 236 para 9.

³⁸⁹ *Minister of Health v TAC* 2002 5 SA 721 (CC) para 99.

³⁹⁰ Provided that the amended policies are constitutional and legal. *Minister of Health v TAC* 2002 5 SA 721 (CC) para 114; see also Pieterse “Coming to terms with judicial enforcement of socio-economic rights” (2004) 20 SAJHR 414 - 415; *Vumazonke v MEC for Social Development, Eastern Cape* 2005 6 SA 229 (SE) 237 para 11.

do not know what is required of them, or that the effectiveness of the remedy is compromised”.³⁹¹

It has been argued that the decision by courts not to exercise supervisory jurisdiction might compromise the efficacy of the court order, leaving the applicant with no other option as to resort to contempt proceedings to secure compliance with the judgment.³⁹² The Constitutional Court has also been criticised for remaining “peculiarly hesitant to showcase the full extent” of the competence of the court to affirm the judiciary’s competence to enforce socio-economic rights.³⁹³



In *MEC, Department of Welfare v Kate*³⁹⁴ the Supreme Court of Appeal had the opportunity to resolve the question of what the consequences of public functionary not complying with duties and court orders should be. It held that the courts are willing to “fashion innovative remedies” to ensure that their orders are properly implemented.³⁹⁵ In some instances the particular public official does not fail to make payment of a debt, but rather neglects to consider and decide upon a grant application. Therefore “there ought to be no doubt that a public official who is ordered by a court to do or refrain from doing a particular act and fails to do so

³⁹¹ Pieterse “Coming to terms with judicial enforcement of socio-economic rights” (2004) 20 *SAJHR* 412-3.

³⁹² Pieterse (2004) 20 *SAJHR* 416.

³⁹³ Ibid. In the wake of the *Magadimisi* judgment, De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 13 expressed the hope that the Constitutional Court would take a less cautious approach than before and follow the example of the High Courts in making use of structural interdicts. A failure by the Constitutional Court to do so would, in their view, “render the concept of justiciable socio-economic rights a mockery.”

³⁹⁴ [2006] 2 All SA 455 (SCA).

³⁹⁵ De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 7.

is liable to be committed for contempt in accordance with ordinary principles and there is nothing in *Jayiya* that suggests the contrary”.³⁹⁶ The current position is therefore that a state official can under certain circumstances be held liable for contempt of court, for example where the official is ordered to see to it that systems are put into place to ensure the prompt payment of the applicant’s older person’s grant and then fails to do so.³⁹⁷

Another possible remedy is in interpreting the “constitutional relief” available in terms of section 38 to include damages payable in terms of the delictual liability of a state official who acts negligently fails to perform his or her duties properly. Nugent JA in *MEC, Department of Welfare v Kate*³⁹⁸ had no doubt that “delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations”.³⁹⁹ If the state can be delictually liable for the actions or omissions of officials, individual officials as “organs of state”⁴⁰⁰ can also be personally liable for damages caused by their negligent actions or omissions.

De Beer and Vettori agree that delictual liability of a state official who does not comply with a court order is a remedy which has to be given serious

³⁹⁶ *MEC Department of Welfare, v Kate* [2006] 2 All SA 455 (SCA) 466 para 30.

³⁹⁷ De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 22.

³⁹⁸ [2006] All SA 455 (SCA).

³⁹⁹ At 465, para 27.

⁴⁰⁰ I.t.o. s 239 of the Constitution an individual functionary is included in the definition of “organ of state”.

consideration.⁴⁰¹ They propose that once it is accepted that a state official can be held in contempt of court, “there is no reason why a state official should not be civilly liable in delict for not complying with a court order or for simply not performing adequately in his capacity as state employee”.⁴⁰²

The advantages of individual delictual liability include reimbursement of the loss or damage suffered by the wronged person, as well as increased accountability for individual state officials due to the threat of personal liability should they neglect their duties.⁴⁰³

A delictual claim against a particular state official would ideally follow on a structural interdict which would name the persons responsible for fulfilling the terms of the order. Should the named person fail to comply with the structural interdict, he or she can be held liable in terms of a delictual claim for damages suffered.⁴⁰⁴

⁴⁰¹ De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 16.

⁴⁰² At 16 and 18.

⁴⁰³ De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 18. They defend their view on the advantages of delictual claims as remedies against recalcitrant state officials as follows: ““To those who perceive personal delictual liability of state officials as a drastic measure, our response is two-fold. Firstly, drastic times call for drastic measures. When something as fundamental to the fabric of our society such as the rule of law is threatened and when the result of this is that the poorest sections of society are denied their constitutional rights to socio-economic rights and ultimately to life, it is clear that this state of affairs simply cannot be allowed to continue. Secondly, in the light of the fact that in order to succeed in a delictual claim both wrongfulness and damages have to be proved, there will be no liability unless the state official acted in an unreasonable manner.” (2007) 3 *PER* 20.

⁴⁰⁴ Provided all the elements of a delict can be proved (De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 20. Therefore, only those state officials who conduct themselves in an unreasonable manner can be held liable, taking into account that more can be expected of higher ranking officials than others occupying less important positions. Innocent officials conducting themselves in a reasonable manner would not be liable for damages as they have not been acting wrongfully, but “the disregard for human dignity and for the rule of law

It is submitted that a delictual claim is not as readily available to all wronged grant applicants as De Beer and Vettori suggest. The problem lies therein that to succeed with a delictual claim, the claimant has to prove all the elements of a delict.⁴⁰⁵ The claimant would therefore have to prove the quantum of damages in monetary terms, something which is difficult to prove in the case of a grant applicant or recipient facing unreasonable delays in having their grant applications processed or their grants paid. Whereas it is easy enough to calculate the arrears owing on the grant,⁴⁰⁶ as well as the shortfall on a grant, these are not the only losses suffered by victims of unreasonable and unlawful delays by state officials. In *MEC, Department of Welfare v Kate*,⁴⁰⁷ Nugent JA held that there is “no empirical monetary standard” against which to measure the enduring poverty and reduced dignity suffered by persons who are unlawfully deprived of a grant.

In comparison to the High Courts in the Eastern Cape, the Constitutional Court has been quite cautious with its use of “the remedial arsenal at its disposal”.⁴⁰⁸ In *Minister of Health and others v Treatment Action Campaign* the constitutional

displayed by the officials of the Department of Social Welfare in the Eastern Cape is so outrageous that it will easily qualify as wrongful for the purposes of a delictual claim” (De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 21).

⁴⁰⁵ As De Beer and Vettori rightly acknowledge in “The enforcement of socio-economic rights” (2007) 3 *PER* 20-21.

⁴⁰⁶ In terms of reg 12 read with reg 10(4) of G R898 in GG 31356 of 22 August 2008, the grant accrues from the date when the application form was signed in the presence of a designated officer. The arrears owing to the applicant are therefore calculated from the date that the application was made.

⁴⁰⁷ [2006] 2 All SA 455 (SCA) 468 para 33.

⁴⁰⁸ Pieterse “Coming to terms with judicial enforcement of socio-economic rights” (2004) 20 *SAJHR* 414.

court did not feel the need to impose a structural interdict upon the government, as “[t]he government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case”.⁴⁰⁹

Even the landmark *Grootboom* judgment⁴¹⁰ has attracted criticism for failing to provide the anticipated results with regards to access to housing for people in desperate need. Pillay⁴¹¹ contends that the problem with the Constitutional Court order lies in the declaratory nature of the order, in that no time frames were set for state action on the order. In her view, this has led to “a clear lack of understanding that the judgment requires systematic changes to national, provincial and local housing programmes to cater for people in desperate and crisis situations”.⁴¹² In addition, the court declined to exercise a supervisory role in order to ensure that the state complies with the court order, with the result that the state’s tardiness in complying with the order would only have been dealt with when poor communities and their representatives brought a new case.⁴¹³

⁴⁰⁹ *Minister of Health v TAC* 2002 5 SA 721 (CC) 763 at para 129. De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 9 are of the opinion that the Constitutional Court’s view that it was “unnecessary for it to play a supervisory role in order to ensure implementation of its order by the government”, was “misplaced and naïve”, in the light of the government’s failure to act on the declaratory order until the TAC took further steps. See below at fn 415.

⁴¹⁰ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

⁴¹¹ Pillay “Implementing *Grootboom*: Supervision needed” (2002) 3 *ESR Review* 14.

⁴¹² *Ibid.*

⁴¹³ *Ibid.*

Trengove⁴¹⁴ argues that supervisory orders are the appropriate remedy in cases where “the pattern of violation may be too widespread and diffuse to put a stop to it by a single Court order”.⁴¹⁵ It is submitted that the widespread violations of grant beneficiaries’ rights of access to social security and right to just administrative action could only be stopped by supervisory orders ensuring that the required reforms in the social grant system take place. The courts “should be adventurous in crafting means to ensure that their orders are properly implemented and adhered to”,⁴¹⁶ whilst still ensuring that the remedies imposed are appropriate and practicable.⁴¹⁷

4.4 STATE LIABILITY TOWARD OLDER PERSONS: CONCLUSION

In terms of sections 27(1)(c) and (2) of the Constitution the state is required to design and implement within its available resources a comprehensive system to realise progressively the right of older persons to have access to social security, particularly social assistance. This system must be realised within available

⁴¹⁴ Trengove “Judicial remedies for violations of socio-economic rights” (1999) 1 (4) *ESR Review* 9.

⁴¹⁵ In hindsight, the case of *Minister of Health v TAC* 2002 5 SA 721 (CC) was exactly the type of case where supervisory orders are appropriate according to Trengove, given the widespread violation of rights and the failure of the government to act on the declaratory order. The court had ordered the government to make nevirapine available without delay at hospitals and clinics when the treatment was medically indicated, in order to reduce the risk of mother-to-child transmission of HIV. The government did not act without delay and only proceeded to roll out the provision of nevirapine after the TAC had taken further steps. See De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 9.

⁴¹⁶ De Beer and Vettori “The enforcement of socio-economic rights” (2007) 3 *PER* 3.

⁴¹⁷ *Cele v SASSA* Unreported 7940/07 Durban and Coast Local Division (19 March 2008) para 37.

resources and must include reasonable measures to provide for older persons currently excluded from the grants system.

While the South African older person's grant system is unequalled in other developing countries, particularly in terms of its coverage of the many older persons who have been deprived of the opportunity to provide for their own retirement income, it does display some weaknesses and to that extent falls short of compliance with the requirements of section 27 of the Constitution. Issues such as the exclusion of certain groups of older persons from the grant, for example, permanent residents and men between the ages of 60 and 65, have been addressed by amendments to the SAA and its regulations. The widespread fraud and corruption in the current administration of the grant will most probably decline as SASSA takes full control of the administration and once all the measures envisaged to counter fraud have been implemented.⁴¹⁸

It is hoped that transfer of the grant administration function to SASSA and the resultant reconfiguration of the grants delivery system will over time lead to an improvement in the chaotic situation caused by mismanagement of grants described above.⁴¹⁹ Placing the responsibility for the administration of grants in the hands of one central organisation could also lead to a reduction in the costs

⁴¹⁸ See above at 4.3.3 for a discussion of the problem of fraud and corruption in the grants administration system and the measures that the Minister of Social Development and SASSA have undertaken to purge the system of fraud and corruption.

⁴¹⁹ At 4.3.4. The Memorandum on the objectives of the South African Social Security Bill 51 of 2003 noted that certain weaknesses in the social grant administration and payments necessitated the creation of a "focused, specialised delivery mechanism" such as SASSA. See also *Cele v SASSA* Unreported case no. 7940/07 D&CLD para 15.

of service delivery and gains in efficiency.⁴²⁰ The fact that SASSA is also accountable for the operation of the SOCPEN data system has increased confidence that “ghost beneficiaries” and other incidences of mismanagement will decrease.⁴²¹ SASSA has developed a communication strategy, whereby grant applicants can be informed of the decision on their applications within a reasonable time.⁴²² The improved communication strategy is required to comply with the SAA and administrative justice requirements.⁴²³ Above all, it is submitted that the greatest advance in creating SASSA is moving the responsibility for the administration and payment away from provincial departments that clearly did not have the capacity to handle these tasks.⁴²⁴

It is anticipated that the grant function shift to SASSA would at least in future entail improved conditions and better accountability. The Constitution requires SASSA, as an organ of state, to overcome the administrative problems that it inherited from provincial governments in order to progressively realise the right of

⁴²⁰ S3 of the South African Social Security Agency Act (SASSA Act) aims that SASSA will eventually act as the “sole agent” to ensure the efficient and effective management, administration and payment of social assistance. See 4.3.1.4 above where the consolidation of the grant administration is listed as one of the factors that may in the long run reduce grant costs.

⁴²¹ See 4.3.3.2.3 where data correction is listed as a crucial measure to combat grant fraud.

⁴²² SASSA Act s 4(1)(b) requires SASSA to “collect, collate, maintain and administer such information as is necessary for the payment of social security”.

⁴²³ Joseph (2005) *Resorting to the courts: Litigation and the crisis in the administration of social grants in the Eastern Cape* 5. See above at 4.3.4.4 for a discussion of the case law on non-compliance with administrative justice requirements.

⁴²⁴ During the transition process (SASSA only became fully operational nationally on 1 April 2006) where the liability for grant administration was transferred from the provincial departments to SASSA, some confusion existed about who should be liable for claims that result from grant applications made to the provincial departments before SASSA even existed. In *Cele v SASSA* Unreported case no. 7940/07 D&CLD paras 4 and 51, Wallis AJ held that the administration of and responsibility for paying social assistance grants has been delegated to SASSA as from 1 April 2006 and that SASSA would be responsible from that date for claims arising from grant applications before SASSA started operating.

access to social security, as well as the right to just administrative action. In *Government of the Republic of South Africa and Others v Grootboom and Others*⁴²⁵ it was held that “the Constitution requires that everyone must be treated with care and concern”. Therefore the level of care and concern for the needs “of those most desperate”⁴²⁶ must be taken into account when evaluating whether the measures taken by SASSA to give effect to the right of access to social security are “reasonable” in terms of section 27 of the Constitution.

Unless the courts can ensure that the government is forced to comply with its constitutional and statutory duties, the rights of older persons to access social security and to administrative justice are not protected and the rather pessimistic view of Wallis AJ in *Cele v SASSA* on the extent of the powers of the courts to address the situation will prevail:

With the best will in the world it cannot force the employees of SASSA and the Department of Social Development to do their jobs properly, although it has striven hard to do so over the years, as it did with the provincial authorities in the past.⁴²⁷

The abovementioned problems with the grant system do not, however, detract from the number of advantages the older person’s grant hold as a means to alleviate poverty, for example, the fact that it is well targeted at rural women, and the positive effect it has on the welfare of household members other than the grant recipient. Social assistance for older persons therefore has to remain a

⁴²⁵ 2000 (11) BCLR 1169 (CC) para 44.

⁴²⁶ Ibid.

⁴²⁷ Unreported case no 7940/07 D&CLD (19 March 2008) para 26.

policy priority in the face of other competing interests,⁴²⁸ such as assisting families with children and providing assistance to persons with HIV/Aids, as can be seen from the following quote from the 2007 Budget Review:

How a society provides for ordinary people's income security beyond their working years is one of the central expressions of its long-term institutional stability, integrity and social solidarity.⁴²⁹

The abovementioned issues will have to be addressed before the older person's grant can be said to meet the standard set by section 27 of the Constitution and the goal of "every elderly citizen and qualifying resident of South Africa to have, as a minimum, sufficient total income to meet basic subsistence needs" as recommended by the Mouton Committee.⁴³⁰

Another major concern is the lack of coordination between the two chief systems to provide income during retirement: the older person's grant system discussed above, and the occupational retirement fund system. Combined, the two systems provide a retirement income for a vast majority of older persons in South Africa and demonstrate that providing retirement income to older persons remains a priority issue.⁴³¹ As the state cannot possibly provide "a reasonable

⁴²⁸ The potential impact that high grant costs may have on the state's spending priorities and, therefore, on intergenerational solidarity was analysed above at 4.3.1.

⁴²⁹ National Treasury (2007) *Budget Review 2007* "Social Security" 114. See also Liebenberg "The right to social security: Response" in Brand and Russell (eds) (2002) *Exploring the core content of socio-economic rights: South African and international perspectives* 154.

⁴³⁰ Mouton Committee Report (1992) para 3.3(a). See also BIG Financing Reference Group (2004) *"Breaking the Poverty Trap" – Financing a BIG in SA* 4 where it is stated that "government has both a constitutional obligation and a political and moral commitment to ensuring that all in South Africa have the means to meet their basic needs".

⁴³¹ In 1992 the Mouton Committee reported the resources allocated to the two systems combined as nearly 7% of the gross domestic product.

level of replacement income after retirement for all”,⁴³² a certain measure of integration between state social assistance and occupational retirement provision is required. Unfortunately, the two systems can be mutually exclusive, as benefits from retirement funds may disqualify an older person from receiving the older person’s grant due to the means test.⁴³³ It is submitted that a coordinated national “multi-pillar” retirement income system with the older person’s grant and a national retirement fund as the basic pillars, would reduce the adverse effects of the current means test for the older person’s grant.⁴³⁴ Therefore, an argument for a national retirement fund for South Africa is made in Chapter 5 below.



⁴³² Mouton Committee Report (1992) para 3.5.

⁴³³ Discussed above at 4.3.2.

⁴³⁴ See below at 7.3 for a comparative overview of the retirement funding systems in Chile, Sweden, the UK and the USA, with particular reference to the balance between the national retirement fund and non-contributory (social assistance) benefit systems in these countries.

CHAPTER 5

INTERGENERATIONAL SOLIDARITY AND INCOME SECURITY IN RETIREMENT

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5.1 INTRODUCTION

“The organisation and financing of income security in retirement is amongst the most profound expressions of a nation’s cohesion and values. It relies on confidence in the long-term continuity of institutions, it rests on trust in the law and sound financial and economic management, it embodies principles of solidarity, risk-sharing and prudential foresight.” (National Treasury *Retirement Fund Reform: a discussion paper* (2004) 4)

The quotation above underlines the importance of solidarity as a principle guiding the organisation of retirement savings measures. More so, the reference to “confidence in the long-term continuity of institutions” and “trust in the law and sound financial and economic management” relates to the important role of intergenerational solidarity as an expression of the South African nation’s values. Intergenerational solidarity is where the younger generation ensure that sufficient retirement protection is available to retired persons through pay-as-you-go (PAYG) systems.¹ The aim of this chapter is to show that the principle of intergenerational solidarity (more so than intra-generational solidarity) is fundamental to the current process of pension reform and the resultant legislation.²

¹ In the context of retirement funding, there is, however, also a component of intra-generational solidarity, where the working age members of a retirement fund share the risk of income loss at retirement among themselves through their contributions into a retirement fund system. This solidarity is more tenuous than intergenerational solidarity, as each member’s contributions are paid into an individual account for that member in the fund. See above at 2.3 for descriptions of inter- and intragenerational solidarity, and 2.7 for the distinction between PAYG and fully-funded retirement systems.

² Gruat (1997) *Adequacy and social security principles in pension reform* 10 describes the close link between the law, pension systems and intergenerational solidarity as follows: “A pension system is one of the income redistribution devices of a national social protection system. It is essentially a set of legal rules which govern the functioning of that redistribution.

The current South African retirement funding structure unfortunately does not reflect the abovementioned values of solidarity and risk-pooling. Instead, it attempts to combine a 'neo-liberal'³ approach which encourages individuals to provide for their own financial security in old age with a social assistance system paying older person's grants to older persons without means. As was seen in the Chapter 3, retirement provision law is spread over different pieces of legislation, regulations and practice notes, of which very little aims to promote solidarity.

Evidence of a 'neo-liberal' approach can be seen in the National Treasury's 2004 objectives of retirement policy which include the intention to:

- Encourage individuals to provide adequately for their own retirement and the needs of their dependants.
- Encourage employers and employees to provide for retirement funding as part of the remuneration contract.
- Ensure that retirement funding arrangements are cost-efficient, prudently managed, transparent and fair.
- Promote the retention of purchasing power of pensions through protection against the effects of inflation, within the resource constraints of the fund.
- Improve standards of fund governance, including trustee knowledge and conduct, protection of members' interest, accountability, and disclosure of material information to members and contributors.⁴

These objectives are dealt with individually below as the key issues that will

In effect the legal rules determine how much the active (insured) population has to allocate to the non-actives."

³ See above at 2.3 for a discussion of 'neo-liberalism' and its impact on social policy.

⁴ National Treasury (2004) *Retirement Fund Reform: a discussion paper* (hereafter "National Treasury (2004) *Discussion paper*") 4. Provision of social assistance to older persons is reserved only for those older persons who could not be reached by the above objectives.

determine the individual's ability to adequately⁵ save for his or her own retirement. The current retirement provision system⁶ provides an opportunity for a large proportion of the formally employed to contribute towards providing for their own retirement income needs.⁷ Without aiming to detract from its positive aspects, it is submitted that there are some weaknesses in the system that could lead to a lack of or decline in retirement income for fund members, with resultant reliance on assistance from the state.

The current retirement funding system requires reform as it has been described as “fragmented, inadequate, prohibits portability, punishes those who wish to transfer benefits, excludes low-income people, the costs are the highest in the world and benefits do not always provide value for money”.⁸ This chapter is dedicated to examining the extent of the defects in the current occupational retirement funding system and to determining the appropriate policy and statutory interventions to improve the system. In particular, the shortcomings in the current system that have a significant impact on

⁵ According to the National Treasury *Discussion paper* (2004) 30 “adequate” retirement benefits would be 75% of earnings in the year before retirement for low-income earners, with a possible reduction in applicable percentage for higher income levels.

⁶ As opposed to the non-contributory means-tested social assistance system intended for those in financial need, the occupational retirement fund system is a voluntary earnings-related system (Department of Social Development (2007) *Reform of Retirement Provision Discussion Document* 61, hereafter referred to as “DSD Discussion document (2007)”). See above at 2.2 for the distinction between social assistance and earnings-related social insurance.

⁷ Estimated at 9,85 million members for 2004 according to the DSD Discussion document (2007) 59. The National Treasury (2007) *Social Security and Retirement Reform 2nd discussion paper* 5 (hereafter referred to as “National Treasury (2007) 2nd discussion paper”) estimates the number of members at 9 million. Both sources warn that the number of members may be overestimated due to double-counting of members belonging to more than one fund.

⁸ ANC (2007) *Social Transformation* 4.

intergenerational solidarity have been selected for further analysis and include: the type of fund the individual belongs to;⁹ leakage from the retirement funding system due to a lack of preservation of retirement benefits; the voluntary nature of retirement funds; limited access to retirement funds for workers in the informal economy, low-income workers, the unemployed and family caregivers; and fund governance.

5.2 THE PENSION REFORM PROCESS IN SOUTH AFRICA

President Mbeki announced the overhaul of the South African retirement funding system in February 2007. He revealed that the new social security system will be based on the principle of social solidarity, among others.¹⁰ It was envisaged that the reformed social security system would be made up of a number of 'pillars', more or less based on the World Bank's multi-pillar model.¹¹

The stated aims with the reform process were to:

- Encourage higher levels of retirement savings, including measures to assist lower income employees to save for their retirement;
- Create a single national retirement fund to "take advantage of economies of scale" and reduce costs;
- Support current fund members' efforts to save for their retirement;

⁹ Certain problems relate only to certain types of funds.

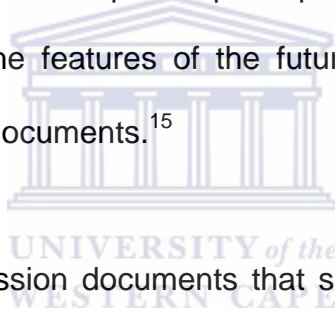
¹⁰ National Treasury (2007) 2nd discussion paper 1.

¹¹ For more on the World Bank model and the adoption thereof in other countries, see below at 7.3.2.

- Build on current retirement legislation;¹² and
- Create a sustainable pension structure.¹³

The emphasis in these aims on assisting employees to save for their retirement still reflects a ‘neo-liberal’ element, but this is balanced with the aim of pooling of risks and costs in a national system which is characteristic of social solidarity.

Various discussion documents have been published to facilitate the reform process and to ensure as much public participation as possible.¹⁴ The following is an outline of the features of the future social security system proposed in the discussion documents.¹⁵



It is envisaged in the discussion documents that social assistance for older persons will constitute the first pillar of the reformed social security system. A mandatory contributory retirement funding scheme for all employees, with possible contributions by self-employed individuals and workers in the

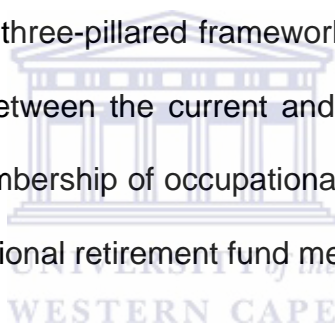
¹² Joint press statement on Retirement Reform by Government, COSATU, FEDUSA and NACTU issued on 27 June 2008.

¹³ Cameron “SA’s new retirement structure takes shape” *Personal Finance* 20 Jan 2008 <http://www.persfin.co.za> (accessed 05/02/2009).

¹⁴ The discussion documents include the National Treasury (2004) *Discussion paper and 2nd discussion paper* (2007); the DSD discussion document (2007); and the Taylor Committee Report (2002). The reform process is driven by an inter-ministerial committee chaired by the Minister of Finance and will include negotiations with trade unions and other social partners, as well as broad public consultation (Joint press statement on Retirement Reform by Government, COSATU, FEDUSA and NACTU issued on 27 June 2008; Cameron “SA’s new retirement structure takes shape” *Personal Finance* 20 January 2008).

¹⁵ The DSD and National Treasury discussion documents reflect significantly different views on only a few points. These are discussed below when they arise in the context of the discussion on how the proposed reforms can address the current shortcomings in the retirement funding system.

informal economy, is planned as the second pillar. The retirement funding pillar of the reformed system will be based on principles such as equity, pooling of risks, mandatory participation, administrative efficiency and solidarity.¹⁶ These principles are closely related to the promotion of intergenerational solidarity and are dealt with in more detail below.¹⁷ The remaining pillar(s) of the social security system will be supplementary retirement saving schemes to boost retirement income received from the second pillar scheme,¹⁸ as well as systems to assist older persons with medical care and accommodation. At first glance, these ‘pillars’ seem to correspond with the current three-pillared framework for retirement funding.¹⁹ The significant difference between the current and the proposed multi-pillar system is that voluntary membership of occupational retirement funds is to be replaced with mandatory national retirement fund membership.



The social security reforms aspire to develop a retirement system “in keeping with South Africa’s level of development and its need to ensure adequate access to social security as required by the Constitution”.²⁰ Section 27(2) of the Constitution requires the state to take reasonable measures to realise the

¹⁶ National Treasury (2007) *Budget review 2007* 110.

¹⁷ See 5.3 for the impact that fund choices can have on intergenerational solidarity and 5.5 for a discussion of the advantages of compulsory participation in retirement funds. Pooling of risks and solidarity as principles on which the reformed retirement scheme is to be based are discussed throughout the chapter.

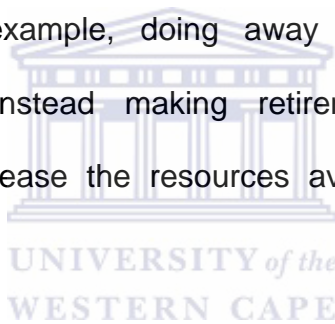
¹⁸ It is envisaged by the Department of Social Development that the mandatory PAYG retirement fund will be supplemented by a mandatory tier of defined contribution fully-funded benefits (“third pillar”). Employees who wish to save even more for retirement can take part in voluntary retirement savings schemes (“fourth pillar”). See DSD discussion document (2007) 93.

¹⁹ See above at 3.3.2.

²⁰ DSD Discussion document (2007) 92.

right of access to social security. The ‘reasonableness’ of measures will be determined based on the “disproportionately high” levels of unemployment prevalent in South Africa and the legacy of inequality.²¹ It is submitted that the level of support of intergenerational solidarity will also affect the ‘reasonableness’ of measures such as funding for retirement and the social security reforms.

Social security reforms occur in the context of the resources available to the state.²² Therefore, some of the reform proposals deal with alternative uses of available resources; for example, doing away with tax incentives for retirement savings and instead making retirement fund membership mandatory in order to increase the resources available for the reformed system.²³



In addition, the parties driving the pension reform will have to be mindful of the constitutional imperative of progressive realisation of social security rights.²⁴ Therefore, the reforms must not adversely affect existing social insurance benefits.

The effect that the pension reforms will have on the right to access to social security has great significance for intergenerational solidarity, as the solidarity

²¹ National Treasury (2007) *Budget review 2007* 112.

²² See above at 3.2.2.3 for more on the impact of limited resources on the realisation of social security rights.

²³ See below at 5.5.6.

²⁴ S 27(2) of the Constitution, 1996.

principle “stems directly from the recognition of an individual right to social security protection for all human beings”.²⁵

5.3 CHOICES OF FUNDS: COMPARATIVE ADVANTAGES AND DISADVANTAGES

The nature of a retirement fund determines the rights and interests of the fund members. The following comparison of the different categories of funds does not serve to highlight all of the comparative advantages and disadvantages of the different types of funds,²⁶ but it is intended to establish the optimal fund type choice for the planned national social security system, measured against the impact of the various fund types on intergenerational solidarity and the constitutional obligations of the state. As was explained above,²⁷ all retirement funds can be classified as either pension or provident funds in terms of the frequency of benefit payments, and defined benefit or defined contribution funds in terms of the method of determining benefit levels.

5.3.1 The creation of a public retirement fund

The differences between public (national) and occupational retirement funds were outlined in Chapter 2. It now seems a *fait accompli* that the reform

²⁵ Gruat (1997) *Adequacy and social security principles in pension reform* 7.

²⁶ The relative advantages and disadvantage of the different fund types were discussed above at 2.4 (national retirement schemes and private and occupational pensions); 2.5 (pension funds and provident funds); 2.6 (defined contribution funds and defined benefit funds); and 2.7 (pay-as-you-go and fully-funded schemes).

²⁷ At 3.3.2.1.1.

process will result in a mandatory national fund as the basic form of saving for retirement.

The envisaged national fund can be regarded as evidence that the state is taking steps to improve access to social security. Whereas the regulation of private/occupational funds by the state can be regarded as the state fulfilling its duty to take reasonable measures to ensure access to social security indirectly, a public fund shows direct participation by the state in the implementation of the right of access to social security.

The extent to which the creation of a national fund will have an impact on intergenerational solidarity is unclear at this early stage of the reform process. The only pointers available are the experiences of other countries that have adopted various forms of the multi-pillar pension model. A comparative overview of the pension structures of these countries and particularly the influence a national pension fund had on intergenerational solidarity follows later in this thesis.²⁸

5.3.2 Effect of the choice between pension and provident funds on intergenerational solidarity

The relative advantages and disadvantages of pension and provident funds

²⁸ See below at 7.3.

were compared in Chapter 2.²⁹ From this comparison it becomes clear that the choice of fund will have important consequences upon retirement. On the one hand there is the freedom offered by the provident fund benefit, but with the risk that it may not last the beneficiary's lifetime. On the other hand, there is the relative security of the pension benefit.

Even though the perceived advantages of provident funds over pension funds have made them the more popular option in South Africa, the absence of compulsory periodical payments³⁰ causes provident funds to fall foul of the International Labour Organisation (ILO) standards. The Social Security (Minimum Standards) Convention,³¹ and the Invalidity, Old-Age and Survivors' Benefit Convention³² both require that any old-age benefit in cash must be a periodical payment provided throughout retirement. Retirement funds are consequently required to provide benefits from retirement to death. Although neither of the Conventions has been ratified by South Africa, they serve as a benchmark for the interpretation of the Bill of Rights and social security legislation.³³

Intergenerational solidarity is the solidarity that the working age generation

²⁹ See above at 2.5.

³⁰ The Income Tax Act 58 of 1962, as amended, allows provident funds to pay lump sums. Depending on the rules of the fund, there is nothing barring provident funds from paying periodical payments.

³¹ Convention 102 of 1952, Art 28 and 30.

³² Convention 128 of 1967, Art 17 and 19.

³³ The significance of international law, in general, and international social security standards, in particular, is outlined below at 7.2.1 and 7.2.4 respectively.

has with older persons. In the case of retirement funds it will therefore constitute the solidarity between working-age fund members and retirees. Pension funds have more in common with intergenerational solidarity as they provide life-time benefits to retired fund members and therefore the solidarity with retired members extends all through their retirement.³⁴

The lump sum payments made by provident funds leave little space for solidarity with retirees by the younger working-age generation and rather amount to an abdication of the responsibility that the younger generation has toward older persons once the lump sum payment is made. It is therefore submitted that only pension funds correspond with the notion of intergenerational solidarity, as well as complying with international standards that require benefits to last until the beneficiary's death. For that reason it is imperative that the new national retirement fund is designed as a pension fund.

Support for the arguments above in favour of a pension fund as the future national retirement fund is found in recent policy documents that tend to lean in the direction of the payment of benefits in the form of an income after retirement, with only a modest lump sum made available to settle debt.³⁵ This would require a significant amendment of current legislation as well as

³⁴ Assuming that the requisite measures to ensure that retired members in rural areas have access to their pension payments are taken.

³⁵ National Treasury (2004) *Discussion Paper* 36; National Treasury (2007) *2nd discussion paper* 24 – 25.

amendments to the existing provident fund rules.³⁶

5.3.3 Effect of the choice between defined contribution and defined benefit funds on intergenerational solidarity

The choice between defined contribution and defined benefit funds is important for an individual who is given the option to join either fund, as a misguided choice could lead to inadequate savings at retirement. As was explained above,³⁷ defined contribution fund benefits are determined by contribution levels and investment returns, whereas defined benefit funds pay guaranteed benefits based on a set formula.

The most significant difference between defined benefit and contribution funds, from an intergenerational solidarity perspective has to be the location of investment risk. With defined contribution funds the investment risk lies with the member, whereas the employer, or in the case of a national fund, the government, bears the investment risk in the case of defined benefit funds.³⁸ Exposing the retired generation to the unpredictable consequences of investment decisions and market fluctuations, as is the case with defined contribution funds, runs contrary to the concept of intergenerational solidarity. On the other hand, the shift of investment risk to a third party coupled with the notion of guaranteed benefits payable upon retirement from defined benefit

³⁶ In effect they would no longer be provident funds as the major characteristic of provident funds would have been removed.

³⁷ At 2.6.

³⁸ See above at 2.6.

funds supports and strengthens intergenerational solidarity.³⁹

In addition, defined contribution funds will find it difficult to comply with the requirement set down by the ILO Invalidity, Old-Age and Survivors' Benefits Convention that a retirement benefit must replace previous earnings of a beneficiary to a certain specified extent,⁴⁰ as the benefit is not calculated in relation to pre-retirement income but is based on contributions and returns on investments.⁴¹

5.3.4 The effect of the choice between PAYG and funded systems on intergenerational solidarity

The choice of funding arrangement for (mainly public) retirement funds is the factor regarding retirement funding with the greatest potential impact on intergenerational solidarity.⁴²

In funds that are funded on a pay-as-you-go (PAYG) basis, current financing sources such as contributions from the current active members are used to

³⁹ Solidarity is strengthened by the working-age generation's knowledge that they will be entitled to guaranteed benefits when they reach retirement and because the benefit structure creates clearly defined limits to the obligations of the working age generation.

⁴⁰ Convention 128 of 1967, Art 26(1).

⁴¹ Convention 128 has not been ratified by South Africa, but still serves as a guideline for the interpretation of the Bill of Rights and social security legislation. See below at 7.2.1 and 7.2.4 for the role of international law, particularly international social security standards, in South African law.

⁴² Gruat (1997) *Adequacy and social security principles in pension reform* 7.

fund the retirement benefits of the currently retired population.⁴³ No assets are held to cover future liabilities.⁴⁴ The link between PAYG funds and intergenerational solidarity is clear: in an ideal PAYG scheme, the current retired generation funded the retirement pensions of the previous generation of older persons. The current working-age population makes contributions to current retirement provision in the knowledge that the PAYG nature of the scheme will entitle them to similarly calculated benefits when they retire. Their contributions therefore serve to fund current pension payments as well as to establish their future pension rights.⁴⁵

With fully-funded schemes,⁴⁶ the retirement benefits paid to a fund member are linked to the contributions made by (or on behalf of) a fund member, as the contributions are invested in the long term for the payment of that particular member's benefits. In other words, current benefits are paid from previously accumulated funds.⁴⁷

The intergenerational 'contract' that the following generation is responsible for the pensions paid to the older generation has the result that older persons

⁴³ Kalisch and Aman (1998) *Retirement income systems: the reform process across OECD countries* 11; Midgley (1984) *Social security, inequality and the Third World* 92; Cameron "SA's new retirement structure takes shape" *Personal Finance* 20 January 2008.

⁴⁴ Asher (2001) *Retirement and old age* 253.

⁴⁵ Kalisch and Aman (1998) *Retirement income systems: the reform process across OECD countries* 12.

⁴⁶ The differences between PAYG and fully-funded schemes are outlined above at 2.7.

⁴⁷ Barr "Economic theory and the welfare state: a survey and interpretation" (1992) 30 *Journal of Economic Literature* 769; Midgley (1984) *Social security, inequality and the Third World* 92.

may resist pension reforms that may lead to their benefits decreasing.⁴⁸ In terms of the 'contract', the younger generation are promised similar benefits on retirement to those paid by them to the older generation. Hence, public pensions cannot be changed swiftly or without giving affected persons sufficient notice of the change so that they can adjust their retirement savings plans.⁴⁹

PAYG funding arrangements in many developed countries have run into funding problems as a result of demographic changes such as an "ageing" population,⁵⁰ leading to a conversion to fully-funded pension systems in many of these countries.⁵¹ South Africa still has a relatively "young" population⁵² and therefore the ratio between the generations by itself does not disqualify PAYG funding.



The composition of the workforce may pose a more significant problem for a South African PAYG scheme. Whereas many of the current retirees had one full-time permanent job throughout their career, the current labour market is more flexible, with contract and temporary employment on the rise and many

⁴⁸ Ibid.

⁴⁹ Hicks "The policy challenge of ageing populations" (1998) 212 *The OECD Observer* http://www.oecd.org/publications/observer/212/Article2_eng.htm (accessed 30/10/2008).

Blommestein, Hicks and Vanston (1997) *Retirement-income reforms in the context of OECD work on ageing* 8.

⁵⁰ Asher (2001) *Retirement and old age* 256. Ageing populations lead to fewer people of working age having to support more people not working.

⁵¹ Kalisch and Aman (1998) *Retirement income systems: the reform process across OECD countries* 12; Cameron "SA's new retirement structure takes shape" *Personal Finance* 20 January 2008.

⁵² DSD discussion document (2007) 16; Olivier "Old age and retirement provision" in Olivier et al (eds) *Introduction to social security* (2004) 270.

employees having faced unemployment at some or other stage of their career. The current working-age generation may therefore not be able to contribute enough to fulfil the PAYG fund's liabilities to current retirees without increasing the contributions currently payable.⁵³ The question therefore becomes: to which extent can government burden future generations of workers to fund public pensions of future generations of retired persons? In other words, do the cross-subsidisation and pooling of risks inherent in PAYG funds discriminate against younger generations?⁵⁴

Partridge⁵⁵ points out that “younger and generally healthier” persons are required to balance out the cost of older lives in a PAYG fund. The time may come when younger fund members realise that their benefits may increase if they only carried the cost of their own risk. She therefore regards the cross-subsidisation in PAYG funds as the problem and the incorporation of fully-funded aspects to these funds as the solution.⁵⁶

A contrary view is held by O'Regan who views the pooling and sharing of risks as central to pension schemes. The intergenerational pooling of risks leads to “inevitable conflict between individual fairness and the pooling of

⁵³ Barr “Economic theory and the welfare state: a survey and interpretation” (1992) 30 *Journal of Economic Literature* 769.

⁵⁴ Assuming for now that the retired members outnumber the younger generation.

⁵⁵ Partridge “The Bill of Rights and its effect on the allocation of death benefits and other issues relating to retirement funds” Pension Lawyers Association Conference (1998).

⁵⁶ Holzmann et al “Comments on Rethinking pension reform” in Holzmann and Stiglitz (eds) (2001) *New ideas about old age security* 63 also caution against the impact on the welfare of the young of a PAYG system. In their view prefunding the retirement system helps to “insulate the system from demographic shock”.

risks. Somebody is going to come off badly by definition and end up subsidizing other members of the group”.⁵⁷ Cross-subsidisation by younger members is therefore justifiable, as the idea is not to specifically disadvantage any individual younger member but to create a system that is of advantage to the entire group of fund members.

Admittedly, when a PAYG scheme has just been established and it immediately has to provide benefits to a generation of members who did not contribute, it may not seem to be the ideal expression of intergenerational solidarity.⁵⁸ In the words of Orszag and Stiglitz, the situation “may be understandable in terms of political exigencies but may or may not make sense in terms of intergenerational welfare policy”.⁵⁹

Naturally, the comments above regarding “cross-subsidisation” of retired members by the younger generation will only ring true if the retirees are proportionately more than the younger generation. Where the younger generation outnumber retirees, the fund can build up a surplus, the use of which is determined by legislation but may include advantages to the younger generation such as transferring the surplus to a trust fund to bolster the

⁵⁷ O'Regan “The achievement of equality: a new challenge for retirement funds” Keynote address at the 1998 Pension Lawyers Conference.

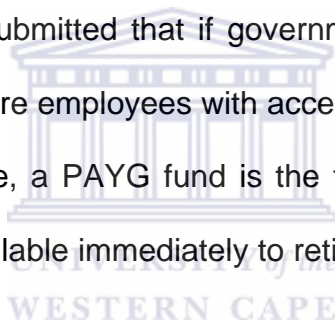
⁵⁸ In a newly created PAYG system the first beneficiaries may not have directly contributed to the system themselves. See Heller (1998) *Rethinking public pension reform initiatives* 26.

⁵⁹ Orszag and Stiglitz “Rethinking pension reform: Ten myths about social security systems” in Holzmann et al (eds) (2001) *New ideas about old age security* 29.

system against future demographic shocks.⁶⁰

The question therefore arises whether intergenerational solidarity is sufficient justification for the perceived inequality created by the cross-subsidisation intrinsic to PAYG funds.

Section 27(1)(c) of the Constitution guarantees the right of access to social security. In addition, section 27(2) requires the state to take reasonable measures to progressively provide access to social security within its available resources. It is submitted that if government is serious about the pressing need to provide more employees with access to social security in the form of retirement insurance, a PAYG fund is the fastest means to achieve this goal as benefits are available immediately to retirees.



The Department of Social Development is of the view that public PAYG systems effect the redistribution of funds from young people to retirees, as well as from the rich to the poor.⁶¹ South Africa's unique history and socio-economic conditions necessitate this type of cross-subsidisation to deal with the high levels of unemployment and inequality.⁶² Redistribution of funds is the essence of intergenerational solidarity, which can only be achieved by PAYG funds. A system that redistributes funds to retirees and the poor from

⁶⁰ However, trust funds do not offer 100% protection against demographic shocks as illustrated by the financial difficulties facing the Trust Funds of the Social Security and Medicare systems in the USA. See below at 7.3.5.5.

⁶¹ DSD discussion document (2007) 20.

⁶² National Treasury (2007) 2nd discussion paper 12.

working-age income earners can therefore be regarded as a “reasonable measure” undertaken by the state in terms of its obligations under section 27(2) of the Constitution, as it provides benefits to a vulnerable sector of our society. The likelihood that wealthier individuals may prefer a fully funded system should not detract from the fact that section 27 provides a constitutional mandate to provide benefits to vulnerable older persons and that their interests should be the primary policy priority. Therefore, a redistributive measure such as a PAYG fund can be regarded as a reasonable and justifiable limitation in terms of section 36 of the Constitution⁶³ of the rights of wealthier individuals who feel that they may have received better benefits from a fully funded system.⁶⁴

Internationally, the proponents of fully-funded schemes aver that replacing PAYG schemes with fully-funded schemes leads to increased national savings which in turn lead to higher levels of investment.⁶⁵ This view is regarded as controversial and the assumption that full funding automatically

⁶³ See above at 3.2.1.

⁶⁴ See *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) BCLR 139 (CC) the applicant sought to have s 35 of the Compensation for Occupational Injuries and Disease Act 130 of 1993 declared unconstitutional, as it barred her, as an employee, from suing her employer for damages related to a workplace injury, whereas nothing bars non-employees from suing under similar circumstances. Yacoob J held (at para 8) that “[t]he Compensation Act is important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large. The state has chosen to intervene in that relationship by legislation and to effect a particular balance which it considered appropriate.” The logical and rational connection between s 35 and the legitimate purpose of the Act led the Court to a finding that s 35 is constitutional. Similarly, a PAYG system is logically and rationally connected to the constitutional mandate to implement reasonable measures, that in the context of retirement funding translate to measures that will benefit vulnerable older persons.

⁶⁵ See e.g. Shapiro “Rethinking Social Security” (1995) 7 (5) *The New Democrat* 16.

leads to increased savings is disputed.⁶⁶ Authors such as Orszag and Stiglitz warn that it is dangerous to conflate privatisation of pension systems with prefunding of benefits and that many of the estimated savings through privatising pension systems are incorrectly ascribed to prefunding.

Cursory comparisons of PAYG and fully funded schemes may create the impression that individual accounts by and large offer higher rates of return than PAYG systems. This notion can be misleading if the administrative costs of individual accounts are not included in the comparative calculations.⁶⁷

PAYG funds may experience sustainability problems when the “political willingness” to maintain high benefits overrides the fiscal soundness of the retirement funding plan.⁶⁸ If the persons in charge of the reform of the South African social insurance system decide on a PAYG public fund, they will have to give careful consideration to the exact structure of the fund. It will be difficult to reform the structure of the fund at a later stage, because adjustments to the system will be politically unattractive once politicians realise that gains from reforms will only be clear some time after they are out

⁶⁶ DSD discussion document (2007) 20 and 22-23; Barr “Economic theory and the welfare state: a survey and interpretation” (1992) 30 *Journal of Economic Literature* 774; Orszag and Stiglitz “Rethinking pension reform: Ten myths about social security systems” in Holzmann et al (eds) *New ideas about old age security* (2001) 23; Blommestein, Hicks and Vanston (1997) *Retirement-income reforms in the context of OECD work on ageing* 15-16.

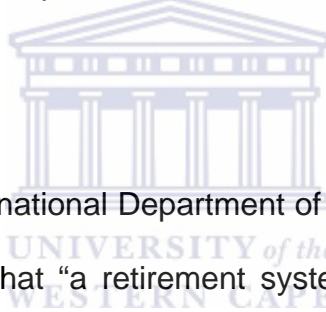
⁶⁷ Orszag and Stiglitz “Rethinking pension reform: Ten myths about social security systems” in Holzmann et al (eds) (2001) *New ideas about old age security* 24.

⁶⁸ Holzmann et al “Comments on rethinking pension reform: ten myths about social security systems” in Holzmann et al (eds) (2001) *New ideas about old age security* 58 and 74.

of office.⁶⁹

5.3.5 Conclusion: fund types compatible with intergenerational solidarity

A concept such as solidarity is hard to define and it is therefore difficult to measure whether one type of fund supports intergenerational solidarity more than another: The discussion documents on the reform of the retirement system in South Africa demonstrate the different views within government on the role of, and the relative importance of solidarity in, a retirement funding system.



The Director-General of the national Department of Social Development, Vusi Madonsela, is of the view that “a retirement system, as part of the overall social security system, is about a commitment to risk pooling and the sharing in the benefits.”⁷⁰ A fully-funded defined contribution scheme as the main component of the reformed retirement system is therefore ruled out, as the individual accounts in such a scheme put paid to the idea of risk pooling. The Department of Social Development is therefore in favour of a defined benefit

⁶⁹ See below at 7.3.5.5 for a discussion of the failed attempts to reform the Social Security programme in the United States of America. One of the perceived advantages of a defined contribution fully-funded scheme is that benefits only depend on the individual’s savings for retirement, “rather than being subject to the risk that government, at the time of retirement, may be unwilling to levy the taxes required to finance the earlier level of benefits”. (Heller (1998) *Rethinking public pension reform initiatives* 7). In Heller’s view defined contribution fully-funded schemes are no more “transparent” than defined benefit PAYG schemes as the long-term projections of the rate of return on investment are just as uncertain as the political willingness of the state to step in with defined benefit PAYG funds.

⁷⁰ Madonsela (2008) “Keynote address” Institute of Retirement Funds Conference 6.

system which is “in line with the principles of social solidarity and risk sharing”.⁷¹

The Department of Social Development discussion paper recommends that at least half of the proposed mandatory social insurance system should involve a PAYG defined benefit scheme. This scheme must be designed so as to enable it to cope with long-term demographic changes,⁷² changes in financial conditions, employment levels “and all other variables which could create unintended implicit cross-subsidies”.⁷³ It therefore proposes that the PAYG tier of retirement benefits be “formula-based, with automatic adjustments in benefits over time if the ratio of contributors to beneficiaries changes”.⁷⁴ Where the redistribution of funds to retirees inherent in intergenerational solidarity is an aim of the state, PAYG defined benefit funds are the only funds that can make such redistribution possible.⁷⁵

⁷¹ Madonsela (2008) “Keynote address” Institute of Retirement Funds Conference 7.

⁷² Hicks “The policy challenge of ageing populations” (1998) 212 *The OECD Observer* http://www.oecd.org/publications/observer/212/Article2_eng.htm (accessed 30/10/2008) warns that “the failure to keep up with demographic realities can cause a misallocation of resources between older and younger people”.

⁷³ DSD discussion document (2007) 39. The scheme’s ability to manage changes to the benefit formula will have to be carefully considered as “often attempts to change defined benefit formulas to make them more equitable and efficient meet with unmitigated failure for political reasons: the beneficiaries are well-defined groups who know they are benefiting and do not want to lose their privileges”. (Holzmann et al “Comments on Rethinking pension reform: ten myths about social security systems” in Holzmann et al (eds) (2001) *New ideas about old age security* 67).

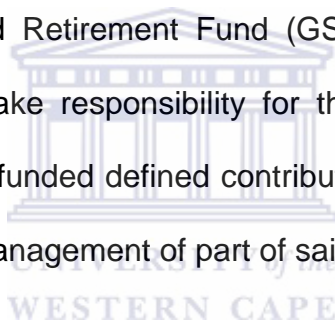
⁷⁴ DSD discussion document (2007) 93.

⁷⁵ Barr “Economic theory and the welfare state: a survey and interpretation” (1992) 30 *Journal of Economic Literature* 772. The Department of Social Development’s view is that a mandatory PAYG scheme is “the best way to ensure effective cross-subsidisation between contributors and beneficiaries” (DSD discussion document (2007) 94). As long as the formula on which benefits are based is correctly specified, such a PAYG scheme will create balance between contributors and beneficiaries. See also Madonsela (2008) “Keynote address” Institute of Retirement Funds Conference 7.

The Department of Social Development envisages that the PAYG tier should be complemented by a second tier of retirement benefits comprising defined contribution fully-funded benefits.⁷⁶

Because some fund members may lack knowledge of how retirement funds work, it is important that a default investment vehicle for retirement insurance is developed to relieve individual fund members from investment decisions.⁷⁷

It has been proposed that the PAYG tier of the retirement system be run by the Government Sponsored Retirement Fund (GSRF).⁷⁸ In addition, it is proposed that the GSRF take responsibility for the implementation of the legislation creating the fully-funded defined contribution part of the retirement system, as well as for the management of part of said fully-funded tier.⁷⁹



⁷⁶ DSD discussion document (2007) 93. Blommestein, Hicks and Vanston *Retirement-income reforms in the context of OECD work on ageing* (1997) 13 advise that a mix between PAYG and fully-funded pillars is advisable to diversify risks. The compulsory PAYG tier is intended to meet the poverty reduction objectives of the scheme, whereas a voluntary fully-funded tier would allow individuals to take some responsibility for their retirement saving choices (at 21).

⁷⁷ The retirement funding systems in the UK (see 7.3.4 below) and Sweden (see 7.3.6 below) make provision for default investment vehicles.

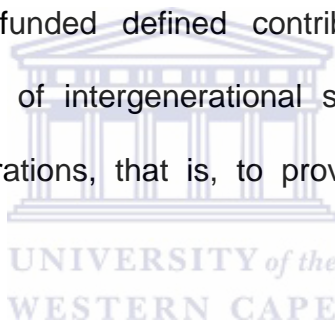
⁷⁸ DSD discussion document (2007) 95.

⁷⁹ DSD discussion document (2007) 96. One of the reasons advocated for a multi-pillar approach for the reformed retirement system, is recognition of the concerns raised about a single national pension fund approach and the failures of such funds in other countries (Madonsela Keynote address” Institute of Retirement Funds Conference (2008) 8). According to Holzmann et al “Comments on rethinking pension reform: ten myths about social security systems” in Holzmann et al (eds) (2001) *New ideas about old age security* 59, the track record on investments of public PAYG funds is “not encouraging”. See below at 7.3 for examples of other countries where systems based on single national pension funds were replaced by multi-pillar schemes.

The National Treasury Task Team's second discussion paper⁸⁰ takes a different view and proposes that the envisaged national retirement scheme be fully-funded. In their view

modern data management techniques make it administratively practical for retirement funding contributions to accumulate in individual accounts and to be credited with a standard real return on investment, effectively providing a secure mandatory savings arrangement in which all contributors share a common administrative platform and a pooled common rate of return on savings.

It is submitted that the view of the Department of Social Development that the national retirement scheme must comprise of a PAYG defined benefit scheme complemented by a fully-funded defined contribution scheme is more compatible with the notion of intergenerational solidarity as it creates a common goal for all generations, that is, to provide adequate retirement benefits.⁸¹



It is understandable that the fact that defined contribution fully-funded schemes are not redistributive is perceived as an advantage by members of these types of funds, as members can be assured that their contributions are allocated to their own individual accounts.⁸² Altruistic notions such as redistribution and intergenerational solidarity tend to take a back seat. It is submitted that it is precisely for this reason that the main pillar of the reformed system should not be defined contribution or fully-funded and why legislation

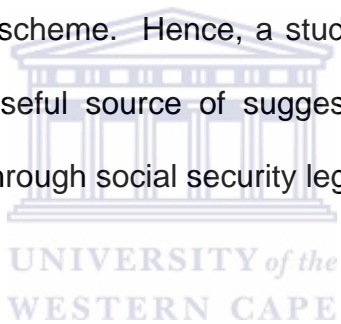
⁸⁰ National Treasury (2007) *2nd discussion paper* 16.

⁸¹ See Heller (1998) *Rethinking public pension reform initiatives* 27 for support for a "well-formulated" public defined benefit pillar as the principal source of retirement income.

⁸² See Heller (1998) *Rethinking public pension reform initiatives* 23.

advancing the cause of intergenerational solidarity is required. Redistributive issues must be addressed from the outset of the reform process.⁸³

In the final analysis, the level of priority that intergenerational solidarity enjoys compared to other interests will determine the choice of funds to make up the reformed pension structures in South Africa. It is therefore submitted that the legislation used to create the new pension structure must also include sections establishing and entrenching intergenerational solidarity as one of the main of the retirement scheme. Hence, a study of reform processes in other countries will be a useful source of suggestions on how to bolster intergenerational solidarity through social security legislation.⁸⁴



5.4 LEAKAGE

5.4.1 Introduction

In addition to the choice of funds discussed above, another factor that may have a significant impact on the level of an individual member's retirement benefit and on intergenerational solidarity in general, is leakage of members from funds. Many ex-members of occupational retirement funds still live out their old age in poverty as a result of exiting the funds before retirement and

⁸³ Heller (1998) *Rethinking public pension reform initiatives* 27. See above at 5.3.4 for the importance of having a redistributive PAYG system as the main pillar of a multi-pillar system.

⁸⁴ See below at 7.3.

failing to reinvest the benefit paid out to them. Such leakage from the retirement funding system indicates that not all individuals can take sole responsibility for saving for their retirement and is a good example of a case where the law has to intervene to secure an adequate retirement income for the individual. Such statutory intervention can occur either in the form of prescribed minimum benefits payable or compulsory preservation of benefits.

5.4.2 Withdrawal benefits

Withdrawal benefits are payable when an employee is dismissed, retrenched or resigns prior to retirement age.⁸⁵ Resignation benefits paid by retirement funds generally are lower than retirement benefits.⁸⁶ Therefore, an employee would have to remain in his or her employer's employ until retirement age to receive the full benefit.⁸⁷ On the surface this practice seems justified, as retirement funds are supposed to provide for retirement. However, low withdrawal benefits may have a negative impact on a person's ability to save for retirement.

⁸⁵ See above at 3.3.2.2.2 for a discussion of withdrawal benefits payable in terms of fund rules, as well as the minimum withdrawal benefits payable in terms of the Pension Funds Act 24 of 1956, as amended by the Pension Funds Second Amendment Act 39 of 2001.

⁸⁶ The failure of many funds to pay adequate withdrawal benefits is discussed above at 3.3.2.2.2.

⁸⁷ Reineck (1999) *A specie of promise and its effect on the pension fund surplus 7*. Strasheim "Determining 'fair retirement fund practices' in relation to fair withdrawal benefits" Pension Lawyers Association Conference 1998 http://www.icon.co.za/~pla/con_98/Feedback/PLA%20P%20Strasheim%20unf%20ret%20prac.htm (accessed 10/03/2008)) describes low withdrawal benefits as "golden handcuffs".

Low withdrawal benefits payable to retrenched fund members have been an even greater source of discontent for some time as the socio-economic circumstances of employees dismissed for operational requirements seemingly are overlooked in favour of the stated objective that the foundation of retirement funds should remain the payment of benefits at retirement. The traditional justification of low withdrawal benefits, that is, ensuring that an employee remains in the employ of the employer until retirement, has been overtaken by “modern workplace realities” such as greater occupational mobility.⁸⁸ Hence, the retention of low withdrawal benefits penalise individual fund members even further than a situation not of their making.

The Pension Funds Second Amendment Act⁸⁹ attempted to address this problem by providing for “minimum benefits” payable to fund members even upon withdrawal from the fund. Members are now entitled to payment of a “minimum individual reserve”.⁹⁰

The debate about withdrawal benefits has been resurrected by the social security reform process. Views range from that of the African National Congress, which wants government to rule out early withdrawals from the

⁸⁸ Strasheim “Determining ‘fair retirement fund practices’ in relation to fair withdrawal benefits” Pension Lawyers Association Conference 1998 http://www.icon.co.za/~pla/con_98/Feedback/PLA%20P%20Strasheim%20unf%20ret%20prac.htm (accessed 10/03/2008).

⁸⁹ Act 39 of 2001.

⁹⁰ S 14A(1)(a) Pension Funds Act 24 of 1956 (as amended) is discussed above at 3.3.2.2.2.

envisaged national retirement fund,⁹¹ to the National Treasury's stance that provision for withdrawal benefits may be necessary to deal with "life crises".⁹²

The current position regarding withdrawal benefit levels was discussed in Chapter 3.⁹³ The close connection between the issues of withdrawal benefits on the one hand, and preservation and transferability of benefits on the other, requires a closer examination of the latter two issues.

5.4.3 Lack of compulsory preservation of funds

The absence of statutory measures to compel occupational fund members to preserve savings for retirement may lead to a lack of adequate accumulated savings at retirement.⁹⁴ These difficulties arise particularly when individuals change jobs or are dismissed and they take their retirement benefits in cash in order to fund periods of unemployment. Their retirement benefits are consequently neither transferred to another fund, nor reinvested in a retirement savings vehicle.⁹⁵

The three main ways to re-invest money after leaving retirement funds are to transfer to a new fund as soon as one is employed again, to transfer funds

⁹¹ ANC (2007) *Social Transformation* 4.

⁹² National Treasury (2007) *2nd discussion paper* 14.

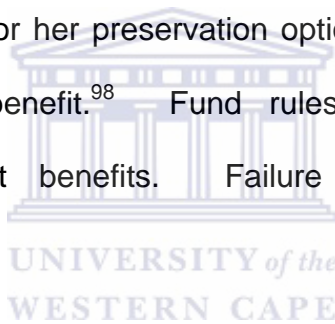
⁹³ At 3.3.2.2.2.

⁹⁴ According to the National Treasury (2007) *2nd discussion paper* 5 less than 10% of people leaving retirement funds preserve their benefits.

⁹⁵ Private retirement savings vehicles such as retirement annuities and unit trusts are briefly discussed above at 3.3.3.

from the previous fund to a preservation fund,⁹⁶ or to purchase a retirement annuity.⁹⁷ The relative merits of the various options to re-invest money withdrawn from a previous retirement fund are not the main issue where preservation of retirement benefits is at stake. Issues such as whether the fund member had been given a reasonable opportunity to exercise his or her preservation options, and whether the member had elected to exercise any preservation option at all, are of far greater significance.

A retirement fund must offer a retrenched or dismissed member reasonable opportunity to exercise his or her preservation options before the fund pays out a cash withdrawal benefit.⁹⁸ Fund rules must also encourage preservation of retirement benefits. Failure to do so constitutes



⁹⁶ See s 1 of the Income Tax Act 58 of 1962 for the definitions of “pension preservation fund” and “provident preservation fund”. Membership of pension preservation funds and provident preservation funds includes former members of a pension fund who had resigned, or were retrenched or dismissed and who elected to have their lump sum withdrawal benefit transferred to the fund; and former members of a fund that had been wound up and the members elected to transfer to the preservation fund. In addition, a former employee of an employer whose business has been transferred to another employer becomes a member of a preservation fund if the member elects to transfer to the preservation fund.

⁹⁷ Retirement annuities are described above at 3.3.3.1. Where a member withdraws from his or her retirement fund before the age of 55, he or she can transfer funds from the pension or provident fund tax free into a preservation fund. The member can then withdraw up to 100% of his or her funds only once before retirement. The detailed workings of a preservation fund full outside the scope of this research. See SARS Practice Note RF1/98 “Funds for the preservation of the retirement interests of employees” read with Addendum A to RF1/98 (2000); Addendum B to RF1/98 (2001); Addendum C to RF1/98 (2007); Addendum D and E to RF1/98 (2008); *Human v Protektor Pension Fund* [2001] 9 BPLR 2462 (PFA); *Cloete v Sasol Pension Fund and Another (1)* [2000] 11 BPLR 1210 (PFA).

⁹⁸ *Maepa v Sanlam Retirement Fund (Office Staff)* [2002] 2 BPLR 3093 (PFA) 3096. This rule applies unless the fund rules make provision for a specific period within which the option must be exercised.

maladministration by the fund and a complaint can be lodged with the Pension Fund Adjudicator.⁹⁹

The debate regarding compulsory preservation of benefits has to be understood in the context of the hardship faced by retirement fund members who become unemployed but are not allowed to access retirement savings. Due to the myriad of administrative problems and delays experienced with the unemployment insurance fund¹⁰⁰ many fund members have to rely on their retirement benefits to support themselves and their dependants.¹⁰¹ It is therefore strictly speaking not correct to refer to a “choice” not to preserve benefits.¹⁰² As long as the high levels of unemployment continue, so too will the preference for cash benefits rather than preservation of benefits.¹⁰³ The National Treasury supports the principle that employees should only be allowed access to their retirement savings once their unemployment benefits

⁹⁹ See e.g. *Fourie v Free State Municipal Pension Fund* [2002] 12 BPLR 4131 (PFA) where the fund rules provided for higher withdrawal benefits for members who resigned from service than those colleagues who transferred to another fund. The rules clearly discouraged preservation of retirement savings and were held to be unconstitutional on the basis of unfair discrimination between members transferring benefits to a preservation fund and those drawing withdrawal benefits.

¹⁰⁰ Established in terms of s 4 of the Unemployment Insurance Act 63 of 2001. For more on the problems experienced in the unemployment insurance system, see Olivier and Van Kerken “Unemployment insurance” in Olivier et al (eds) (2004) *Introduction to Social Security* 301 and 318; National Treasury (2007) 2nd discussion paper 16-17.

¹⁰¹ Shipman “Fair retirement fund practices” PLA Conference 1998.

¹⁰² The dilemma of retrenched employees who have to rely on their retirement funding during a time of no income was summarised succinctly by the complainant in *Maepa v Sanlam Retirement Fund (Office Staff)* [2002] 2 BPLR 3093 (PFA) 3095: “I find it very strange and unfair for the company to say that for me to get the company’s contribution, I was supposed to transfer my benefits to a Pension Fund of a new employer or Retirement Annuity. How can that happen because when retrenched, it is impossible for one to get a new job in a very near future for the benefits to be transferred. Lastly money is needed to pay up debts, that is the fact that made it impossible to transfer the benefits to a Retirement Annuity.”

¹⁰³ Asher (2001) *Retirement and old age* 253 states that withdrawal benefits act as “an important and irreplaceable extra buffer” against unemployment.

have been exhausted, but acknowledges that this principle “is reliant on the efficient functioning of the UIF”.¹⁰⁴

The Treasury Task Team’s second discussion paper also makes allowance for the early withdrawal of retirement savings “to take account of life crises” such as unemployment and debts,¹⁰⁵ but only as an exception to the broad steps to encourage preservation of retirement savings. The interface between retirement benefits and unemployment benefits needs to be formalised in legislation to avoid over-reliance on withdrawals from retirement benefits in the event of loss of employment.¹⁰⁶

In the context of the level of preservation of benefits required, a distinction can be made between a member losing his or her employment completely and the case of a change in jobs.¹⁰⁷ In the latter case the need to access retirement savings falls away and members should not be allowed to withdraw their benefits in cash. Even so, the flexibility of the labour market requires legislative measures aimed at reducing retirement saving losses on job changes.¹⁰⁸ The fact that an employee has undergone many job changes

¹⁰⁴ National Treasury (2004) *Discussion Paper* 39. The Mouton Committee found that: “There are indications that the making of provision for pre-retirement life crises, for example, unemployment, may be seen by many employees as more important than retirement provision in some of these funds. Clearly, an emphasis on provision for longer term retirement needs will only be possible if and when the Unemployment Insurance Fund becomes recognised as providing more effective protection against short term unemployment needs.” (Mouton Committee Report (1992) para 2.5).

¹⁰⁵ National Treasury (2007) *2nd discussion paper* 14.

¹⁰⁶ National Treasury (2007) *2nd discussion paper* 23.

¹⁰⁷ Taylor Committee Report (2002) para 9.2.1.2.

¹⁰⁸ Asher (2001) *Retirement and old age* 258.

during his or her career should not in itself lead to diminished retirement benefits. The Taylor Committee's recommendations would restrict compulsory preservation of benefits, by transfer to the new employer's fund or another fund of the member's choice, to instances where the member remains in the formal sector after the job change.¹⁰⁹ Where the member cannot find alternative employment in the formal sector, he or she should be entitled to withdraw only a portion of their benefit and only once unemployment benefits have been exhausted.

As was stated above,¹¹⁰ intergenerational solidarity requires that the older generation does not squander benefits paid by the younger. This also includes cash withdrawals while of working age, thereby forfeiting benefits payable upon retirement. As intergenerational solidarity relies on the pooling of resources, preservation of retirement benefits also means that benefits that may have been withdrawn from the solidarity "pool" are retained. The proposals for compulsory preservation of benefits until retirement, therefore, have to be understood in the context of their positive impact on intergenerational solidarity.

¹⁰⁹ Taylor Committee Report (2002) para 9.2.1.2.

¹¹⁰ At 2.3.

5.4.4 Section 14 transfers

The issue of the pension rights of employees of a business that is transferred to a new employer as a going concern is an intersection between labour law and retirement fund legislation. The protection of employees against the potential loss of a portion of their benefit entitlements when they are transferred to a new fund is as fundamentally important to intergenerational solidarity as the other factors leading to leakage of pension benefits discussed above.¹¹¹

Section 197 of the Labour Relations Act¹¹² regulates the transfer of a business or part of a business as a going concern.¹¹³ In terms of section 197(2) the employees of the seller become entitled to be employed by the purchaser under the same conditions of employment as applied with the seller.¹¹⁴ Employment benefits such as pension rights are included within the

¹¹¹ See 5.4.2 and 5.4.3 above.

¹¹² Act 66 of 1995.

¹¹³ For more on the interpretation of “transfer”, “business or part of a business” and “as a going concern” see Bosch “Of business parts and human stock: some reflections on s 197(1)(a) of the Labour Relations Act (2004) 25 *ILJ* 1865; Bosch “Balancing the Act: Fairness and business transfers” (2004) 25 *ILJ* 923; Bosch “Reincarnating the vibrant horse? The 2002 amendments and transfers of undertakings” (2002) 1 *LDD* 84; Du Toit “The transfer of enterprises and the protection of employment benefits” (2004) 1 *LDD* 98 – 101; Todd, Du Toit and Bosch (2004) *Business transfers and employment rights in South Africa*.

¹¹⁴ In terms of ss 197(2)(a) and (b), which provide that in the event of a transfer of business protected by s 197,

- (a) “the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- (b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee”.

scope of section 197(2).¹¹⁵ The purchaser (new employer) might be placed in an extremely difficult position in the case where the employees belonged to a defined benefit fund and it is expected of the new employer to attempt to reproduce the same retirement funding scheme. Then again, employees who had been members of a defined benefit fund before the transfer are entitled to protection against erosion of their guaranteed pension benefits.¹¹⁶

In terms of section 197(3) the employment conditions at the new employer must be “on the whole not less favourable to the employees than those on which they were employed by the old employer”.¹¹⁷ Whether or not the new employer will be able to provide such employment conditions would depend on the “pension promise” made by the old employer and how much of those obligations are transferred to the new employer.¹¹⁸ It is submitted that Todd is correct in stating that the employer’s promise to employees can merely be described as “a promise of participation in a fund”.¹¹⁹

¹¹⁵ Du Toit “The transfer of enterprises and the protection of employment benefits” (2004) 1 *LDD* 104.

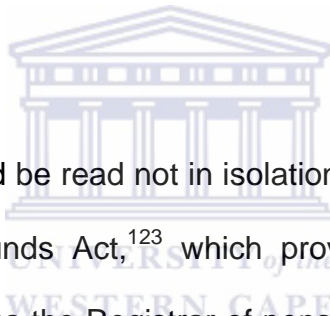
¹¹⁶ Du Toit (2004) 1 *LDD* 109.

¹¹⁷ Whether or not this occurred will depend on the facts of each case (Todd, Du Toit and Bosch (2004) *Business transfers and employment rights in South Africa* 97). S 197(3) therefore does not guarantee identical retirement benefits to those received from the old employer.

¹¹⁸ Todd, Du Toit and Bosch (2004) *Business transfers and employment rights in South Africa* 100.

¹¹⁹ In Todd, Du Toit and Bosch (2004) *Business transfers and employment rights in South Africa* 101.

Specific provision for the transfer of an employee from one fund to another retirement or similar fund is made in section 197(4).¹²⁰ The difficulty with section 197(4) is that it merely allows for the transfer of an employee to a different retirement fund. It does not require that the employee's existing pension rights *must* be transferred to the new employer's fund. The uncertainty regarding the extent of the new employer's obligations increases where the new employer does not have any retirement fund.¹²¹ According to Todd,¹²² it cannot be expected from the new employer in a section 197 transfer to "provide a new pension fund which is in all respects identical to the old fund".



However, section 197 should be read not in isolation but together with section 14(1)(c) of the Pension Funds Act,¹²³ which provides that no transfer to another fund has force unless the Registrar of pension funds is satisfied that the scheme is reasonable and equitable and "accords full recognition to the

¹²⁰ Section 197(4) provides that "subsection (2) *does not prevent* an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)(c) of the Pension Funds Act, 1956 (Act No. 24 of 1956), are satisfied" (my emphasis). See Todd, Du Toit and Bosch (2004) *Business transfers and employment rights in South Africa* 111.

¹²¹ Du Toit "The transfer of enterprises and the protection of employment benefits" (2004) 1 *LDD* 110-111.

¹²² In Todd, Du Toit and Bosch (2004) *Business transfers and employment rights in South Africa* 114. He postulates that "[t]he primary difficulty is that not all employment rights are capable of unqualified transfer from the old employer to the new employer. Some form of modification will sometimes be inevitable...[I]t is frequently not possible for the new employer to provide transferred employees with continued access to the benefit schemes provided by the old employer." (at 98).

¹²³ Before the amendment of the Labour Relations Act in 2002 (by s 49 of Act 12 of 2002) adding s 197(4) and thereby specifically including the transfer of employees from one fund to the others, there were conflicting decisions in different fora on whether s 14 was applicable to such transfers. See *Younghusband & others v Decca Contractors (SA) Pension Fund and Its Trustees* (1999) 20 *ILJ* 1640 (PFA); *Resa Pension Fund v Pension Funds Adjudicator & others* 2000 3 SA 313 (C); *Telkom SA Ltd & others v Blom & others* 2005 5 SA 532 (SCA).

rights and reasonable benefit expectations” of the transferring members in terms of the rules of the old fund.¹²⁴ The Registrar consequently issues a certificate of approval of the transfer scheme.¹²⁵

Whether a particular transfer scheme “accords full recognition to the rights and reasonable benefit expectations” of the transferring members, as required by section 14 (1)(c), will depend on a variety of factors. In an attempt to provide more clarity on the extent of the obligations of the new employer,¹²⁶ Todd came to the following conclusion:¹²⁷

¹²⁴ Additional benefits that the transferring members may be entitled to and minimum benefits payable in terms of s 14A also have to be considered (s 14(1)(c)(ii) and (iii)). The financial soundness of the transferring fund is also a factor to be considered by the Registrar. The instances where the Registrar’s approval is not required for a transfer, for example, transfers between two beneficiary funds, are listed in s 14(8).

¹²⁵ In *Tek Corporation Provident Fund and others v Lorentz* 1999 4 SA 884 (SCA) the Supreme Court of Appeals had to determine whether the Registrar’s approval of a transfer scheme in terms of s 14(1) of the Pension Funds Act precluded the Court’s jurisdiction unless the Registrar’s certificate is set aside. The Court held that if the trustees’ decision to allow the transfer scheme was *ultra vires*, the decision is open to attack despite the Registrar’s certificate (at 902 para 41). Marais JA held that there is a measure of uncertainty regarding the meaning of the expression “reasonable benefit expectations” referred to in s 14(1)(c)(i). He held that it must mean “something over and above the defined benefits to which the persons mentioned are entitled.” He cited periodic inflation-related increases in payments to existing pensioners as an example of “reasonable benefit expectations” (at 903, para 47). The Registrar’s certificate of approval is not required where a member’s (or non-member spouse’s) interest in a retirement annuity fund is transferred to another retirement annuity fund (s 14(7)(a)).

¹²⁶ The Treasury Task Team pointed out that the extent of the obligations of the new employer in terms of the current law on transfer schemes is ambiguous because it is “by no means clear that employees are entitled to identical retirement fund benefits” (National Treasury (2004) *Discussion paper* 61) and “there is never any certainty that a particular employee will remain in employment until retirement, or become entitled to retrenchment or disability benefits.” (at 62). To lend more certainty to the situation, the Task Team has recommended that employers should be entitled to arrange the transfer of their employees from a defined benefit fund to a defined contribution fund,¹²⁶ without the consent of the employees. Employees should however be informed before such a conversion from defined benefit to defined contribution funds occur. The employer should ensure that the opening fund credit of each affected fund member in the new fund will be equivalent to the member’s minimum individual reserve in the old fund. The employer should also be required to make such contributions that “can reasonably be expected to procure for the employee a retirement benefit equivalent in value to the benefit to which the employee would have been entitled on retirement in terms of ... his or her original fund” (at 62).

Where a new employer, acting on reasonable actuarial advice, has established a new retirement fund that provides benefits that may be demonstrated to be a reasonable and equitable substitute, on the actuarial assumption used, for the benefits provided by the transferring employees' previous retirement fund, then the new employer must be considered to have satisfied the primary employer promise in the employment contract,...and to have satisfied the obligations articulated in the provisions of section 197.

It is submitted that the aim of the labour and pension legislation with regard to the transfer of undertakings discussed above is to find a balance between allowing employers to restructure their operations without undue financial burden and to protect the retirement savings of members being transferred from one fund to another.

The current pension reform process aims to create a national mandatory retirement fund, which will ease concerns regarding transfers of undertakings. In future, even if the business of an employer is transferred, the employees will remain members of the national fund. The interface between labour law and pension legislation on transfers of businesses will only remain relevant for employees belonging to the proposed additional voluntary or 'top-up' funds.

¹²⁷ In Todd, Du Toit and Bosch (2004) *Business transfers and employment rights in South Africa* 117. He came to this conclusion after examining and adapting the guidelines used in the United Kingdom for transfers of employees from the public to the private sector.

5.5 VOLUNTARY NATURE OF RETIREMENT FUNDS

5.5.1 *Current voluntary participation*

There is currently no statutory compulsion for individuals to join and contribute to a retirement fund, which makes the existing South African position “unique from an international perspective”.¹²⁸ In addition, no positive duty is placed on employers to establish retirement funds for their employees.¹²⁹ Once the employer decides to establish a fund, the decision can be made what categories of employee are eligible to join the fund.¹³⁰

As far as South African employees are concerned, a statutory compulsion to participate in retirement funds is absent. An employer who participates in respect of any category of employee may, however, compel future new entrants to that category to join the particular retirement fund contractually. If employees are not bound through their conditions of employment to belong to the employer-sponsored fund, they have the choice of joining that fund or an individual retirement fund. Therefore, currently “only employees who meet eligibility criteria for the company’s fund and whose conditions of employment so determine” are compelled to contribute to a retirement fund.¹³¹

¹²⁸ DSD Discussion document (2007) 57.

¹²⁹ *Lezar v Braitex Pension Fund and Another* [2001] 8 BPLR 2380 (PFA) 2382 para 14.

¹³⁰ National Treasury (2004) *Discussion paper* 18.

¹³¹ Mouton Committee Report (1992) para 41.1

The Treasury Task Team has observed that it is remarkable how the retirement fund industry has flourished in the absence of compulsion to establish or join a fund.¹³² It is submitted that the high levels of participation by formal sector employees can be attributed to the tax incentives currently offered for contributing to a fund and the realisation by employees of the importance of saving for retirement.

One of the key issues addressed in the process of reforming the South African retirement funding system, is the lack of adequate accumulated retirement savings caused by the non-compulsory nature of the current system.¹³³ Intergenerational solidarity in the context of retirement funds requires that the working-age generation contribute to the retirement income of the older (retired) generation. A lack of compulsion for the working-age generation to contribute therefore disturbs the balance required for intergenerational solidarity.

5.5.2 Need for mandatory membership

International best practice frameworks for developing countries suggest that governments should set up systems based on compulsory contributions for

¹³² National Treasury (2004) *Discussion Paper* 18.

¹³³ The proportion of potential contributors to retirement funds who do not participate in retirement savings is estimated at 47,8% (DSD Discussion document (2007) 62).

retirement.¹³⁴ Compulsory fund membership as a method of saving for retirement hold advantages for

- the individual fund members, as it enables them to meet the costs of retirement;
- the state, as it reduces the dependence on the state for older person's grants; and
- the country as a whole, as it builds up "long term savings to help fund the country's development program".¹³⁵

The problems associated with voluntary membership of retirement funds have been ascribed to the myopic view of employees regarding future needs such as financial security after retirement.¹³⁶ Other possible reasons for non-participation by lower income earners include that saving for retirement could potentially disqualify employees from receiving the older person's grant due to the grant currently being means tested,¹³⁷ and the difficulties faced by low earning workers to save adequately for their retirement.

The different commissions and task teams on retirement fund provision have come to different conclusions regarding the level of compulsion that is required in the context of fund membership. The Taylor Committee Report recommended that all formal sector employees be compelled to make a

¹³⁴ DSD Discussion document (2007) 39; National Treasury (2007) *2nd discussion paper* 10.

¹³⁵ Mouton Committee Report (1992) para 41.3.

¹³⁶ Taylor Committee Report (2002) para 3.6.1; National Treasury (2007) *2nd discussion paper* 9.

¹³⁷ See above at 4.3.2 for a discussion on the negative consequences attached to the administration of a means test.

minimum contribution¹³⁸ to their retirement savings.¹³⁹ This was in line with the earlier recommendations of the Mouton Committee that, despite difficulties with compulsory contributions such as the high level of unemployment, mandatory fund membership would be a necessary step in broadening the scope of application of retirement insurance.¹⁴⁰

The Treasury Task Team's 2004 discussion paper highlighted experiences of other compulsory systems¹⁴¹ where it was found that mandatory systems "may encourage people and businesses to remain in the informal sector because of the perceived costs associated with moving to the formal sector".¹⁴² It therefore recommended that rather than compulsory fund membership enforced by legislation, measures to encourage the extension of retirement provision to all employees in the formal sector should be promoted as long as the current high levels of unemployment continue.¹⁴³ Out of the various possible measures to encourage participation in retirement funds recommended by the Task Team, the preferred options were to make fund membership a condition of employment and to compel employers to educate their employees on the desirability of retirement savings.¹⁴⁴ The onus would

¹³⁸ Calculated as a prescribed minimum percentage of their income.

¹³⁹ *Transforming the present – protecting the future* Consolidated report (2002) 94.

¹⁴⁰ Mouton Committee Report (1992) para 29.14.

¹⁴¹ For instance Chile – see below at 7.3.3 for a comparative overview of the Chilean retirement funding system.

¹⁴² National Treasury *Discussion Paper* (2004) 19. See below at 5.6 for more on the exclusion of workers in the informal economy from retirement saving structures.

¹⁴³ National Treasury (2004) *Discussion Paper* 19.

¹⁴⁴ National Treasury (2004) *Discussion Paper* 19-20, 24.

therefore once again be on employers to increase the number of fund members.

However, the suggested retention of the current system with various occupational funds would not address the difficulties experienced with monitoring fund membership resulting from the multitude of funds in existence. Hence, the Treasury Task Team, after considering the submissions after the first discussion document, shifted to the notion of mandatory participation in a pooled social insurance fund.¹⁴⁵ In its second discussion paper it states a preference for mandatory participation in a national retirement provision system, particularly as it offers the advantage of economy of scale in the maintenance and monitoring of member records.¹⁴⁶ It envisages mandatory supplementary contributions to occupational pension funds or independent retirement funds to supplement the mandatory contributions to the national fund.¹⁴⁷

The likely consequences of pension reforms and the creation of a single public fund are that smaller funds will disappear, while some will merge with the national fund and others will continue to provide supplementary benefits in the voluntary savings pillar.¹⁴⁸

¹⁴⁵ National Treasury (2007) 2nd discussion paper 10.

¹⁴⁶ At 9.

¹⁴⁷ At 10.

¹⁴⁸ Cameron "SA's new retirement structure takes shape" *Personal Finance* 20 January 2008 <http://www.persfin.co.za> (accessed 05/02/2009). The Treasury Task Team has recommended that existing funds may continue to collect contributions to "top-up" on the

Almost all the discussion documents outlining the possible structure of the reformed retirement system refer to compulsory membership of a national pension fund.¹⁴⁹ The widespread support for the notion of mandatory fund membership addressed one of the main concerns of the Mouton Committee, which expressed its belief that reforms culminating in a system requiring compulsory membership have to be preceded by “strong consensus support among all interested parties” or otherwise face unintended consequences.¹⁵⁰ Compulsory fund membership has the advantage that arbitrary exclusions of certain groups of persons from fund membership become less of an issue as the eligibility requirements for the fund will be set in the founding legislation. However, some institutional obstacles, such as determining which state organ should enforce the mandatory membership and contributions,¹⁵¹ must first be overcome.¹⁵²

benefits provided by the compulsory national system (National Treasury 2nd discussion paper (2007) 15).

¹⁴⁹ The ANC (2007) *Social Transformation Policy* 3 supports the concept of mandatory retirement savings and the establishment of a national fund such as the proposed GSRF. See also DSD discussion document (2007) 92; National Treasury (2007) 2nd discussion paper 19.

¹⁵⁰ Mouton Committee Report (1992) para 41.1 and 41.9.

¹⁵¹ The Taylor Committee recommended that SARS be tasked with identifying non-contributors, specifically employers (*Transforming the present – protecting the future* Consolidated report (2002) 94).

¹⁵² Asher and Olivier “Retirement and old age” in Olivier et al (eds) (2003) *Social security – a legal analysis* 289.

5.5.3 Proposed wage subsidy

While it is clear that the unemployed will not gain by compulsory fund membership for all employees, compulsion may make a significant change in the retirement income of lower earners. As lower earners often do not earn enough for additional expenses such as retirement savings, the National Treasury has recommended that the pension contributions of low-income workers be subsidised by the state.¹⁵³ The wage or employment subsidy can take the form of a broad-based subsidy, or be targeted at lower earners, at young work seekers or at a specific sector of workers. The aims of the proposed wage subsidy are to create a system that

- allows lower income workers to save for their own retirement;
- increases the labour income of lower earners;
- has the potential to lower the costs of employment.¹⁵⁴

It is submitted that a wage subsidy will lead to a significant increase in the number of participants in the reformed pension system. Any such increase of participants will have an effect on intergenerational solidarity. The more people participating in a particular scheme to save for their retirement, the

¹⁵³ National Treasury (2007) *2nd discussion paper* 14. See also Sapa “Pension savings are safe – govt” 19 May 2008 http://www.fin24.com/articles/default/display_article.aspx?ArticleID=1518-1786_2325320 (accessed 01/05/2009).

¹⁵⁴ National Treasury (2007) *Budget Review 2007* 112. One of the proposed design options for the wage subsidy is the reimbursement of employers’ contributions, possibly as a tax rebate or credit. The aim is to encourage employers to increase low wages, as increased wages paid would lead to increased subsidies (National Treasury (2007) *Budget review 2007* 113). The detail of the design options for the proposed wage subsidy falls outside the scope of this study. See below at 7.3 for examples of wage subsidy schemes or “credits” in other countries.

greater the interest in defending and maintaining the system until their retirement.

The state will also be meeting its constitutional obligation to take reasonable measures to promote access to social security in terms of section 27 of the Constitution. The implementation of a wage subsidy is a reasonable step towards achieving increased access to retirement insurance to lower earners, who as a group count among the most vulnerable people in South Africa.¹⁵⁵

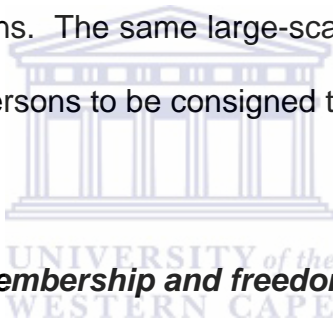
5.5.4 Inclusion of self-employed persons

Attention should also be given to the position of self-employed persons and independent contractors who currently have to rely on retirement annuity funds and other private savings vehicles, as they are disqualified from belonging to occupational retirement funds because the required employer-employee relationship is lacking.

The Treasury Task Team initially recommended the creation of Individual Retirement Funds that would not have the employer-employee relationship as a prerequisite as is currently the case with retirement funds. Instead, the

¹⁵⁵ In terms of s 27 of the Constitution the state is only required to take the steps in realising the right of access to social security that are feasible within its available resources. It is not possible at this stage to determine the availability of resources for the wage subsidy, although some of the proposals for the reformed social insurance system recommend the reform of many of the current tax incentives to belong to a retirement fund (National Treasury (2007) *Budget review 2007* 115; National Treasury (2007) *2nd discussion paper* 34; DSD discussion document (2007) 92), thereby creating the potential for freeing funds for the wage subsidy.

primary relationship would have existed between the member and the fund.¹⁵⁶ The Treasury Task Team subsequently adjusted its position regarding Independent Retirement Funds for self-employed persons. In the second discussion document it recommends that provision be made for the phasing in over time of mandatory contributions to the national retirement fund by self-employed persons.¹⁵⁷ It is submitted that the inclusion of self-employed persons in the national fund is in the interest of social solidarity: not only will self-employed persons stand to gain from the retirement benefits offered by the national fund, but the fund (and therefore other fund members) will also benefit from their contributions. The same large-scale sharing of risks will not occur were self-employed persons to be consigned to independent funds.



5.5.5 Compulsory fund membership and freedom of association

The next question to address is whether the intended legislation compelling employees to become members of a retirement fund(s) would constitute an infringement of the employees' freedom of association, in the sense that they would no longer have a choice regarding which fund to join.¹⁵⁸

¹⁵⁶ National Treasury (2004) *Discussion paper* 26-27. The Treasury Task Team recommended that Independent Retirement Funds be defined contribution funds allowing irregular contributions. It also recommended that similar arrangements to those applicable to occupational retirement funds with relation to the transfer of retirement savings between funds, disclosure of prescribed information and the prohibition of payment of commission by an Independent Retirement Fund to an intermediary for inducing a member to join the fund, be contained in the enabling legislation.

¹⁵⁷ National Treasury (2007) *2nd discussion paper* 14.

¹⁵⁸ S 18 of the Constitution guarantees the right to freedom of association.

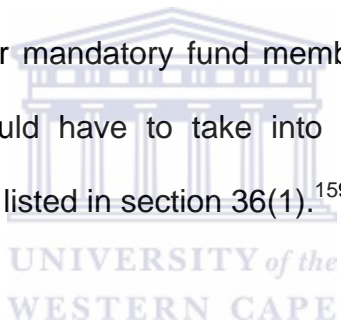
Freedom of association is not an absolute right. The restriction of freedom of association by legislation introducing compulsory fund membership would need to meet the criteria set by section 36 of the Constitution.

Section 36(1) restricts the limitation of rights in the Bill of Rights to limitations

“only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

A court determining whether mandatory fund membership limits employees' freedom of association would have to take into account all the relevant factors, including the factors listed in section 36(1).¹⁵⁹



Mandatory fund membership can be compared to closed shop agreements in the sense that both limit an employee's freedom of association. In both cases the limitation serves to reinforce another fundamental right: in the case of a closed shop, the right of trade unions to engage in collective bargaining; in the case of mandatory fund membership, the state's ability to progressively provide access to social security.¹⁶⁰ The limitation of an individual employee's freedom of association by compelling him or her to become a

¹⁵⁹ Rautenbach (2008) *Introduction to the Bill of Rights* para 1A66.1.

¹⁶⁰ For a discussion of the constitutionality of closed shop agreements see Du Toit et al (2006) *Labour relations law: A comprehensive guide* (5th edition) 191-193.

fund member, serves an important purpose¹⁶¹ as compulsory fund membership broadens the scope of application of earnings related social insurance and reduces the reliance on social assistance measures.

It is suggested that limiting freedom of association and compelling employed persons to join one national fund and/or occupational funds would lead to increased social solidarity and economies of scale and therefore the relation between the limitation and its purpose is clear.¹⁶²

The measures that are currently employed to encourage participation in occupational retirement funds, such as tax incentives¹⁶³ and, depending on the rules of the fund, providing members with security for loans, have not proven to be sufficient motivation for workers to participate in the current voluntary system.¹⁶⁴ It is therefore submitted that there are no other less restrictive means to achieve the purpose of including all employed persons in a national social insurance system and that the limitation of the employee's freedom of association is justifiable in terms of section 36(1)(e).

It is submitted that the criterion of the reasonableness and justifiability of limiting individual employees' right to freedom of association by compelling

¹⁶¹ S 36(1)(b).

¹⁶² As required by s 36(1)(d).

¹⁶³ The main reason being that tax incentives lead to greater savings for higher income groups who are subject to higher tax rates. See Heller (1998) *Rethinking public pension reform initiatives* 24.

¹⁶⁴ Low-income workers may find it difficult to save for their retirement and/or fear that any retirement savings may count against them in the means test for the older person's grant.

them to join and contribute to a national fund is met and as such a mandatory system would be constitutional.¹⁶⁵ Mandatory fund membership will reduce the burden on the state and enable provision to be made for retirement benefits for all employees. Such a measure will enhance equality as all employees will be required to join.¹⁶⁶

The contributions in terms of a mandatory retirement fund will have to be set at reasonable and financially affordable levels; otherwise their levels would not be “politically acceptable”.¹⁶⁷ However, there are difficulties in evaluating the affordability of a particular pension system for the state and for individual fund members. According to Gruat:¹⁶⁸

What matters therefore is not so much the absolute or relative share of social security financing expressed as a percentage of salaries or of GDP, but what remains to cover other basic needs once the size of resources allotted to social protection has been decided upon. In other words, there is no absolute figure, or threshold, which would form an objective limit to what a society, or a group can afford to spend for its social protection.

Although compulsory pension systems seem to shift the responsibility to save for retirement to the individual employee, it can also be argued that by legally requiring contribution, the state assumes “some responsibility in the event that the ultimate investment outcome proves unsatisfactory”.¹⁶⁹ Compulsory

¹⁶⁵ Depending, of course, on the actual provisions of the proposed legislation creating the mandatory national fund.

¹⁶⁶ Partridge “The Bill of Rights and its effect on the allocation of death benefits and other issues relating to retirement funds” Pension Lawyers Association Conference 1998.

¹⁶⁷ Gruat (1997) *Adequacy and social security principles in pension reform* 9.

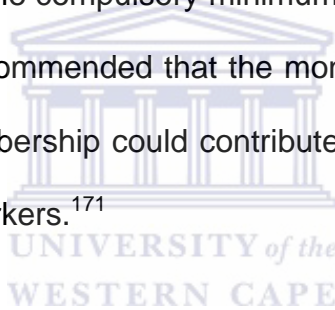
¹⁶⁸ *Ibid.*

¹⁶⁹ Heller (1998) *Rethinking public pension reform initiatives* 15.

fund membership also leads to maximum participation, which in turn strengthens the solidarity base.

5.5.6 Mandatory participation: concluding remarks

As a by-product of compulsory fund membership, the need for tax incentives for saving for retirement all but disappears. Tax incentives to belong to retirement funds can therefore be confined to the envisaged voluntary pillar of the reformed system. The goal of such tax incentives must be to encourage retirement savings beyond the compulsory minimum contributions required by the other pillars.¹⁷⁰ It is recommended that the money saved by abandoning tax incentives for fund membership could contribute to the costs of the wage subsidy to lower earning workers.¹⁷¹



The full effects of a mandatory system will only be clear once the reformed system has been operational for some time. The success of, or problems experienced with, compulsory fund membership in other countries therefore serves as a valuable guideline for policy makers and the legislature.¹⁷² The extent of voluntary supplementary participation in the reformed social

¹⁷⁰ National Treasury (2007) *2nd discussion paper* 32. One of the points of difference between the Treasury Task Team and Department of Social Development's discussion paper is whether tax incentives are at all necessary. The Department of Social Development's view is that compulsory fund membership will render tax incentives unnecessary (DSD discussion document (2007) 84), whereas the Treasury Task Team ((2007) *2nd discussion paper* 34) underscores the value of tax incentives for supplementary savings.

¹⁷¹ The proposed wage subsidy is discussed above at 5.5.3.

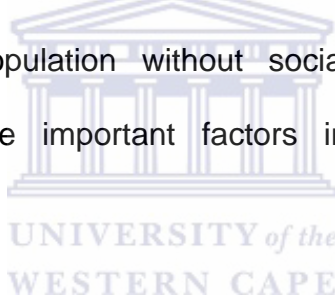
¹⁷² See below at 7.3 for an overview of the mandatory retirement funds in Chile, Sweden, the UK and the United States.

insurance system is not clear at this stage and as such the discussion of how voluntary participation should be combined with compulsory membership will be limited to the various models implemented in other countries.¹⁷³

5.6 EXCLUSION OF WORKERS IN THE INFORMAL ECONOMY, LOW-INCOME WORKERS AND THE UNEMPLOYED

5.6.1 Workers in the informal economy

Internationally, the growth of the informal economy,¹⁷⁴ which leaves large sections of the active population without social security protection is recognised as one of the important factors informing social security reforms.¹⁷⁵



The South African retirement fund system currently caters mainly for formally employed workers, as funds are by and large created by employers. Coverage of employees in the formal sector is relatively good,¹⁷⁶ but

¹⁷³ See below at 7.3 for examples of retirement funding systems that successfully combine compulsory and voluntary participation.

¹⁷⁴ The term “informal economy” is used where possible instead of “informal sector” which does not really denote a specific “sector”, but is rather used to describe all workers deriving their income from informal and unregulated activities. However, the use of the terms “formal sector” and “informal sector” throughout the sources referred to in this section, makes the occasional reference to these terms unavoidable.

¹⁷⁵ Gruat (1997) *Adequacy and social security principles in pension reform* 3.

¹⁷⁶ Estimated between 66% and 84% of employees in the formal sector, which is good, even when compared to international levels (National Treasury (2004) *Discussion Paper* 13 and 17. The Taylor Committee Report (2002) para 9.1.1 estimates coverage at about 80% of formally employed workers.

exclusive, as workers outside of this sector do not enjoy the same protection.¹⁷⁷

South Africa has a large and growing informal economy,¹⁷⁸ characterised by informal traders, small-scale manufacturers and domestic workers.¹⁷⁹ In the absence of a public national retirement insurance scheme, workers deriving their incomes from informal or unregulated activities are therefore left to their own devices when it comes to securing retirement income. Most workers in the informal economy lack the means to pay regular contributions and administration costs and are thereby excluded from retirement funding schemes.¹⁸⁰ The National Treasury's *Retirement Fund Reform* discussion paper rightly identified providing improved access to an affordable retirement saving vehicle for those with irregular and informal earnings as a key reform objective.¹⁸¹

¹⁷⁷ National Treasury (2004) *Discussion paper* 13.

¹⁷⁸ 20% of the economically active population are made up of persons deriving their income from informal, irregular or unregulated economic activities (National Treasury (2004) *Discussion paper* 12). The DSD discussion document (2007) 62 estimates that there are 2,5 million informal sector workers.

¹⁷⁹ Asher and Olivier "Retirement and old age" in Olivier et al (eds) (2003) *Social security: a legal analysis* 253.

¹⁸⁰ According to the National Treasury (2004) *Discussion paper* 21 fn 17, "[t]he administration cost of operating an individual account for a member of an occupational retirement fund is equivalent to so large a percentage of likely savings for such a person that participation in an occupational retirement fund or a retirement annuity fund is not feasible." Workers so excluded could potentially qualify for the older person's grant, provided they can meet the requirements for the grant. The Mouton Committee used students and housewives as examples of persons involved in the informal economy and who are unlikely to be able to contribute to the formal retirement system (Mouton Committee Report (1992) para 2.4).

¹⁸¹ National Treasury (2004) *Discussion paper* 12. See also National Treasury (2007) 2nd *discussion paper* 19.

Workers in the informal economy mainly rely on social assistance such as the older person's grant for retirement income. The means test for the older person's grant as currently applied, combined with the relatively high level of the grant compared to the earnings of the majority of workers in the informal economy,¹⁸² may serve as a disincentive to save for retirement through contributory earnings-related schemes.¹⁸³ Informal social security measures are seen as alternative social protection measures by many persons marginalised in terms of the formal system.¹⁸⁴

That said, it is submitted that cost-effective options to progressively include workers in the informal economy in the earnings-related pillars of the reformed social insurance scheme should be investigated.¹⁸⁵ One option would be the progressive inclusion of workers in the informal economy in a mandatory social insurance scheme that is adapted to make provision for workers from this sector. A major difficulty for the inclusion of workers in the informal economy in a mandatory system is the collection of their contributions and therefore only those informal sector employees whose

¹⁸² Asher and Olivier "Retirement and old age" in Olivier et al (eds) *Social security: a legal analysis* (2003) 254.

¹⁸³ Future changes to the older person's grant, for instance, if the means test were to be abolished (as proposed above at 4.3.2), may have a positive effect on the participation of workers in the informal economy in the retirement funding system.

¹⁸⁴ Burial societies and stokvels are examples of informal social security measures. See Dekker and Olivier "Informal social security" in Olivier et al (eds) *Social security* (2003) 559-593 for a discussion of the role of informal social security structures in South Africa.

¹⁸⁵ See below at 7.3 for a discussion of the coverage of the informal sector in other countries.

contributions can effectively be collected could be included.¹⁸⁶ It should be recognised that once workers in the informal economy are included in a mandatory system and arrangements made for the collection of their contributions, they *pro tanto* become part of the formal economy. Due to the abovementioned difficulties with compulsory participation by informal sector workers, the Treasury Task Team in its second discussion paper recommends that steps be taken to encourage voluntary participation by workers in the informal sector.¹⁸⁷

The other option is the creation of a low cost savings scheme for workers marginalised from the formal retirement funding structures.¹⁸⁸ It is submitted that workers in the informal economy should be encouraged to join the savings scheme on a voluntary basis to avoid the abovementioned problems related to mandatory systems and the collection of contributions.

5.6.2 The effect of low wages and sporadic unemployment on coverage

South Africa has a high rate of unemployment.¹⁸⁹ The unemployed are not covered by the current retirement funding system as only employees can

¹⁸⁶ The Taylor Committee Report (2002) para 3.6.2 suggested that “if the mechanisms for collection are not likely to be efficient, regulations for the introduction of compulsory cover will not be effective, and should not be introduced”.

¹⁸⁷ National Treasury (2007) *2nd discussion paper* 14.

¹⁸⁸ As proposed by the Taylor Committee Report (2002) para 9.2.6.3; National Treasury (2004) *Discussion paper 22* and National Treasury (2007) *2nd discussion paper* 14.

¹⁸⁹ The unemployment rate for the 3rd quarter of 2009 was 24.5% (StatsSA (2009) “Latest key indicators” <http://www.statssa.gov.za/keyindicators/keyindicators.asp> (accessed 11/11/2009).

become members of occupational retirement funds.¹⁹⁰ They therefore have to rely on social assistance in the form of the older person's grant when they reach retirement age. Retirement funds, including public funds, are seen as part of social insurance and therefore aim to compensate workers for loss of income.¹⁹¹ For this reason persons who remain unemployed for most of their working lives will continue to fall outside the scope of retirement insurance.

Unemployed persons are not the only persons that find themselves marginalised in the current retirement funding system. Both defined benefit and defined contribution funds have factors that have a prejudicial effect on the retirement benefits of low wage workers and 'atypically'¹⁹² employed workers. In the case of defined benefit funds, lower paid and "atypical" employees are penalised by the benefit formula, as the employee's final wage¹⁹³ and years worked¹⁹⁴ would yield lower benefits. With defined contribution funds, the benefit is based on contributions made by and on behalf of the employee. As contributions are usually based on a percentage of the wage set out in the fund rules, the contributions for low wage

¹⁹⁰ In theory, an unemployed person can purchase a retirement annuity, but it is unlikely that the majority of unemployed South Africans can afford to do so.

¹⁹¹ See above at 2.2 for the distinction between social assistance and social insurance.

¹⁹² E.g. contract workers who might experience periods of no income once a particular contract is terminated, casual employees and seasonal workers (although "atypical" may be a misnomer, as this type of employment is becoming increasingly prevalent). Casualisation of the workforce also has an impact on retirement income as many of these employees have no benefits such as retirement fund contributions paid on their behalf. See Bodibe (ed) (2006) *The extent and effects of casualisation in Southern Africa: analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe* 13.

¹⁹³ Which would be low for lower paid workers.

¹⁹⁴ Atypical (or 'non-standard') workers have difficulty with accumulating a sufficient length of service as they work fewer and irregular hours.

employees would be low which translates into lower retirement benefits. This is particularly the case with employees who can only make irregular contributions to the fund.

In terms of the current legislation applicable to older persons there are a number of disadvantages for low income workers in joining a retirement fund. In the first instance, they run the risk of being disqualified from receiving the older person's grant, as other retirement income is currently taken into account in the means test for the grant.¹⁹⁵ It was therefore recommended by the Treasury Task Team that the benefits received from the proposed National Savings Fund¹⁹⁶ be exempt from the means test. However, an exemption of only members of the National Savings Fund could constitute unfair discrimination against low income earners belonging to other funds and a blanket exemption from, or abolishing the means test for the older person's grant would be a better option,

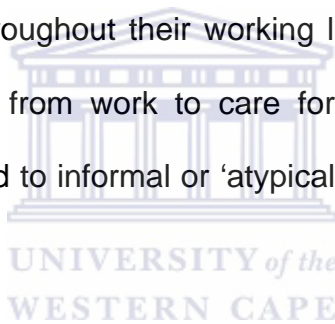
In addition, disincentives for saving for retirement such as high administration costs, the risk of low investment returns and the inability to make regular contributions exist. These disincentives to retirement saving by low income workers can possibly be addressed in a retirement savings vehicle similar to the National Savings Fund proposed by the Treasury Task Team rather than

¹⁹⁵ Reg 19(1)(e) read with Annexure A of GN R898 in GG 31356 of 22 August 2008; National Treasury (2007) *Budget review 2007* 112.

¹⁹⁶ The National Savings Fund (NSF) is envisaged as a national savings vehicle for persons with low incomes. See National Treasury (2004) *Discussion paper 22*.

occupational retirement funds.¹⁹⁷ It is recommended that the retirement savings fund be regulated to the same extent as existing funds as far as administration and governance is concerned in terms of legislation similar to the Pension Funds Act. This would allay fears that the savings fund would be a less secure and inferior retirement savings vehicle compared with other funds.

Restricted access to retirement funding is a problem for members of both defined benefit and defined contribution funds who have periods of unemployment scattered throughout their working lives, for example women who have to take time off from work to care for their children or elderly parents or who are relegated to informal or 'atypical' employment due to their care-giving tasks.



Under the current retirement benefit system, only employees can become members of funds and thereby entitled to benefits upon retirement. People who spend all their time on tasks that are not regarded as "work" for an "employer" such as household maintenance, caring for other household members and community service, therefore, have no access to retirement funds. The time these caregivers spend caring for their children and elderly parents is time that they cannot earn pensionable income, leading to decreased or no retirement benefits and, in many cases, reliance on the state

¹⁹⁷ National Treasury (2004) *Discussion paper* 22-23 and 26.

The high cost of private retirement savings vehicles also prevent many caregivers from saving for their own retirement. As stated by Binney and Estes:

Caregivers face financial burdens, loss of outside employment opportunities, disqualification from Social Security and penalties for “years out” of employment.¹⁹⁸

Pension reform will have to include special provisions to cater for the needs of caregivers who, relative to other members, could not accumulate enough contributions or years of service to benefit from a decent pension.¹⁹⁹ The call for improved social security benefits for caregivers gains in importance in the context of legislation aimed at shifting much of the burden of caregiving of older persons to their families and communities.²⁰⁰

Periodically unemployed and low income workers are economically vulnerable and increasingly so in their old age. A retirement funding system that excludes them or pays them minimum benefits only, cannot be regarded as a reasonable measure to provide access to social security as required by section 27 of the Constitution. In cases like these where there are design faults in the retirement benefit system, the state surely cannot require individuals to be responsible for their own retirement funding and should step in.

¹⁹⁸ This statement of Binney and Estes “The retreat of the state and its transfer of responsibility: the intergenerational war” (1988) 18 (1) *International Journal of Health Services* 92 was made in the context of caregivers in the USA, but is just as relevant to South African caregivers.

¹⁹⁹ Gruat (1997) *Adequacy and social security principles in pension reform* 11.

²⁰⁰ See below at 6.2 and 6.3 for a discussion of the role of family and community caregivers in providing domiciliary care to older persons.

It is in the interest of intergenerational solidarity that provision is made for marginalised groups such as workers in the informal economy, family and community caregivers, low income workers and sporadically unemployed persons. Even though the intergenerational contribution by formal sector employees is more noticeable and easily measured, the groups discussed above contribute (even if sometimes only indirectly) to the welfare of older persons and children in their families and communities. As a consequence they are equally entitled to intergenerational support upon reaching retirement age than formal sector employees, and the law should make provision for measures to put intergenerational solidarity into effect. What is required is an arrangement which allows the members of the marginalised groups mentioned above membership to a retirement funding system which is both flexible enough to handle irregular contributions and contains incentives to retain benefits until retirement.²⁰¹

5.7 FUND GOVERNANCE

As was stated earlier in this chapter²⁰² “confidence in the long-term continuity of institutions” and “trust in the law and sound financial and economic management” are central to a functioning retirement insurance system and to

²⁰¹ National Treasury (2004) *Discussion Paper* 20 – 23. See also Taylor Committee Report (2002) figure 16 at 94

²⁰² Above at 5.1.

intergenerational solidarity. The Fidentia scandal²⁰³ (and other less widely reported fund failures) has highlighted the importance of legal standards for the governance of retirement funds. The various acts regulating the current retirement fund landscape were outlined above.²⁰⁴ The fragmented legislation, amongst a variety of other reasons, has led to problems of poor governance of retirement funds.

The reform discussion documents examined in this chapter all point to one of the pillars (“second pillar”) of the new retirement system being a mandatory public fund. Fund governance issues for the public fund such as oversight and disclosure of information can be addressed in the founding legislation. The situation would be different for the so-called “third pillar” funds (mandatory supplementary funds). If the reformed system provides members with the option to choose which fund they want to belong to, improvements in the regulation of the different funds will be required. Definite measures should be taken to minimise failures of these funds, particular if they are in the hands of private fund managers²⁰⁵ and to ensure that there is proper

²⁰³ Fidentia Asset Management (Pty) Ltd was placed under curatorship in February 2007 by the Cape High Court after R689m of the Mineworkers’ Provident Fund invested in Fidentia through the Living Hands Investment Trust (owned by Fidentia) was found to be missing. As a result many of the widows and orphans who depended on the payments from the Mineworkers’ Provident Fund for their livelihood were left destitute (Morris “Fidentia case: complaints by mine widows sparked probe” *Cape Times* 5 February 2007 <http://www.capetimes.co.za> (accessed 16/05/2009); Steenkamp and Malan “How safe is safe” Febr 2009 *USB Leaders’ Lab* 26). See also Financial Planning Institute of Southern Africa (2007) *Social security and retirement fund reform in South Africa* 9.

²⁰⁴ At 3.3.2.1.

²⁰⁵ ANC (2007) *Social Transformation* 4. See below at 7.3.3.2 and 7.3.3.3 for a discussion of the Chilean experience with a variety of fund managers.

disclosure of all relevant information to fund members, so that they can make informed choices about which fund offers the best value.

Fund governance will remain an important factor even in the reformed pension system, as no matter what the design of a retirement system is – whether it is PAYG or fully funded; defined benefit or defined contribution – if the persons in charge of funds do not comply with their legal duties, the benefits of some or, in worst-case scenarios, all members will be adversely affected.²⁰⁶ The Department of Social Development recognises that neither state-run nor private funds are immune to governance failures and suggests that an independent “special-purpose” regulator be established to oversee all retirement funds in the reformed system, whether the funds are public or private.²⁰⁷ It is submitted that a cohesive approach to the reformed multi-pillar system would indeed call for a “special-purpose” regulator for the whole system, as long as steps are taken to retain the expertise of the current regulator, particularly for the proposed occupational fund pillar(s) in the reformed system.²⁰⁸

²⁰⁶ The “failure of trustees and product and service providers to recognise, disclose and adequately manage conflicts of interest” is a regulatory problem experienced worldwide (National Treasury (2007) 2nd *discussion paper* 26).

²⁰⁷ DSD discussion document (2007) 41.

²⁰⁸ It is worth mentioning that in the UK, the Pensions Act 2004 created the Pension Regulator to supervise all occupational funds and to ensure compliance with the relevant legislation (see below at 7.3.4.2). The fact that the need for a regulator specifically for the occupational fund pillar of a multi-pillar system was identified in the UK should be taken into account when the level of supervisory authority for the proposed multi-pillar system in South Africa is determined.

The promotion of intergenerational solidarity is a long-term project. The safeguarding of intergenerational solidarity therefore depends on effective fund governance to ensure that retired persons receive promised benefits and that future generations would be able to receive similar benefits.

5.8 INCOME SECURITY IN RETIREMENT

It is submitted that the state's responsibility to retired older persons does not only entail the provision of retirement benefits but also includes measures to ensure that an individual who has saved for his or her retirement can be assured that promised benefits would not have dwindled by the time he or she retires. This responsibility of the state²⁰⁹ towards an individual to secure an adequate standard of living throughout his or her lifetime has much in common with the concept of intergenerational solidarity, whilst still incorporating some aspects of 'neo-liberalism'. The mere presence of 'neo-liberal' aspects in the retirement funding system will not of necessity detract from the goal of social solidarity, as long as a careful balance between self-sufficiency ('neo-liberal') and redistribution (solidarity) is struck. It is submitted that the appropriate tool to strike this balance is the legislation creating the reformed retirement funding system.

²⁰⁹ I.t.o. s 27(1)(c) and (2) of the Constitution (right of access to social security); s 25 (right not to be arbitrarily deprived of property); the equality clause (s 9) and the protection of human dignity of older persons (s 10).

Because of limited financial resources, measures to encourage those individuals who are able to do so to save for their retirement will always form part of the South African retirement income system, despite their 'neo-liberal' slant. This chapter of this thesis therefore aimed to determine whether the state offers adequate protection for those who wish to provide for their own retirement or whether more could be done.

The National Treasury 2004 discussion paper²¹⁰ estimates that although approximately 50% of the economically active population are able to provide for their own retirement through occupational retirement funds and voluntary savings arrangements, thus supporting the ideal of the individual providing for his or her own old age, a proportion of these will nonetheless fall back on the older person's grant at a later stage. This is a clear indication that the state should not be absolved of responsibility for even those that provide for their own old age and that steps have to be taken to make sure that their retirement income is secured.²¹¹

It is submitted that even though there is a close relation between the individual's moral obligation to make use of opportunities to provide for

²¹⁰ National Treasury (2004) *Discussion paper* 12.

²¹¹ See Mokgoro J's comments on the interface between "self-sufficiency" of an individual and the granting of access to socio-economic rights as part of the "cost we have to pay for the constitutional commitment to developing a caring society" in *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC) 595, para 65. Although these comments were made in the context of the right of access to social security of permanent residents, they can be equally applied to individuals who initially have the ability to save for their retirement but then fall on hard times.

financial security in old age and the extent of the state's financial obligations towards that individual,²¹² this does not absolve the state from its duty in terms of section 27 of the Constitution to take "reasonable measures" to provide access to retirement funding. The state's constitutional obligation does not require a mere adoption of a legislative framework or regulation of the retirement system; it requires the state to actively participate as guarantor of the system.²¹³ Participation by the state as underwriter of the reformed system is crucial as "history and experience have proved that the role of the State is critical providing the platform for a social insurance system to ensure the pooling of risks and to achieve social solidarity objectives".²¹⁴

Ultimately, the pension reform process seeks to find a new balance of responsibilities between the state, employers and individual fund members. The reforms should build on the achievements of the current retirement funding system. Although the regulatory functions performed by the state (supervision by the Registrar of Pension Funds) generally conform to international standards,²¹⁵ there remains some scope for improvement.²¹⁶

²¹² S 27(1)(c) guarantees access to social assistance to those who "are unable to support themselves and their dependants".

²¹³ Gruat (1997) *Adequacy and social security principles in pension reform* 8. See ANC (2007) *Social Transformation* 3, in whose view the state "cannot simply assume the role of consumer protection and watch failures of private providers" (at 4). Although the National Treasury (2004) *Discussion paper* 7 plays down the frequency of pension failures, it admits that the consequences can be disastrous when pension funds do fail.

²¹⁴ ANC (2007) *Social Transformation* 4.

²¹⁵ National Treasury (2004) *Discussion paper* 12 and 17.

²¹⁶ See above at 5.7.

Hence, the reformed retirement funding system will require the creation of comprehensive standards of regulation and supervision.²¹⁷

Many of the problems currently experienced in the retirement funding sector, such as leakage,²¹⁸ fund governance,²¹⁹ and administrative costs could potentially be addressed through statutory amendments. However, there seems to be consensus among commentators that a complete overhaul of the retirement funding system is required.²²⁰

The objective of adequate retirement income for all will require an improved linkage between the retirement fund sector and private retirement insurance on the one hand and, on the other, social assistance and the benefits paid out of these programmes. Many of the committees and task teams tasked with restructuring and reforming social security in South Africa have advocated a holistic approach to the provision of income in retirement.²²¹ Most of the reform proposals envisage a multi-pillared retirement funding system that incorporates methods of retirement funding ranging from social assistance, to

²¹⁷ Madonsela (2008) "Keynote address" Institute of Retirement Funds Conference 9.

²¹⁸ Discussed above at 5.4.

²¹⁹ Discussed above at 5.7.

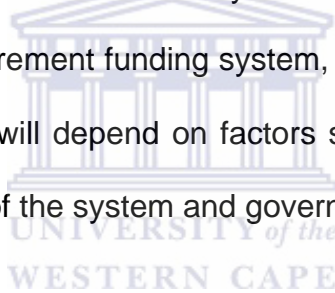
²²⁰ As proposed in the DSD discussion document (2007); National Treasury (2004) *Discussion paper*; National Treasury (2007) *2nd discussion paper*; Madonsela (2008) "Keynote address" Institute of Retirement Funds Conference 6 and 7, in whose opinion the reform of the retirement funding system is crucial to create social solidarity.

²²¹ Taylor Committee Report (2002) para 9.1.2; National Treasury (2007) *2nd discussion paper* 38 where it was stated that "South Africa has a well-established occupational and individual retirement funding industry that provides protection to many, and a substantial social assistance grant programme that provides income support to the poor. But between the means-tested grant programmes and tax incentivised saving, there is effectively no fiscal support for saving and social insurance: the basic, contributory, earnings-related social protection system is incomplete and uncoordinated."

mandatory and/or voluntary retirement fund membership. The multi-pillar model of retirement funding creates the potential for retirement coverage of previously excluded persons, such as workers in the informal economy and employees with low and irregular earnings.²²²

However, the achievements of the current system in addressing social need should be recognised and it follows that it should only be replaced by a system which is economically sustainable and has broad political support.²²³

The retirement reform process is therefore based on principles such as solidarity, equity, inclusiveness and efficiency.²²⁴ Whether the product of the reform process, the new retirement funding system, will indeed incorporate all of these principles equally, will depend on factors such as the choice of the types of funds forming part of the system and governance structures.



It is submitted that pension reform policies and legislation must be judged in terms of their likely promotion of intergenerational solidarity. Evaluated in this context, a multi-pillar approach with universal social assistance with a PAYG tier complemented by a fully-funded component would create a common goal

²²² The proposals for the inclusion of currently excluded workers were discussed at 5.6.2 above.

²²³ The Treasury Task Team summarises the strengths of the current occupational fund system as follows: "South Africa's retirement fund industry is supported by a wide range of sophisticated service providers, in areas such as administration, actuarial services, employee benefit consulting and investment management. In reform, it is necessary to harness this existing capacity and build on the foundation laid by private sector retirement provisioning. Ensuring and maintaining a strong, cost-effective and well-regulated private pensions sector is thus a critical element of South Africa's overall retirement funding strategy." (National Treasury (2007) *2nd discussion paper* 18).

²²⁴ Madonsela (2008) "Keynote address" Institute of Retirement Funds Conference 8. These principles were discussed in various paragraphs in 5.3 - 5.7 above.

for all generations. Such a scheme would promote the interdependence of generations through the social assistance and PAYG components whilst still allowing working age generations the option to save for their own retirement.²²⁵

As was stated above, the South African population is still relatively young and therefore the PAYG component of the proposed scheme is sustainable and will most probably not experience the competition between generations for scarce resources found in aging populations.

Even though retirement funding systems are a reflection of the political, economic and social environment, they can also influence that environment.²²⁶ It is submitted that intergenerational solidarity must be included among the points of reference for assessing the value of the pension reforms. It is imperative that intergenerational solidarity in the pension system is entrenched by legislation and enforced by judicial precedent, as

[p]olitically crafted solutions are likely to change as political circumstances change from time to time. While change is not automatically for the worse, the danger exists that gains achieved at one particular stage may be easily lost. In the past, one has seen governments with lofty ideas about the enforcement of socio-economic rights changing and reneging on their promises. Sometimes it is economic realities which force them to take that route.²²⁷

²²⁵ See Generations United (2007) *GU Public Policy Agenda for the 110th Congress* iv; vi and 19.

²²⁶ Gruat (1997) *Adequacy and social security principles in pension reform* 6.

²²⁷ Majola "A response to Craig Scott: a South African perspective" (1999) 1(4) *ESR Review* 7.

The aim therefore is to develop a pension system which is politically, socially and economically acceptable and which can guarantee the rights of current members as well as future generations of members. Both the new retirement funding system and transitional measures will have to meet the constitutional requirements of reasonableness and progressive realisation of access to social security, with one goal being to limit the effect of reforms on current pensioners and persons nearing retirement.²²⁸

At the heart of the pension reforms lie important issues like poverty alleviation and income replacement rather than the exact number of and composition of the different “pillars” of the reformed system. It follows that these core functions should be guaranteed, which means that they must be “established by law, compulsory, placed under the responsibility and close guidance of the State while not necessarily directly managed by the State or its subsidiary bodies, and include as built-in elements a certain number of safeguards concerning notably good governance, financial viability, predictability and adequacy of benefits.”²²⁹

²²⁸ Gruat (1997) *Adequacy and social security principles in pension reform* 8.

²²⁹ Gruat (1997) *Adequacy and social security principles in pension reform* 11.

CHAPTER 6

INTERGENERATIONAL SOLIDARITY AND THE PROVISION OF CARE AND SUPPORT FOR OLDER PERSONS

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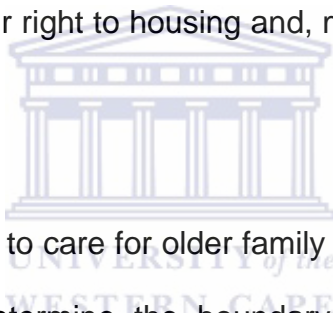
6.1 INTRODUCTION

There are three recognised ways of support for those older persons who no longer have earning capacity and/or the ability to care for themselves, namely families¹, communities and the state. One of the stated aims of this thesis is to determine with whom the obligation to care and support older persons lies: with the state only; with family members and the community where the older persons reside; or, the state, in partnership with families and communities. This chapter will examine the validity of South Africa's official policy that limits the state's responsibility to caring for and accommodating frail and destitute older persons, with families, communities and non-governmental organisations being burdened with the care and support of all other older persons. The need for financial assistance by the state to family and community caregivers will be discussed, with particular focus on the consequences for caregivers of the obligation to care for older persons. In addition, measures to ensure that older persons are treated with the respect and dignity they deserve will be investigated. Finally, the notion of 'intergenerational equity' and its potential impact on intergenerational solidarity and policy on older persons will be discussed.

¹ Family support is more dominant in developing countries.

6.2 THE FAMILY AS A SOURCE OF SUPPORT FOR OLDER PERSONS

In addition to the financial support provided for older person through older person's grants and retirement fund benefits,² older persons have an additional need for support and care. Due to the decreased ability of a large number of older persons to see to their daily needs and the increasing medical care required by many older persons, the physical circumstances of older persons need as much attention as their financial needs. The protection of older persons' right of access to care and support is part of their right of access to social security³ and is linked to their right to housing and, most importantly, their right to dignity.⁴



The responsibility of families to care for older family members is discussed in this section. The aim is to determine the boundary between the family's legal obligation to care for older family members and the state's obligation to take reasonable measures to provide appropriate care to older persons.

6.2.1 History of and assumptions regarding familial support of older persons in South Africa

Many references are made in this thesis to the "traditional" obligations of the family towards older family members. This "tradition" is not confined to any

² Discussed above at 3.3.1.1 and 3.3.2.

³ The right of access to social security is discussed at 3.2.1 above.

⁴ See above at 3.2.5 and below at 6.4.2 for discussions of older person's right to dignity.

single ethnic group or culture and, as can be seen from the following quote from Midgley, it can be found in many communities in developing countries:

The family has for centuries been the primary institution through which the basic needs of individuals have been met. The family has also provided for those who could not participate fully in its efforts to produce enough for subsistence and exchange; in this way, those who were economically active, supported the young, elderly, handicapped, and sick whose productive capacities were limited or impaired. These primordial responsibilities were institutionalized in most cultures in the patterns of kin and clan obligations which specified what help should be given, by whom, and under what conditions.⁵

Studies have shown that in developing countries, particularly in Africa, informal (family and community) systems “provide the bulk of social support for older persons” and that the public social security systems therefore play a less important role.⁶



The rules of customary law have to a great extent determined the extent of the duty to care for older family members in South Africa. The comments made by Langa DCJ in *Bhe and Others v Magistrate, Khayelitsha and Others*⁷ regarding the customary laws of succession are just as applicable in the context of the traditional obligation to support family members. According to Langa DCJ:

The rules did not operate in isolation. They were part of a system which fitted in with the community’s way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities. It was designed to preserve the cohesion and stability of the extended family unit and

⁵ Midgley (1984) *Social security, inequality and the Third World* 103. This view is echoed by Quadagno “Generational equity and the politics of the welfare state” (1990) 20 (4) *International Journal of Health Services* who states (at 647) that the concept of children caring for their aging parents “has been an enduring facet of both western and eastern cultures for centuries”.

⁶ Ståhlberg et al *Retirement income security for men and women* (2008) 10. An in-depth study of informal kinship-based social security measures falls outside the scope of this research. See Dekker and Olivier “Informal forms of social security and informal sector social security” in Olivier et al (eds) (2004) *Introduction to social security* 83-99; Dekker “Mind the gap: suggestions for bridging the divide between formal and informal social security” (2008) 1 *LDD* 117-131 for more on informal social security measures.

⁷ 2005 (1) BCLR 1 (CC).

ultimately the entire community. This served various purposes, not least of which was the maintenance of discipline within the clan or extended family. Everyone, man, woman and child had a role and each role, directly or indirectly, was designed to contribute to the communal good and welfare.⁸

In his judgment in the same case, Ngcobo J explained the significance of the family unit in traditional society as follows:

The family unit was the focus of social concern. Individual interests were submerged in the common weal. The system emphasised duties and responsibilities as opposed to rights...

A sense of community prevailed from which developed an elaborate system of reciprocal duties and obligations among the family members. This is manifest in the concept of *ubuntu – umuntu ngumuntu ngabantu* – a dominant value in African traditional culture. This concept encapsulates communality and the interdependence of the members of a community.... It is this system of reciprocal duties and obligations that ensured that every family member had access to basic necessities of life such as food, clothing, shelter and healthcare....

The obligation to care for family members is a vital and fundamental value in African social system.⁹

During the apartheid era the assumption that socio-economic burdens are to be carried by families was the justification for excluding Africans from welfare provisions.¹⁰ Even though racial parity has been achieved in welfare provisions, government policy regarding older persons generally operates on the assumption that they can rely on their families for support.¹¹

Apartheid-era welfare policy was based on the assumption that all people lived in two-generational nuclear families headed by a male and with female

⁸ At 26, para 75.

⁹ 2005 (1) BCLR 1 (CC) 50 - 51, paras 162, 163 and 166. Reference is also made to Art 29 of the African (Banjul) Charter on Human and Peoples' Rights which makes provision for the individual's duty "to respect his parents at all times, to maintain them in case of need". See below at 7.2.5.1 for the duties created by the African Charter on Human and Peoples' Rights.

¹⁰ Hassim (2005) "Gender, Welfare and the Developmental State in South Africa" 6.

¹¹ The White Paper for Social Welfare GN 1108 in GG 18166 of August 1997 (hereafter "White Paper for Social Welfare") 93.

caregivers.¹² This assumption ignored the reality of the variety of household forms in South Africa.¹³ The definition of “family” provided by the White Paper for Social Welfare¹⁴ reflects the shift to a more realistic concept of family that includes the extended family as “individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system”. The family is regarded as “the primary social unit which ideally provides care, nurturing and socialisation for its members”.¹⁵

The impact of the White Paper for Social Welfare on policy regarding care and support of older persons is twofold:

- The family is seen as the core support structure for older persons;
- Only frail and destitute older persons are deemed to be the responsibility of the state.¹⁶

The assumption that families are the primary support structure for older persons therefore seems to translate into a limitation of state care and support for older persons.¹⁷

¹² Based on the Western-based nuclear family model from which family benefits as a branch of social security originated (Malherbe “Family” in Olivier et al (eds) (2003) *Social security: a legal analysis* 378.

¹³ Dekker and Olivier “Informal forms of social security and informal sector social security” in Olivier et al (eds) (2004) *Introduction to social security* 86. See above at 4.2 for a general overview of apartheid-era welfare policy.

¹⁴ White Paper for Social Welfare (1997) 93.

¹⁵ Ibid. At para 2.31, the White Paper describes the family as “the basic unit of society”.

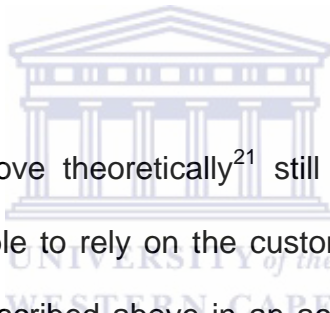
¹⁶ White Paper for Social Welfare para 8.82.

¹⁷ Other than the reference to the proposed programmes to promote home-care of older persons, including “support programmes for care-givers” (White Paper para 8.82(i)), no mention is made in the White Paper of any specific assistance for families as they take up their duties as the “primary support structure for older persons”. S 11 of the Older Persons Act 13 of 2006, makes provision for some assistance for caregivers in the form of respite care for family members caring for older persons.

In 1984, Midgley¹⁸ described a situation where state schemes other than social assistance required beneficiaries

to be in a state of near or total destitution to qualify for help and normally the capacity of relatives to maintain the claimant is taken into account. Generally, assistance can only be expected if there are no relatives who can support the claimant. In many developing countries, the legacy of the English Poor Laws is still a powerful influence. In addition to the notion of [relatives'] responsibility, which is incorporated into most schemes, residential care is widely used to deal with the destitute...¹⁹

In many cases family caregiving is preferred over “impersonal” state services. In the absence of state-provided services, many older persons have to turn to traditional systems of support, of which support by the extended family is the most prevalent.²⁰



The situation described above theoretically²¹ still applies today and an older person may therefore be able to rely on the customary rule of support of older persons by their families described above in an action against his or her family members, as customary law is recognised by the Constitution as part of South African law. In terms of section 211(3) of the Constitution, courts must apply customary law “when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”. In terms of section 39(3), rules of customary law are protected as long as they are consistent with the Constitution and the Bill of Rights.

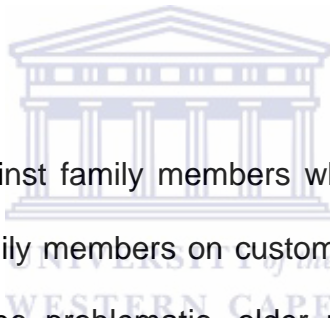
¹⁸ Midgley (1984) *Social security, inequality and the Third World* 133.

¹⁹ For more on the English Poor Laws see below at 7.3.4.4.1.

²⁰ Midgley (1984) *Social security, inequality and the Third World* 196.

²¹ See below at 6.2.2 for the view that the traditional family support structure for older persons is not necessarily the norm anymore.

The question arises whether an action based on the customary duty of support by family members is the best course of action for all older persons who are destitute or for whom family support is not forthcoming. The problem with an action based on customary law is that it is “a dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates”,²² making it difficult to determine whether the rule relied upon is still applied. As will be seen below, there is sufficient evidence that the traditional system of reciprocal duties among family members has broken down to such an extent that family support of older persons cannot be regarded as the rule anymore.



While basing an action against family members who are reluctant to fulfil their obligations toward older family members on customary support of older persons by families may prove to be problematic, older persons are not left without recourse. South African common law recognises the rule of filial responsibility, in terms of which adult children are held responsible to care for their indigent parents. The basis of the common law filial responsibility is the reciprocal duty of support existing between parents and children. Just as parents are required to support their children, adult children are required to support their parents.²³

²² *Bhe and Others v Magistrate, Khayelitsha and Others* 2005 (1) BCLR 1 (CC) 48, para 153. Statutes, textbooks and case law on indigenous law constitute codified or “official” customary law that must be distinguished from the customary law practiced in the community, the “living” law (at paras 150-154).

²³ *Voet 25 3 4* cited in *Anthony v Cape Town Municipality* 1967 4 SA 445 (A) 447.

However, the common law filial duty to support parents lacks sufficient clarity to be used widely as the intersection between the family's duty to care for the older person and state support for that older person. As was shown above in the discussion of the case law on the duty to support parents,²⁴ indigence on the part of the parent relying on support has to be proven. Although the test for indigence is that there should be "an extreme need or want for the basic necessities of life",²⁵ whether a parent is indigent enough to be able to rely on support from his or her children will depend on the circumstances of each case.²⁶ In addition, only children who are able to support their parents can be compelled to do so, but no clear benchmark for the ability to do so has been established.

Because it is a common law duty, there is no statutory link between filial responsibility and the state's statutory obligations to provide for older persons.²⁷ "Indigence" is the test for both state support²⁸ and family support. Even if one were to accept the policy view that the state is only liable to provide care for older persons when their own children cannot, the absence of a statutory measure to determine where the filial obligations end and the state's duties begin means that

²⁴ The South African case law on filial obligations was outlined above at 3.3.4.2.

²⁵ *Smith v Mutual Federal Insurance Co Ltd* 1998 4 SA 626 (C) 632. Basic necessities of life include food clothing, shelter, medicine and care in times of illness (*Van Vuuren v Sam* 1972 2 SA 633 (A) 642).

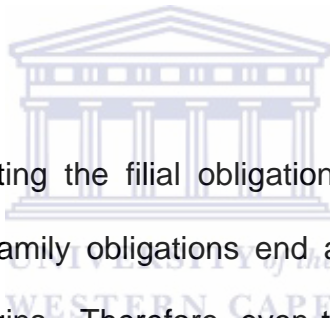
²⁶ *Oosthuizen v Stanley* 1938 AD 322 at 327.

²⁷ The means test for the older person's grant does not include reference to adult children's income and assets. Of course, where the older person receives a grant from the state which enables the older person to provide for the "basic necessities of life", the older person may not be viewed as being "indigent".

²⁸ I.t.o. the White Paper for Social Welfare. The Older Persons Act 13 of 2006 makes no reference to "indigent" older persons, except where the state is required to support community-based programmes to provide "appropriate services contained in the indigent policy for vulnerable and qualifying older persons" (s 11(2)(h)).

there is no current measure to determine whether an indigent older person may directly rely on state support or should rather be advised to seek support from his or her family.

It is submitted that legislation determining the filial obligation to support elderly parents is also required in order to clearly outline the responsible parties, in particular the circumstances under which an adult child is absolved from the duty to support. Legislation can also determine the penalties for failing or refusing to support a parent, as well as measures to enforce the duty to support other than expensive civil actions.

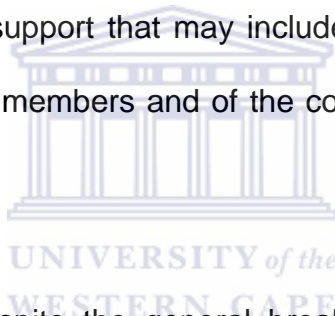


Most importantly, incorporating the filial obligation in legislation would clearly delineate the point where family obligations end and the state's responsibility toward the older person begins. Therefore, even though both the common law and customary law make provision for support of older persons by their families, the breakdown of traditional support of older persons necessitates statutory intervention to enforce the obligations of family members toward older relatives.

Intergenerational solidarity implies the willingness of the working-age generation to provide financial and non-cash support to older persons. Care and support services for older persons provided by and subsidised by the state can also be considered solidarity-based schemes.²⁹ However, intergenerational solidarity

²⁹ See above at 1.3.

also entails that older persons abstain from unnecessary claims for support from solidarity-based schemes, as this may strain the willingness of the working-age generation to contribute to these schemes. As with the older person's grant, a solidarity-based measure where legislation clearly delineates the boundaries of solidarity for that particular measure by stating the requirements to benefit from the grant, legislation can, in the case of solidarity-based care and support services, require those older persons whose families have the means to provide care and support, but fail to do so,³⁰ to claim support from their families rather than relying on state-run or state-subsidised services.³¹ Such legislation would have to define the duty to support that may include elements of the customary duty to support older family members and of the common law reciprocal duty of support.



It is acknowledged that despite the general breakdown of traditional support systems for older persons,³² there are still families and communities in all racial and cultural groups where traditional support for older persons continues. Some resistance to legislation regulating family obligations toward older persons is therefore to be expected. It would serve the legislature well to heed the following warning by Dekker and Olivier:³³

³⁰ The breakdown in the traditional support of older persons is discussed below at 6.2.2.

³¹ This does not apply to whether or not the older person is entitled to an older person's grant as the means of the older person's family is not taken into account in the means test for the grant. See below at 7.3.5.7.3 for the interaction between filial support laws and Medicaid benefits (solidarity-based benefits for *inter alia* nursing home care) in a number of states in the USA.

³² Discussed below at 6.2.2.

³³ Dekker and Olivier "Informal forms of social security and informal sector social security" in Olivier et al (eds) (2004) *Introduction to social security* 87. The warning by Dekker and Olivier

“It should also be borne in mind that African people, especially in rural communities, have a strong sense of pride in their own traditions and in the functioning of their community: they, therefore, often resist changes which are imposed on them from outside and which do not evolve from communities themselves.”

For this reason, legislation on family obligations should incorporate as many of the customary law principles as possible. The legislation will have to strike a balance between compensating for the breakdown of traditional family support, whilst still acknowledging and strengthening family support where it still exists.

6.2.2 Breakdown of traditional support of older persons

The breakdown of traditional support of older persons in the rural areas due to the migration of the younger generation to the urban areas is a global phenomenon also found in South Africa.³⁴



According to the National Report on the Status of Older Persons³⁵ the assumption that families will care for older family members no longer holds true for a number of reasons, leaving older persons increasingly reliant on services provided by the community in the absence of state support.

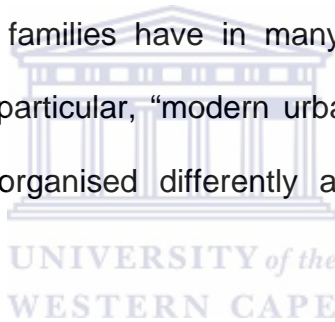
applies equally to other racial and cultural groups with a strong tradition of family and community support for older persons.

³⁴ Myers and Agree “The world ages, the family changes – a demographic perspective” (1994) 21 (1) *Aging International* 12; Bolani et al “Family support” in Olivier et al (eds) (1999) *Social security law – general principles* 270; Asher and Olivier “Retirement and old age” in Olivier et al (eds) (2004) *Introduction to social security* 270. Ståhlberg et al (2008) *Retirement income security for men and women* 2 noted the following about family and community caregiving in developing countries: “Urbanization and changing family patterns put a heavy strain on the extended family or village support and make these informal security systems less reliable.”

³⁵ National Report on the Status of Older Persons (2002) 42 (hereafter referred to as “National Report”).

The main problem in respect of family support of older persons is the “increasing geographic distance between family members created by migration of younger persons and reduced availability of household members for support”.³⁶ The following are additional factors leading to the decline in traditional support of older persons:

- Poverty among rural families, making it difficult for them to provide any assistance to older relatives beyond the most basic support.³⁷
- Disintegration of cultural norms that value older persons and reluctance to accept responsibility for the care of older relatives.³⁸
- Traditional extended families have in many cases been replaced with nuclear families. In particular, “modern urban communities and families are structured and organised differently and no longer purely along traditional lines”.³⁹



The abovementioned factors have all contributed to the “transformation of the traditional African communities into urban industrialised communities with all their trappings...”.⁴⁰ This statement was made in the context of the traditional African duty of support, but is true for all racial groups. Urbanisation and increasing

³⁶ Myers and Agree “The world ages, the family changes – a demographic perspective” (1994) 21 (1) *Ageing International* 14. According to Midgley (1984) *Social security, inequality and the Third World* 197 the migration of adult children to the urban areas has partly been caused by a growth in economic individualism which has undermined the reciprocal economic obligations that traditionally existed in the rural areas. In addition, the practice of circular migration, whereby rural persons migrated to the urban areas to work, but returned to their rural home to share their income with their families, is declining and many adult children settle in the urban areas permanently.

³⁷ Midgley (1984) *Social security, inequality and the Third World* 197.

³⁸ *Ibid.*

³⁹ *Bhe and others v Magistrate, Khayelitsha and Others* 2005 (1) BCLR 1 (CC) 27, para 80.

⁴⁰ At 58, para 190.

economic individualism are factors contributing to the breakdown of support for older family members in all racial groups.

In far too many cases, older persons cannot rely on support from the younger generation and end up being the caregivers of their grandchildren. The role of older persons as caregivers is brought about by increasing numbers of women entering the paid labour force and the decline in the number of members of the younger generation in the rural areas due to AIDS-related deaths.⁴¹

Even if support by family members is to be regarded as the main source of support and care for older persons, this can of course only occur in cases where older persons indeed have adult children or other family members to care for them. Many older persons have no family members to care for them, either because they have never been married and/or had children, or because they have outlived available family members. These older persons are at risk of institutionalisation and poverty, unless their communities provide them with help and support. It is submitted that the state has the responsibility to provide for these older persons what family members would provide for older persons with family caregivers.

⁴¹ Myers and Agree "The world ages, the family changes – a demographic perspective" (1994) 21 (1) *Aging International* 13. See also Tout "Grandparents as parents in developing countries" (1994) 21 (1) *Ageing International* 19-23 for the effect of men and women of working age leaving the rural areas and AIDS-related deaths on the extended family and the additional caregiving burden placed on older persons.

The disintegration of traditional support discussed below creates the need for formal support systems that cater for older persons in need.⁴²

6.2.3 Interaction between family and formalised care for older persons

Any discussion of the choice between family and formal care for older persons of course assumes the existence of a viable system of care provided by, or subsidised by, the state. This has prompted Myers and Agree⁴³ to state that

[b]ecause many of the options for formal service substitution are not available in the less developed regions, such tasks are more unambiguously the responsibility of family and friends.

It can also not be said with certainty whether formalised care for older persons is needed as a result of the disintegration of traditional family support, or whether the existence of, and reliance on, formalised care in fact contributes to the breakdown of traditional family support. The fundamental questions are therefore how family caregiving should interact with state assistance and community care, or, more importantly, whether it can be regarded as an abdication of the state's constitutional obligation to put reasonable measures in place to provide older persons with care and support when the care and support duty is shifted to family members. Can the reliance on family members for care and support be seen as "reasonable" as required by section 27(2) of the Constitution if viewed in the light

⁴² Midgley (1984) *Social security, inequality and the Third World* 126. See Dekker "The role of informal social security in an inter-generational society" ISSA 4th International Research Conference on Social Security, Antwerp 2003, 17.

⁴³ Myers and Agree "The world ages, the family changes – a demographic perspective" (1994) 21 (1) *Ageing International* 17.

of the breakdown of traditional family support? Clearly the state's limited resources for care and support services contribute to the reliance on family members to provide care and support, but it is not as clear whether this is sufficient reason to abandon the notion of state-run and financed care and support services for older persons.

These questions can only be answered in the context of the consequences of family caregiving responsibilities for the family members involved and any assistance provided to family caregivers by the state. Where state programmes to provide assistance to family caregivers are absent, or only provide limited services,

the state should not be allowed to destroy the family, in its many and varied forms, by abandoning it to unsupported burdens in the name of fiscal austerity. Rather, it should become responsive to the needs of individuals and families.⁴⁴

Midgley⁴⁵ believes that the answer to the lack of formal services for older persons lies in finding ways of “mobilizing and linking traditional practices to established government programmes”. His solution is that “instead of lamenting the demise of traditional institutions, social security planners could more usefully seek to identify ways of strengthening them so that their protective functions are maintained”. It is submitted that the more adequate the level of assistance provided by the state to family caregivers, the more reasonable the shift of the caregiving burden to family caregivers would be.

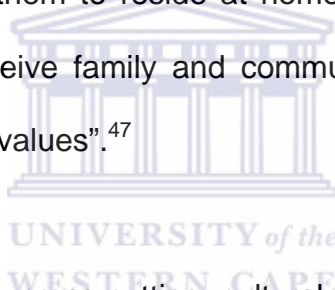
⁴⁴ Binney and Estes “The retreat of the state and its transfer of responsibility: the intergenerational war” (1988) 18 (1) *Intergenerational Journal of Health Services* 95.

⁴⁵ Midgley (1984) *Social security, inequality and the Third World* 196.

6.2.4 Assistance to family caregivers

6.2.4.1 Emphasis on “home-based care”

Traces of the policy preference for family and community-based care over formal residential care can be seen in the Older Persons Act (OPA) where it is stated that older persons have the right to reside at home “as long as possible”.⁴⁶ It is therefore envisaged that older persons should only rely on residential care once it is no longer possible for them to reside at home. Older persons residing at home have the right to receive family and community-based care in line with “society’s system of cultural values”.⁴⁷



As was seen above,⁴⁸ the cross-cutting cultural values that required family members to care for older persons have broken down to such an extent that they should not be regarded as the standard for older persons’ entitlement to family and community-based care. It is therefore recommended that legislation outlining filial support⁴⁹ and community care obligations be enacted, and that this legislation serve as the basis for an older person’s right to family and community-based care, or, when applicable, residential care rather than waning cultural values.

⁴⁶ Act 13 of 2006, s 10(a).

⁴⁷ Section 10(c).

⁴⁸ At 6.2.2.

⁴⁹ See above at 6.2.1 for the argument for formalising filial support in legislation in order to determine the boundary between filial support and solidarity-based measures.

The OPA already regulates community-based care for older persons. What it does not do, is to state at which point an older person becomes entitled to the types of services regulated by the Act.⁵⁰ One option to secure older persons' right to family and community-based care is to amend the Older Persons Act to make provision for assessment procedures as part of older persons' applications for access to residential facilities.⁵¹ The factors that could be taken into account during such an assessment could include:

- Whether care is available for the older person in the family home;
- If so, what steps can be taken to ensure that the family complies with their obligation to support the older person, and whether the family caregiver has access to benefits and support services for caregivers;
- If care is not available in the family home, whether the older person's family can support him or her financially so that the older person can remain in his or her own home, and if so, whether the family can pay for care and support services; and

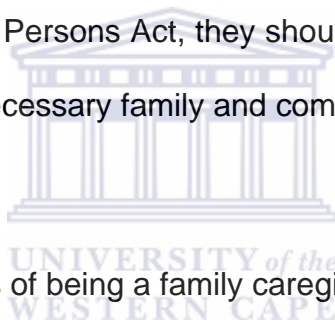
⁵⁰ Except for "home-based care" which is limited to frail older persons in need of full-time care.

⁵¹ As argued below at 6.3.3.3, the proposed multi-pillar national social security system should incorporate a pillar dealing with family, community and residential care and support services for older persons, in addition to the pillars providing financial support. In addition to possible amendments to the OPA, the founding legislation for the new system may offer another opportunity to delineate the boundaries between family, community-based and state care and support services for older persons.

- Whether there are free (or cheap) community-based care and support services available should the older person continue to reside in his or her home and the family is not in the position to support the older person.⁵²

If the proposed assessment shows that the family and community cannot provide the older person with the necessary support, residential care may then be determined to be the best alternative for the particular older person.

Therefore, even though older persons are currently afforded the statutory right to reside at home by the Older Persons Act, they should also have the option *not* to reside at home where the necessary family and community support is absent.



6.2.4.2 Consequences of being a family caregiver

The high costs involved in employing a paid caregiver means that poor families have to rely on informal caregiving for older family members, which often falls to the women in the family.⁵³

A caregiver sees to the physical, psychological, social and material needs of an older person. Although the term “caregiver” is generally a gender neutral concept, there is ample empirical evidence and other authority to safely claim

⁵² See below at 7.3.4.4 for the legislation in the UK providing for assessment of older persons’ financial and personal circumstances before residential or community-based services are allocated to them.

⁵³ Binney and Estes “The retreat of the state and its transfer of responsibility: The intergenerational war” (1988) 18 (1) *Intergenerational Journal of Health Services* 95.

that women make up the majority of family caregivers.⁵⁴ For this reason, it is submitted that Binney and Estes were correct in their assertion that “the call for family responsibility ... is a euphemism for women’s responsibility”.⁵⁵ They also point out the consequences of the policies and laws that emphasise caregiving at home that are followed in many countries, including South Africa, as follows: “Although ‘the family’ has become a surrogate for ‘women’s work’, few women can expect to have caregivers in their own old age.”⁵⁶

South African caregivers also face the dilemma that they forfeit pension-earning employment to take care of older family members.⁵⁷ The choice between pension-earning employment and family caregiving responsibilities may have a disproportionately adverse effect on women as family caregivers, and lead to their reduced retirement income for the following reasons:

- Women’s “lower participation rate in the formal labour market”,⁵⁸
- The interruption of women’s careers in response to child-rearing; and
- The longer life expectancy of women.⁵⁹

⁵⁴ E.g. National Report (2002) 54; Badgett and Folbre “Assigning care: Gender norms and economic outcomes” (1999) 138 *International Labour Review* 311.

⁵⁵ Binney and Estes “The retreat of the state and its transfer of responsibility: The intergenerational war” (1988) 18 (1) *Intergenerational Journal of Health Services* 92. According to Myers and Agree “The world ages, the family changes – a demographic perspective” (1994) 21(1) *Aging International* 15 women are often expected to act as the main caregivers to older persons.

⁵⁶ Binney and Estes “The retreat of the state and its transfer of responsibility: The intergenerational war” (1988) 18 (1) *Intergenerational Journal of Health Services* 93.

⁵⁷ See above at 5.6.2 for the impact of family caregiving on retirement benefits.

⁵⁸ Ståhlberg et al (2008) *Retirement income security for men and women* 3.

⁵⁹ Ibid.

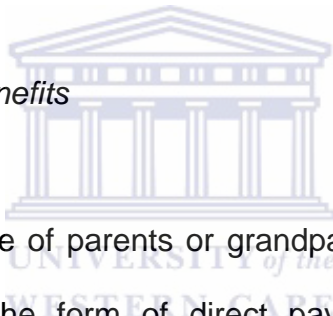
In many cases family caregivers themselves will be retired and nearing retirement. According to Myers and Agree,⁶⁰

increased longevity also means that family caregivers will themselves be aged and subject to functional limitations. Performing some of the most demanding physical caregiving tasks may be too difficult for them. Under these circumstances, the availability of some kind of supplemental care is important so that individuals may be maintained in the community with their families and not confined to institutions.

Support for female and older caregivers must therefore enjoy priority in measures aimed at improving the lives of caregivers.

6.2.4.3 Avenues of state support for caregivers

6.2.4.3.1 *Caregivers' benefits*



Cash benefits for taking care of parents or grandparents at home are paid in a number of countries⁶¹ in the form of direct payments to caregiving family members.⁶²

According to Midgley⁶³ the payment of cash allowances to poor families, to enable them to take care of their needy older relatives at home, should be encouraged for a number of reasons. Firstly, the state saves the costs of maintaining that older person in a residential home. The allowances may not be

⁶⁰ Myers and Agree "The world ages, the family changes – a demographic perspective" (1994) 21 (1) *Aging International* 18.

⁶¹ Such as Sweden – see below at 7.3.6.4.

⁶² Benefits for taking care of adults are generally incorporated in other forms of comprehensive social security and are, therefore, not usually categorised as family benefits (ILO (1984) *Introduction to social security* 99).

⁶³ Midgley (1984) *Social security, inequality and the Third World* 197.

enough to sustain the older person on his or her own, but “may provide the incentive for relatives to support them”.⁶⁴

It is worth investigating the possibility of the payment of cash benefits to caregivers in South Africa and in this context the Swedish caregivers benefit and the legislation regarding the payment of the benefits will be examined below.⁶⁵

6.2.4.3.2 Cash payments to older persons

Another avenue of support to older persons still residing at home is cash payments to the older person for the specific purpose of assisting him or her to pay for formal care or offset the costs of informal care by family or community members.⁶⁶ In South Africa, the grant-in-aid currently is the only statutory assistance to families caring for older persons in the family home. The grant-in-aid is an additional grant payable to older persons already in receipt of the older person’s grant and who need regular attendance by another person.⁶⁷ The current grant-in-aid amount is R240 per month⁶⁸ and is negligible compared to the actual costs of formal care.⁶⁹ In the light of the limited resources currently

⁶⁴ Ibid.

⁶⁵ At 7.3.6.4.

⁶⁶ Myers and Agree “The world ages, the family changes – a demographic perspective” (1994) 21 (1) *Aging International* 17

⁶⁷ Reg 5(1) GN R898 in GG31356 of 22 August 2008 read with s 12 Social Assistance Act 13 of 2004. See above at 3.3.1.2.

⁶⁸ SASSA “Grant amount” <http://www.sassa.gov.za> (accessed 04/06/2009).

⁶⁹ In countries such as Sweden and the UK the amount paid bears a closer relation to the actual cost of care. See below at 7.3.4.4.4 and 7.3.6.4.

available for grants,⁷⁰ it is unlikely that the the grant-in-aid amount will be increased to a level that bears a close relation to the actual cost of care. It is suggested that further research be done to determine the cost of progressively increasing the grant-in-aid amount. However, the additional money currently brought into the household, even if it is a negligible amount, may be to the advantage of the whole family⁷¹ and thereby improve the older person's position in the family.

6.2.4.3.3 *Respite services for family caregivers*

Respite care is defined as “a service offered specifically to a frail older person and to a caregiver and which is aimed at the provision of temporary care and relief”.⁷²



Respite care is ideally suited to a situation where a frail older person is taken care of by a family or community caregiver at home and the caregiver needs time off from caregiving in order to rest or to take care of his or her other responsibilities. Therefore, family and community-based care⁷³ intersect where community - based organisations provide respite care to family caregivers.⁷⁴ The

⁷⁰ The effect of limited resources on the payment of grants is discussed above at 4.3.1.

⁷¹ According to the White Paper for Social Welfare (1997) para 7.7, the majority of poor people live in three-generation households and the older person's grant is typically “turned over for general family use”, with the result that each pensioner's grant income helps a number of other people in the household.

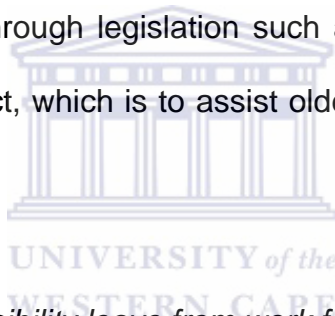
⁷² Section 1 OPA.

⁷³ Discussed below at 6.3.

⁷⁴ Walker, Pratt and Eddy “Informal caregiving to aging family members: a critical review” (1995) 44 *Family Relations* 408.

OPA makes provision for home-based care programmes providing respite care to older persons in the community and their caregivers.⁷⁵ In addition, assistance to family members and caregivers of older persons in the form of education, information and counselling are also categorised as home-based programmes in terms of the Act.⁷⁶ Respite care services can also be provided at residential facilities.⁷⁷

It is submitted that respite care is a valuable service provided to caregivers and that many caregivers would not be up to the task without respite care. The promotion of respite care through legislation such as the OPA supports one of the main objects with the Act, which is to assist older persons to reside at home as long as possible.



6.2.4.3.4 Family responsibility leave from work for caregiving

Section 27 of the Basic Conditions of Employment Act⁷⁸ allows employees to take three days paid family responsibility leave during each annual leave cycle, but only for limited events such as birth of a child, illness of a child or the death of a family member.⁷⁹

⁷⁵ Section 11(3)(d).

⁷⁶ Section 11(3)(3).

⁷⁷ Section 17(h).

⁷⁸ Act 75 of 1997.

⁷⁹ Section 27(2).

No provision is currently made for family responsibility leave in the case where a parent is ill or otherwise in need of care. It is worth investigating whether other countries provide for statutory family responsibility leave for caregiving of parents, in order to determine whether it would be advisable to extend the scope of family responsibility leave in South Africa to include caregiving responsibilities.⁸⁰

6.2.4.3.5 *Including caregiving as pension earning-employment*

Another potential form of assistance to caregivers is the reform of the retirement income system to include caregiving as pension-earning employment through wage subsidies or pension credits.⁸¹ Women's reproductive and caregiving roles are mostly not regarded as work. Lund and Srinivas⁸² advocate that the contributions of women working in what they call the "care economy" should be recognised and their contributions be regarded as economic activities worthy of social protection.

Any such measures would of course have to be available to all family caregivers and not just reserved for women caregivers. For this reason Ståhlberg et al⁸³ warn that "it is important not to compensate for gender differences on the labour

⁸⁰ See below at 7.3.5.7.3 for an overview of the statutory provision for family responsibility leave for caregiving in the USA.

⁸¹ See 7.3.4.2 for the pension credits for caregivers in the UK,

⁸² Lund and Srinivas (2000) *Learning from experience: A gendered approach to social protection for workers in the informal economy* 105.

⁸³ Ståhlberg et al *Retirement income security for men and women* (2008) 3.

market in pension systems, as that would merely reinforce traditional gender roles and preserve discrimination in the labour market". The fact that most caregiving is done by women leads to a situation where even a gender-neutral measure aimed at improving retirement income for caregivers would lead to greater financial security in old age for many women.

A formula for defined benefits that includes the years spent caregiving as years worked should lead to increased benefits for caregivers; otherwise they would forfeit benefits for the time spent in caregiving. For this reason, a panel of international experts from the International Labour Organisation⁸⁴ advised that one of the comparative advantages of a defined benefit national fund over a defined contributions fund would be that a defined benefit system makes provision for the crediting of insurance periods for caring.⁸⁵ They acknowledge that caregiving is going to become increasingly important in South Africa in the near future.

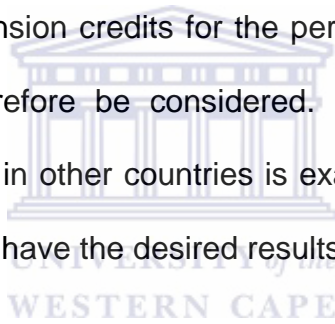
A wage subsidy⁸⁶ would be of greater advantage for caregivers taking part in a defined contribution scheme, as there would be no contributions paid for them during their caregiving years in the absence of a wage subsidy.

⁸⁴ ILO Social Security Department (2008) *Observations on social security reforms in South Africa* Consultation Report 9.

⁸⁵ As a guaranteed amount is paid out at retirement based on the member's final salary and years worked. If the period that the caregiver cannot work due to caregiving duties is credited, the caregiving fund member will not lose out on retirement benefits. A defined contribution system, on the other hand, would penalise caregivers for the period they are not working (and therefore not contributing) due to their caregiving responsibilities.

⁸⁶ See above at 5.5.3 for more on the proposed wage subsidy model.

One must be careful not to over-generalise the redistributive effect of the abovementioned arrangements, as it will differ from case to case, depending on the age when the caregiver concerned takes off from pension-earning work to fulfil caregiving duties, the length of time taken off and the rules of the particular fund.⁸⁷ It is recommended that the founding legislation of the reformed pension system incorporate the appropriate arrangements to compensate caregivers for the period they are not able to contribute to a retirement fund due to their caregiving obligations. The inclusion of measures such as the proposed wage subsidy,⁸⁸ or caregivers' pension credits for the period spent caring for an older family member should therefore be considered. Legislation providing similar compensation to caregivers in other countries is examined below⁸⁹ to determine whether such arrangements have the desired results.



6.2.4.4 Conclusion

The World Bank has incorporated “intrafamily or intergenerational sources of both financial and non-financial support” to older persons as one of the five basic

⁸⁷ “Certain rules favour certain women while putting others at a disadvantage. If an individual's pension is determined by the income of the best or final years, while pension contributions are proportional to income over all years women who alternate between non-market work and market work are at an advantage. If the number of years required to qualify for a full pension is less than the number of potential years of contribution, for example, women who take a break from gainful employment while they have young children are at an advantage. Women who continuously work part-time or have low wage throughout their working lives, on the other hand, are at a disadvantage under these rules.” (Ståhlberg et al (2008) *Retirement income security for men and women* 6).

⁸⁸ Subsidised contributions to the proposed national pension fund. See above at 5.5.3.

⁸⁹ At 7.3.4.4 (UK) and 7.3.6.4 (Sweden).

elements of its updated multi-pillar pension system.⁹⁰ This high-level international recognition of the role of the family as support structure of older persons echoes the policy views in the White Paper and has been included in the Department of Social Development's discussion paper on retirement provision reforms.⁹¹

However, legislative and policy measures to provide care and support for older persons can only be regarded as "reasonable" measures in terms of section 27 of the Constitution if it makes provision for vulnerable groups such as older persons in need of care and support. Reliance on laudable values such as families taking care of older family members unfortunately cannot be regarded as reasonable, when it discounts demographic data proving that family support has broken down to the extent that many older persons have now become the caregivers, and not visa versa.

6.3 THE COMMUNITY AS A SOURCE OF SUPPORT FOR OLDER PERSONS

6.3.1 Introduction

The continuum of support for older persons places community support for older persons between state support at the one end and family support at the other.

⁹⁰ Holzmann and Hinz (2005) *Old-age income support in the 21st century: an international perspective on pension systems and reform* 1-2. See below at 7.3.2 for an overview of the World Bank multi-pillar model.

⁹¹ DSD discussion document (2007) 18.

State support for older persons and family care and support have been discussed above.⁹² This section of chapter 6 focuses on community care and support services for older persons. However, the intersection between state, community and family care remains a recurring theme.

Current legislation and policy documents tend to lean in the direction of increased community support for older persons. Community support for older persons can be provided by non-governmental organisations, faith-based organisations and community-based organisations involved in the care and support of older persons (the welfare sector), or by neighbours of older persons or volunteers in the community (informal social networks). Together, these sectors of civil society “have made and continue to make an important contribution to promoting the well-being and status of older persons”.⁹³

Community support for older persons can therefore be categorised as services provided by the welfare sector or by informal social networks. In terms of the OPA, care and support services to older persons can also be categorised as either residential care in residential facilities⁹⁴ or community-based care and support services.⁹⁵

⁹² State support for older persons is discussed in chapter 4 and family care and support above at 6.2.

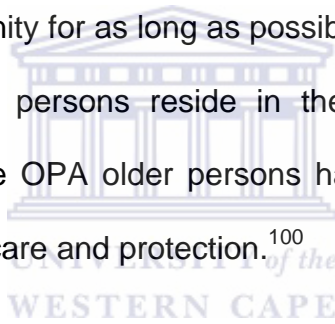
⁹³ National Report (2002) 51; White Paper for Social Welfare (1997) paras 3 and 30.

⁹⁴ The OPA uses the terms “institutional care” (s 1) and residential care (s 1 and chapter 4) interchangeably.

⁹⁵ The terms “residential facility” and “community-based care and support services” are defined above at 2.8 and the provisions of the OPA related to these services are outlined at 3.3.4.5.2. Unless stated otherwise, these terms have the meaning ascribed to them in the OPA.

South Africa currently only has seven state-run residential homes for older persons.⁹⁶ Most residential care for older persons is provided by the abovementioned organisations, with financial awards allocated to them by the state in return for the care provided.⁹⁷ Residential care is therefore mainly provided by civil society with financial support from the state.⁹⁸

One of the aims of the OPA is to “shift the emphasis from institutional care to community-based care in order to ensure that an older person remains in his or her home within the community for as long as possible”.⁹⁹ Family and community care intersect where older persons reside in their family homes within the community. In terms of the OPA older persons have the right to benefit from both community and family care and protection.¹⁰⁰



It is possible that the support for community-based care rather than residential care is based on community-based care being more informal and less “impersonal” than residential care. More importantly, the higher costs associated with residential care have contributed to the policy preference for community-

⁹⁶ Therefore, references to “residential care” or “residential facilities” in this chapter will not consider state-run facilities.

⁹⁷ I.t.o. s 8 OPA.

⁹⁸ Profit-making institutions, such as privately owned retirement villages provide accommodation and care to older persons who can afford to pay for these services. Private retirement villages are also regulated i.t.o. the OPA but have traditionally not qualified for state support.

⁹⁹ Section 1 OPA. Hence, the focus in this section of the chapter is mainly on community-based care and support programmes.

¹⁰⁰ Section 10(c).

based care. In practice, however, residential care still receives more financial support than community-based care.¹⁰¹

The following section aims to assess the level to which communities are capable of providing support to older persons and to determine the balance of state support for community-based and residential care for older persons. In addition, this section seeks to evaluate whether the state, by shifting the responsibility to provide care and support to older persons to their communities and civil society, has succeeded in creating an enabling environment in which older persons' rights are respected, protected and fulfilled.¹⁰²



6.3.2 Impact of the breakdown of traditional support of older persons on communities

As was shown above, the breakdown of the traditional family support structure belies the assumption that all families willingly care for elderly members of the family. As a result increased numbers of older persons have to rely on care and support from their communities and welfare organisations when they are no longer able to provide for themselves. Older persons with no resources of their own and who have no family members to care for them, because they may have

¹⁰¹ National Report (2002) 55; IOL "Older persons bill is 'pretty pathetic'" <http://www.iol.co.za> (accessed 08/10/2008). Although the following quote by Binney and Estes "The retreat of the state and its transfer of responsibility: The intergenerational war" (1988) 18 (1) *Intergenerational Journal of Health Services* 91 was written in the context of the care of older persons in the United States of America, it is just as relevant to the current situation in South Africa: "With costs for institutional care so high and its availability so limited, it is paradoxical that public policy actually gives far more financial support to institutionalization than to the community living situation of elders."

¹⁰² As envisaged in the preamble to the OPA.

never been married and/or had children, or because they have outlived available family members, will become dependent on community care.¹⁰³

6.3.3 *The relationship between community-based care and support services and the state*

National policy documents¹⁰⁴ and recent legislation such as the OPA emphasise community involvement in caring for older persons in addition to the support given by family members and government programmes. The pertinent question is whether it is reasonable to require all community-based organisations, regardless of their financial situation, to bear the burden of caring for older persons in the community, given the level of poverty within many communities, or whether some measure of government intervention would not always be required?¹⁰⁵ As was stated above,¹⁰⁶ community support can be loosely categorised into two groups according to the level of formalised structure of the organisation providing the support: i.e., the welfare sector and informal social networks. The following discussion deals with these two groups separately.

¹⁰³ Unless they are placed in one of the few state-run residential facilities. See above at fn 97.

¹⁰⁴ The White Paper for Social Welfare (1997) para 30 states that "[i]n view of fiscal constraints, low economic growth rates, rising population growth rates and the need to reconstruct social life in South Africa, the Government cannot accept sole responsibility for redressing past imbalances and meeting basic physical, economic and psycho-social needs. The promotion of national social development is a collective responsibility and the co-operation of civil society will be promoted."

¹⁰⁵ National Report on the Status of Older Persons (2002) 30.

¹⁰⁶ At 6.3.1.

6.3.3.1 Provision of services by the welfare sector

As was stated above, much of the community support provided to older persons is provided by non-governmental organisations, faith-based organisations and community-based organisations. It is important that the state strengthens its partnerships with these organisations, as envisaged by the White Paper for Social Welfare¹⁰⁷ where it is stated that

Government will address needs which are not being met by its partners in civil society. In this regard, Government will also play an enabling and pro-active role to ensure that services are provided in under-serviced areas. Government will provide an enabling environment for the delivery of developmental welfare services by its partners”.

The needs of particular groups, such as older persons have to compete with other interests, such as education and housing for support from non-governmental organisations,¹⁰⁸ and therefore the provision of services to older persons cannot be relegated to these organisations without providing them with reasonable state support where it is required.

It is submitted that OPA has created an “enabling environment” for the delivery of care and support services to older persons as mentioned in the quote from the White Paper for Social Welfare above. Whether the measures introduced by the Act will indeed address needs which are currently not met will depend on the implementation of the OPA.

¹⁰⁷ White Paper (1997) para 3.2.

¹⁰⁸ Patel (1992) *Restructuring Social Welfare: Options for South Africa* 109.

Organisations that deliver care and support services to older persons in terms of the OPA can be held liable for the infringement of older persons' rights in terms of this Act because these rights, as well as the applicable fundamental rights, are capable of horizontal application.¹⁰⁹ However, a distinction is drawn below between the duties of profit-making institutions¹¹⁰ or welfare organisations approved by the state to provide care and support to older persons and instances where informal social networks provide care and support without any formal authorisation.

6.3.3.2 Provision of services by informal social networks

Apart from the welfare organisations mentioned above, much of the care and support services provided to older persons in their communities are provided by so-called "informal social networks" such as friends, neighbours, self-help groups, and spiritual and customary networks.¹¹¹

In the context of community caregiving by informal social networks, it has to be established who the groups of community members are who are most likely to be performing these mainly voluntary tasks.

¹⁰⁹ I.t.o. s 4(3) of the OPA, the Act "binds both natural or juristic persons to the extent that it is applicable" taking into account the nature of the specific right i.t.o. s 7 of the OPA and the "nature of any duty imposed by the right". S 4(3) is therefore identical to s 8(2) of this Constitution. See above at 3.2.4 for more on the horizontal application of the Bill of Rights.

¹¹⁰ See above at fn 99.

¹¹¹ White Paper (1997) para 3.2.

The voluntary caring roles in the communities are mostly fulfilled by women.¹¹² The work of women volunteers in community based programmes is generally regarded “as an extension of their domestic tasks, rather than being recognised as ‘work’”.¹¹³ The logical consequence of these women’s caregiving tasks not being regarded as benefit-accruing work is that they do not have an equal opportunity to save for their old age. They, therefore, have the same need for assistance as women fulfilling family caregiving tasks.¹¹⁴ Hence, it is suggested that the possibility of state measures to strengthen community support to older persons - for example, by crediting volunteering as a community caregiver as pension-earning work - should be examined.¹¹⁵

In the context of informal community support for older persons the legal basis to compel informal social networks to provide care and support to an individual older person is absent as such services are provided voluntarily. With family members, filial obligations form the legal basis to compel adult children to provide care and support to elderly parents. There is no equivalent obligation on volunteers in the community to provide care and support for older persons.

The question arises whether the OPA applies to voluntary services provided by informal social networks. Section 1 of the Act defines a “service” in terms of the

¹¹² National Report (2002) 47.

¹¹³ Patel (1992) *Restructuring Social Welfare* 89. Male volunteers providing care and support for older persons would face the same challenges.

¹¹⁴ See above at 6.2.4.3.5.

¹¹⁵ The pension credits for volunteers could work along the same lines as the proposed credits for family caregivers.

Act as an “activity or programme designed to meet the needs of an older person”. Therefore, informal social networks may potentially qualify as “service providers” in terms of section 8(1) of the OPA in order to qualify for the financial awards made available to service providers to older persons. However, most of the informal social networks may have difficulties in meeting the envisaged conditions for receiving financial awards, such as accounting and compliance measures.¹¹⁶ The fact that all community-based care and support services must be registered implies that informal support and care of older persons by volunteers, friends and neighbours are intended to be excluded from the ambit of community-based care and support services regulated by the OPA. Therefore, the OPA does not seem to cover the care and support provided by informal social networks¹¹⁷ and their activities remain largely unregulated and without the financial assistance provided to regulated community-based care and support programmes.

6.3.3.3 State support for community-based caregiving

The emphasis shift toward strengthening community-based care and support for older persons instead of only relying on residential care, as expressed in section 2 of the OPA, coupled with the financial support to qualifying service providers, can be regarded as reasonable measures to promote older persons’ right to

¹¹⁶ Section 8(1)(d). At the time of writing the regulations in terms of the OPA have not been published.

¹¹⁷ Except for Chapter 5 of the OPA dealing with the protection of older persons against abuse and neglect.

dignity¹¹⁸ and right of access to social security. The financial support offered to community-based programmes regulated in terms of the OPA is an expression of intergenerational solidarity with older persons in need of care and support. However, as was shown above,¹¹⁹ the provision of care and support by informal social networks is not regulated by the OPA and does not currently qualify for financial support from the state.

It is, therefore, fitting that non-cash support to older persons has also received recognition as part of the social security reform process currently under way. One of the models for reform, the World Bank multi-pillar pension system,¹²⁰ includes an additional pillar of a national social security system for older persons comprising “informal intrafamily or intergenerational sources of both financial and non-financial support to the elderly, including access to health care and housing”.¹²¹ The additional pillar could in the South African context encompass family caregiving of older persons, the residential¹²² and community-based care and support programmes currently regulated by the OPA, and the support provided by informal social networks.¹²³ It is recommended that steps be taken

¹¹⁸ See below at 6.4.2 for a discussion of measures undertaken to ensure that older persons are treated with respect and dignity.

¹¹⁹ At 6.3.3.2.

¹²⁰ Discussed below at 7.3.2.

¹²¹ Holzmann and Hinz, (2005) *Old-age income support in the 21st century 2* quoted in DSD discussion document (2007) 18.

¹²² Specific mention is made by Holzmann and Hinz (2005) *Old-age income support in the 21st century 2* of access to housing as part of the additional pillar, which points to residential facilities providing accommodation and 24-hour care (see definition of “residential facility” in s 1 of the OPA).

¹²³ Informal social networks can be regarded as informal intergenerational sources of non-financial support i.t.o. the model proposed by Holzmann and Hinz.

to include this additional pillar in the reformed national social security system to bolster community and state non-cash support to boost the well-being of older persons. It is submitted that the inclusion of non-financial measures of support for older persons in the national retirement system would lead to an integrated system of support for older persons which would be a significant improvement on the current system. To this end, the integrated system employed in the UK will be studied below¹²⁴ to determine whether a similar system would be suitable in the South African context.

It is submitted that the proposed integrated system will not entail shifting all responsibility to care for older persons to the state. On the contrary, it is submitted that family and community care and support structures for older persons will remain as important as they are currently, with the important difference being that in an integrated system the point at which the state can reasonably be expected to step in and provide financial and non-cash assistance can be clearly delineated.

6.3.4 Health care for older persons

Due to the almost inevitable decline in health and the resultant increase in medical care associated with ageing, access to appropriate health care for older

¹²⁴ At 7.3.4.4.

persons is an important component of a national social security system for older persons.¹²⁵

In terms of the Constitution, everyone has the right of access to health services. The state is required to take reasonable legislative and other measures to achieve the progressive realisation of the right of access to health care, depending on the resources available.¹²⁶ The public health sector is currently challenged by a lack of resources, which may explain the current health care policy which prioritises child and maternity care,¹²⁷ thereby marginalising older persons' health care needs. Older persons who do not have the resources to pay for private health care are merely entitled to the free primary health care¹²⁸ available to everyone who is not a medical aid member,¹²⁹ despite the fact that one of the objects of the National Health Act is to protect, respect, promote and fulfil the right of access to health care of older persons as a vulnerable group.¹³⁰

¹²⁵ Holzmann and Hinz (2005) *Old-age income support in the 21st century 2*, quoted in DSD discussion document (2007) 18. A detailed discussion of the current South African health care system and laws falls outside the scope of this thesis. The points made below merely serve to illustrate the absence of a comprehensive national response to older persons' health care needs. For more on the South African health care system, see Mpedi et al "Health care in South Africa" in Olivier et al (eds) (2004) *Introduction to social security* 233-252; National Report on the Status of Older Persons (2002) 27-36.

¹²⁶ Section 27 (1) and (2).

¹²⁷ Section 4(3) National Health Act 61 of 2003.

¹²⁸ Although older persons receiving grants in principle have access to free secondary health services at public hospitals, this is not always the case in practice. In Ijumba and Day (eds) (2004) *South African Health Review 2003/04*, Joubert and Bradshaw cite the "preventive, curative and rehabilitative needs of older clients that have for the main part been integrated into general sessions at community clinics at the primary care level, and numerous community nurses that have been redeployed from geriatric services to assist, for example, in child immunisation programmes" as examples of the marginalisation of older persons as a national health priority (at 157).

¹²⁹ In 2004 it was estimated that only 13% of persons over 65 had access to medical aid (Joubert and Bradshaw "Health of older persons" in Ijumba and Day (eds) (2004) *South African Health Review 2003/04* 157.

¹³⁰ Section 2(c)(iv) National Health Act 61 of 2003.

Older persons' constitutional right to good quality health care is thus "compromised as a function of biased policy and sectoral ills".¹³¹ It is submitted that the lack of public health care resources cannot excuse the marginalisation of a particularly vulnerable group such as older persons.

Much of the residential care provided in terms of the OPA to older persons in general, and frail older persons in particular, relates to health care. The same can be said for community-based and home-based care provided to older persons still residing at home. The OPA specifically lists medical services as community-based programmes for older persons regulated by the Act.¹³²

Home-based programmes in terms of the OPA are aimed at providing frail older persons within the community and these programmes include hygienic and physical care and free health care.¹³³ Home-based care is strictly regulated by the OPA and section 14 requires that all caregivers employed by home-based care services must be trained and registered, and that social workers and health care providers must be registered with their respective professional councils.

¹³¹ Ferreira and Kalula (2007) *Human rights and ageing in South Africa* 3.

¹³² Section 11(2)(d) OPA. As was stated above at 6.3.3.2, all community-based and home-based services have to be registered i.t.o. s 13 of the OPA in order to qualify for subsidies. Friends and neighbours providing these services are not seen as "service providers" and hence do not have to register i.t.o. the Act. Support and care provided by these informal support networks are therefore merely unregulated, not illegal.

¹³³ Section 11(3)(a) and (f). The free health care for frail older persons can be extended to other older persons as determined by the Minister of Social Development.

Most importantly, the statutory guidelines to service providers require them to show preference in their services (thus also medical services) for older persons.¹³⁴ Health service providers aiming to be registered in terms of the OPA, and thereby benefiting from the resultant financial awards in terms of section 8 of the Act,¹³⁵ will therefore have to demonstrate that the provision of services to older persons is central to their endeavours. However, the OPA does not guarantee the provision of medical services to older persons but merely provides a framework for the regulation of these services where they exist.

It may be fitting that the Department of Social Development, which is primarily responsible for the well-being of older persons, should be at the forefront of ensuring that the health care services that are available to older persons are well regulated. However, other departments have not responded equally, and older persons as a group are not targeted by the strategies of the national Department of Health, the department responsible for the promotion of the health of all South Africans, including older persons.¹³⁶

Other aspects of health care that can be found in other countries but that are absent in South Africa, thereby adversely affecting older persons, include:

- subsidised medical aid membership after retirement;¹³⁷

¹³⁴ Section 9(h).

¹³⁵ Financial awards i.t.o. s 8 of the Older Persons Act were discussed above at 3.3.4.5.3.

¹³⁶ Ferreira and Kalula (2007) *Human rights and ageing in South Africa* 1.

¹³⁷ The possibility of the inclusion of post-retirement medical aid coverage was examined the DSD discussion document (2007) 85-87, and it was concluded that “a mechanism allowing individuals to create an entitlement to subsidised post-retirement contributions, based on their

- long-term care insurance to cover long-term care in a nursing home;¹³⁸
- a national health system, combining the public and private health care sectors.

Whilst recognising that each country's health care system must be adapted to the circumstances prevalent and the resources available in that country, it may be helpful to determine whether the health care measures and laws adopted in other countries are suitable in the South African context.¹³⁹

6.4 THE INTERGENERATIONAL SOLIDARITY VERSUS 'INTERGENERATIONAL EQUITY' DEBATE

6.4.1 Recognition of role of older persons

It is truly unfortunate that many older persons are abused and subjected to the indignity of poverty¹⁴⁰, as they include the people who have contributed to socio-economic development and the fruits thereof being enjoyed by younger generations. There is therefore a moral obligation to improve the circumstances under which so many older persons have to live.

Older persons as a group have also shown willingness to improve their own circumstances and develop their communities when given the opportunity to do

years of contributing to a medical scheme" should be established as part of the proposed national social security system (at 96).

¹³⁸ The different methods of financing and providing long-term care in the USA is outlined at 7.3.5 below.

¹³⁹ See chapter 7 below for a comparative overview of measures to provide care and support for older persons, including health care for older persons, as applied in selected countries.

¹⁴⁰ See above at 3.2.5 and below at 6.4.2.

so. This is evidenced by the high number of older persons involved in caring for AIDS orphans, many of whom are not direct family members.¹⁴¹

Older persons should not be rejected but rather respected for having as valid a social place as any other person. Their self-esteem and sense of self-reliance can be enhanced by involving them more in community development programmes.¹⁴²

The role that older persons can play in their communities is recognised in the preamble to the OPA which envisages changes to existing laws on older persons “in order to ... empower older persons to continue to live meaningfully and constructively in a society that recognises them as important sources of knowledge, wisdom and expertise”. The OPA, therefore, aims to contribute to a new vision of the role of older persons in their communities.

The ability of older persons to access opportunities to participate in community activities is deemed important enough to warrant the special protection awarded by section 7 of the OPA. Section 7 prohibits discrimination against older persons and enumerates the particular instances where discrimination against older persons is barred.¹⁴³ The aim of the section is clearly to ensure that older persons are not denied access to existing programmes and activities.

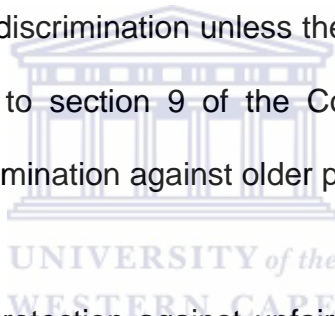
¹⁴¹ National Report (2002) 47.

¹⁴² National Report (2002) 53.

¹⁴³ The provisions of s 7 are outlined above at 3.3.4.5.2.

Section 7 must be read in the context of the prohibition of discrimination in terms of section 9 of the Constitution, the relevant provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act (“the Equality Act”)¹⁴⁴ and the preamble to the OPA.¹⁴⁵

In terms of section 9, the equality clause of the Constitution, discrimination against any older person on the grounds of age would be regarded as unfair discrimination, unless the respondent can show that it is fair.¹⁴⁶ Discrimination against any older person on other prohibited grounds such as race or gender¹⁴⁷ would also constitute unfair discrimination unless the contrary is proven. Section 7 of the OPA gives effect to section 9 of the Constitution by listing specific instances of prohibited discrimination against older persons.



The Equality Act provides protection against unfair discrimination in general by the state or any other person, and prohibits unfair discrimination by any person against any other person on the grounds of race, gender and disability in particular.¹⁴⁸ Section 25 of the Equality Act establishes a link between that Act and the OPA by imposing a duty on the state to enact further legislation that

¹⁴⁴ Act 4 of 2000.

¹⁴⁵ The preamble to the OPA requires the State to “create an enabling environment in which the rights in the Bill of Rights must be respected, protected and fulfilled”. The provisions of the Employment Equity Act 55 of 1998 are also applicable to the extent that older persons are “employed”, which may include community service.

¹⁴⁶ Section 9(5) read with s 9(3) and (4) of the Constitution.

¹⁴⁷ The prohibited grounds for discrimination are listed in s 9(3) of the Constitution.

¹⁴⁸ Sections 6-9 of the Equality Act. Sections 10-12 also prohibit hate speech, harassment and the dissemination and publication of information that unfairly discriminates against any person.

seeks to promote equality.¹⁴⁹ Section 7 of the OPA can be regarded as such “further legislation” promoting equality, therefore giving effect to section 9 of the Constitution. Therefore, it is suggested that section 7 of the OPA must be seen as implementing section 9 of the Constitution by laying down specific protection against unfair discrimination for older persons, supplemented by the provisions of the Equality Act where section 7 is silent.

Any service provider that wishes to qualify for financial awards in terms of section 9 of the OPA has to comply with the statutory guidelines for the provision of services that are aimed at providing an enabling environment for older persons. Service providers must give recognition to the social, cultural and economic contribution of older persons,¹⁵⁰ including the role of older persons as caregivers, particularly of AIDS orphans.¹⁵¹ In addition, service providers are required to create an environment that promotes the participation of older persons in “decision-making processes at all levels”.¹⁵² The above-mentioned sections of the OPA are clear examples of how the moral obligation to respect the role of older persons in society can be translated into a legal obligation to assist older persons to continue to fulfil this role.

¹⁴⁹ Section 25(1)(c)(ii).

¹⁵⁰ Section 9(a) of the OPA.

¹⁵¹ Memorandum on the Objects of the Older Persons Bill, 2003.

¹⁵² Section 9(b) of the OPA. The participation of older persons in decision-making processes “at all levels” presumably applies to *inter alia* the running of residential facilities and of caregiving structures for older persons. Unfortunately the requirement of utilising “the accumulated wisdom of older persons” to promote the participation of older persons in decision-making processes that was included in s 9(b) of the Older Persons Bill 68D of 2003 was not included in s 9(b) of the Act.

The difference between providing care and support for older persons and for children lies in the contributions of older persons and society's debt to them. This, in addition to their willingness to participate in development programmes, is the basis for intergenerational solidarity, which, as has been stated repeatedly throughout this thesis, should be one of the main guidelines for social security spending.

As a society we must guard against looking exclusively at the economic aspects of ageing, as the focus on expenditure on older persons makes it hard to avoid thinking of choices in terms of their cost-effectiveness and thereby downgrading the value of older persons. The positive role of older persons in our society must be emphasised, as is done in the sections of the OPA referred to above, in order to counter the view that older persons are not productive and are a drain on the fiscus.¹⁵³ In the absence of such express emphasis on the positive role of older persons, the possibility exists that the question of "inter-generational equity" may acquire prominence.¹⁵⁴

¹⁵³ National Report (2002) 49.

¹⁵⁴ As has occurred periodically in the USA. The "intergenerational equity" argument sees spending on older persons as a drain on the fiscus to the detriment of younger generations, particularly children. See below at 6.4.4 for more on the influence of "intergenerational equity" on provision for older persons in South Africa, and 7.3.5.5 for the influence of the (perceived) competing interests between older persons and children on social security law and policy in the USA.

6.4.2 The need to treat older persons with respect and dignity

Promoting the interests of older persons in South Africa is complicated by the cultural diversity and, in particular, the differences in the economic status of older persons throughout the country. Older persons are not a homogenous group and therefore legislation intended to provide support and care for older persons must take the difference between rural and urban older persons, and between older men and women,¹⁵⁵ in addition to ethnic, cultural and religious differences, into account. However, according to the National Report on the Status of Older Persons¹⁵⁶ the one common denominator for older persons is “the need to be treated with respect and dignity and to be in control of their own lives.” Then again, older persons constitute a vulnerable group due to declining health and increased dependence on others. In the words of Myers and Agree:¹⁵⁷

Although older persons are thought to be highly vulnerable to the need for support, we must be careful to avoid the myth that they are a homogenous group demanding care. At the same time, it must be recognized that physical limitations are strongly associated with increasing age.

Since 1999, which was designated the International Year of Older Persons by the United Nations General Assembly,¹⁵⁸ a number of initiatives were undertaken locally and internationally to promote respect for and dignity of older persons.¹⁵⁹

¹⁵⁵ Older women may require additional support due to their role as primary caregivers, whereas older men may have experienced the loss of status as breadwinner of the family (National Report (2002) 54).

¹⁵⁶ National Report(2002) 49.

¹⁵⁷ Myers and Agree “The world ages, the family changes – a demographic perspective” (1994) 21 (1) *Aging International* 16.

¹⁵⁸ UN General Assembly Resolution 47/5, 16 October 1992 <http://www.un.org/ageing/iyop.html> (accessed 06/07/2009).

¹⁵⁹ See below at 7.2.3.1 for a summary of the articles of Res 47/5 most relevant to intergenerational solidarity and the care and support of older persons.

The South African government launched Operation Dignity in 1999 as its contribution to the International Year of Older Persons. Operation Dignity was broadly aimed at raising awareness of the rights of older persons, promoting a positive image of older persons and sensitising government officials and communities to the needs of older persons. Operation Dignity centred on the theme of older persons being “valuable and irreplaceable assets” who deserve to be treated with dignity and respect.¹⁶⁰

In addition to Operation Dignity, other steps were also taken to bring across the message that older persons are valuable to society and need to be treated with care and dignity. The Minister of Social Development met with communities between June 2000 and March 2001¹⁶¹ to observe the problems with service delivery, particularly those at pension pay points and homes for older persons. This experience was valuable as the Minister could get first-hand accounts of the concerns of older persons, especially those in rural areas. The information gathered from these visits to communities has formed part of the design for the improved social security programme and many of the concerns raised by older persons were addressed by the OPA.

¹⁶⁰ National Report (2002) 49.

¹⁶¹ For more on the Minister of Social Development's “road-show” to seven provinces in 2000 see the Ministry of Social Development Media Briefing of 14 September 2000 <http://www.archive.pmg.org.za/briefings/000914socialdevelopment.htm> (accessed 06/07/2009).

All the abovementioned programmes and legislative measures have to be viewed in the context of the constitutional obligation to respect the dignity of older persons.¹⁶² The preamble to the OPA refers to the need to respect and protect the inherent dignity of older persons and to implement changes to the law to that effect. Section 9(g) of the OPA limits financial awards by the state to service organisations that create an environment that “promotes the respect and dignity of older persons”.¹⁶³ The express reference to the protection of the dignity of older persons in the OPA is a vital step towards the promotion of the inherent dignity of older persons as required by the Constitution.

6.4.3 Protection against abuse and neglect

In addition to the abovementioned sections that expressly address the protection of older persons' dignity, the OPA also addresses this issue indirectly in the sections that deal with the protection of older persons against abuse and neglect. As was stated above,¹⁶⁴ the provisions of chapter 5 of the OPA are a vast improvement on previous legislation on the protection of older persons against neglect and abuse.

¹⁶² Section 10 of the Constitution, 1996.

¹⁶³ See above at 6.3.3.3 for a discussion of state support to community-based organisations.

¹⁶⁴ The provisions of the OPA dealing with the protection of older persons against abuse and neglect were outlined above at 3.2.4.5.6.

The *Mothers and Fathers of the Nation Report*¹⁶⁵ exposed various violations of older persons' human rights in residential facilities, but also in their family homes. In the context of the policy and legislative shift towards increased family care and support of older persons,¹⁶⁶ the protection of older persons against abuse in the family home increases in importance. For example, recipients of the older person's grant are not necessarily guaranteed the use of the grant as they may give up (or be coerced to hand over) the grant to more powerful (younger) members of the household to secure some degree of care from their families.¹⁶⁷ This state of affairs runs contrary to the intergenerational solidarity at the core of the provision of the grant, but fortunately the OPA provides older persons in this position with a measure of protection.

When it is reported to a social worker that an older person's grant is taken against his or her wishes, the matter must be investigated.¹⁶⁸ If, after the investigation, the older person is deemed to be in need of care and protection¹⁶⁹ the social worker may take the prescribed steps "to ensure adequate provision for the basic needs and protection of the older person concerned"¹⁷⁰ or to assist the older person in laying a criminal complaint against the person who has taken his or her grant.¹⁷¹

¹⁶⁵ Report of the Ministerial Committee on Abuse, Neglect and Ill-treatment of Older Persons (2001).

¹⁶⁶ See above at 6.2.

¹⁶⁷ Hassim "Gender, Welfare and the Developmental State in South Africa" (2005) 24.

¹⁶⁸ Section 25(2) read with 25(3) of the OPA.

¹⁶⁹ Section 25(5)(a) OPA.

¹⁷⁰ Section 25(4)(c).

¹⁷¹ Section 25(4)(d).

Allegations of abuse of an older person in the family home could lead to the alleged offender being removed from the family home and/or barred from having any contact with the older person.¹⁷² However, the alleged offender may still be required to maintain his or her family during the period that he or she is barred from the family home.¹⁷³ If a magistrate determines that the allegation of abuse is correct, and the abuser is allowed to return to the family home, conditions for the further accommodation and care of the older person by the offender may be set.¹⁷⁴

Although the ultimate goal of keeping older persons in their homes as long as possible and having them being taken care of by their families and communities is laudable, it is suggested that the conditions in existing residential facilities should not be overlooked. Residents of old age homes have a right to dignity, in addition to their other constitutional and statutory rights in terms of the OPA.¹⁷⁵ The OPA makes provision for the monitoring of compliance with standards of care and for steps to be taken upon allegations of abuse and neglect of older persons in residential care.¹⁷⁶ Consequently national and provincial government

¹⁷² Section 27(1) and (6). See above at 3.3.4.5.6 for a summary of the procedures followed when an allegation of abuse of an older person is made.

¹⁷³ Section 27(6)(c). This means that the older person's fear of being left destitute if the alleged offender, who may also be the breadwinner of the family, is removed from the family home, is addressed.

¹⁷⁴ Section 29(10).

¹⁷⁵ Sections 7 and 16 of the OPA – see above at 3.3.4.5.2.

¹⁷⁶ See above at 3.3.4.5.5 and 3.3.4.5.6.

should provide in their budgets for measures to ensure that older persons can reside in homes where they are safe and their dignity intact.

Given that the social assistance function has been shifted to SASSA,¹⁷⁷ the Department of Social Development should prioritise capacity-building in order to monitor the situation in residential homes, particularly the training and employment of more social workers in order to improve monitoring of residential facilities.¹⁷⁸

6.4.4 Intergenerational equity

In Chapter 2 of this thesis¹⁷⁹ it was explained that intergenerational solidarity¹⁸⁰ is not considered by all to be the preferred basis of law and policy on intergenerational issues affecting older persons. Significant support for the concept of 'intergenerational equity' has developed internationally in the last three decades.¹⁸¹

¹⁷⁷ See above at 3.3.1.1.

¹⁷⁸ Steps are currently being taken to deal with the exodus of trained social workers and R210m was budgeted for social work bursaries in 2009. See the *Budget Speech 2009* by Minister of Finance, T Manuel <http://www.info.gov.za/speeches/2007/07022115261001.htm> (accessed 02/04/2009).

¹⁷⁹ See 2.3 above.

¹⁸⁰ Intergenerational solidarity is based on a long-term contract between the working-age population and older persons and implies that members of the working-age generation are prepared to meet the claims of older persons for pensions and services in the understanding that similar benefits will be available to them when they become part of the older generation.

¹⁸¹ See, for example, Holzmann et al (eds) *New ideas about old age security* (2001) and the attempts at legislative amendments in countries such as the USA, where the debate on intergenerational equity has been particularly robust (see below at 7.3.5.5).

The 'intergenerational equity' view can be defined as the notion that a country is "squandering its wealth in entitlements to the elderly while children remain impoverished".¹⁸² This view focuses on the impact of social security law and policy on one generation only, i.e. children, whereas intergenerational solidarity implies lifelong social protection.

The 'intergenerational equity' argument relies on the notion that older persons are a financial burden on the younger generation; a notion that can be dispelled by emphasising the positive role played by older persons in society.¹⁸³

The notion that the younger generation has to bear the pension burden is central to the arguments for 'intergenerational equity'. It is submitted that this view does not necessarily mean that the concept 'intergenerational equity' is to be found at the opposite side of the spectrum from intergenerational solidarity. The whole notion of an 'intergenerational war' is disingenuous.¹⁸⁴ It is true that the costs of social security for older persons and, therefore, the financial 'burden' on younger

¹⁸² See Quadagno "Generational equity and the politics of the welfare state" (1990) 20 (4) *International Journal of Health Services* 637.

¹⁸³ See above at 6.4.1 for more on the recognition of the role that older persons fulfil in society, particularly the provisions of the OPA regarding the positive contribution of older persons to society.

¹⁸⁴ Binney and Estes "The retreat of the state and its transfer of responsibility: the intergenerational war" (1988) 18 (1) *Intergenerational Journal of Health Services* 83 postulate that "the 'intergenerational war' has been socially constructed by those who wish to deflect and direct the attention of the public and policymakers toward fighting false conflicts between the generations in order to divert members of all generations from uniting and joining forces to demand from the state universal lifecourse entitlement for basic human needs".

generation are inherent in intergenerational solidarity.¹⁸⁵ It is, however, equally implicit in intergenerational solidarity that the younger generation are entitled to receive similar benefits to those they have funded for older persons when they become the older generation. Hence, their financial ‘burden’ is not without recompense. It is submitted that as long as the support of the older generation poses no threat to the retirement benefits of the younger generation, they can be expected to bear the pension burden. Intergenerational solidarity and ‘intergenerational equity’ therefore, should not be regarded as opposing concepts, as any temporary generational inequity implied by intergenerational solidarity will be redressed at a later stage as the generations age.

In any case, older persons and the costs related to them should not be seen as a burden on the younger generation, as generations are, and have always been, socially and economically interdependent. It is incorrect to assume that money spent on improving the lives of older persons necessarily leads to the “declining economic security of children”.¹⁸⁶ As was stated above¹⁸⁷ in the context of the important role of older persons in communities and families, many older persons support or assist their children and grandchildren. Consequently, money spent on benefits to older persons may improve the economic security of children, contrary to the ‘intergenerational equity’ argument.

¹⁸⁵ Binney and Estes “The intergenerational war” (1988) 94 suggest that taking care of dependent children and older persons should not be regarded as a ‘burden’, but rather as a part of “mutually interdependent actions and activities”,

¹⁸⁶ Quadagno “Generational equity and the politics of the welfare state” (1990) 20 (4) *International Journal of Health Services* 645.

¹⁸⁷ At 6.4.1.

The question, therefore, is whether a system based on intergenerational solidarity that seemingly differentiates between generations violates the younger generation's rights in terms of section 9 read with section 36(1) of the Constitution. The Constitution is not about formal but about substantive equality, that is, equal enjoyment of rights. The point of a system based on intergenerational solidarity is that every generation is secure in the knowledge that they will receive guaranteed retirement benefits from the system when they retire. The younger generation contributing to the system are not excluded from benefits; they merely have to wait until they reach retirement age when their guaranteed benefits would be due. It is submitted that it is actually the concept of 'intergenerational equity' that runs into danger of unfairly discriminating against older generations, by its central notion that the state can arbitrarily change its spending on generations as priorities change.

Of course the proponents of 'intergenerational equity' emphasise the potential of increased benefits were the younger generations allowed to save for their own retirement rather than being 'burdened' with providing benefits to the retired generation. Even if the point made above that a system based on intergenerational solidarity does not discriminate against the younger generation were to be disproved, it is argued that any differentiation between generations inherent in such a system can be regarded as reasonable and justifiable in terms of section 36(1) of the Constitution. The importance of cross-subsidisation of

retirement benefits to ensure that persons who do not have the opportunity to build up adequate benefits for retirement during their working lives are not marginalised was established above.¹⁸⁸ The ‘intergenerational equity’ view is that the younger generation’s opportunity to receive increased benefits upon retirement through contributing toward their own retirement benefits is limited by a solidarity-based system that requires them to contribute to current retirement benefits. It is submitted that the view that the younger generation’s rights are significantly limited by a solidarity-based system is at best speculative as it is based on assumptions regarding the comparative advantage of investing contributions toward retirement benefits on the open market rather than receiving a guaranteed benefit. The current downturn in the global economy rather disproves the argument that guaranteed solidarity-based benefits constitute a substantial limitation of rights. In any event, the younger generation will not be denied the opportunity to make provision for their own retirement over and above the solidarity-based pillar, as they will be able to contribute to the additional retirement savings pillars of the proposed system. It is therefore suggested that any limitation on the younger generation’s rights by compelling them to contribute to a solidarity-based system is reasonable and justifiable in terms of section 36(1).

In any case, the assumption that younger generation not prepared to contribute to system providing for older generation is not sound, as there is no empirical

¹⁸⁸ At 5.3.5.

evidence in South African of such resistance against support for the older generation.

Proponents of 'intergenerational equity' warn of the "risk of polarisation"¹⁸⁹ by pitting older persons against children as groups deserving of assistance. However, it can be argued that all redistributive policies run the risk of polarisation and that this is precisely why laws are required to shape solidarity with other persons. A prime example is the OPA which, whilst acknowledging the potential for "competing social and economic needs", still requires the state to take reasonable steps to care for, support and protect older persons and, to that end, to make the necessary resource available.¹⁹⁰

The more inclusive the system, the less risk of polarisation. The younger generation, therefore, need to be secure in the knowledge that their (and their children's) sacrifice will bear fruit at a later stage. Thus it is imperative that legislative measures be introduced to entrench intergenerational solidarity.

Currently the older person's grant and financial support by the state for the provision of care and support services in terms of the OPA are expressions of intergenerational solidarity. Intergenerational solidarity is, however, largely absent from the occupational retirement fund system, due to the fact that so many funds are fully-funded rather than PAYG. It is submitted that the current

¹⁸⁹ Blommestein, Hicks and Vanston (1997) *Retirement-income reforms in the context of OECD work on ageing* 12.

¹⁹⁰ Section 3(2) OPA.

pension reform process is the ideal opportunity to evaluate the role of intergenerational solidarity in the proposed multi-pillar system and to incorporate and entrench intergenerational solidarity in the founding legislation of the new system. It may prove necessary to retain fully-funded pillars in the national social security system, but only to complement the solidarity-based pillars.

6.5 CONCLUSION

In Chapter 1 of this thesis it was stated that one of the aims of this research is to critically examine the division of responsibility for the care of older persons between the state, family members and the community.

Despite all the arguments why the state cannot bear the burden of caring for older persons on its own, the state is still required to take a proactive role in ensuring that everyone has access to social security.¹⁹¹ Thus, even if it were accepted that the state's role in the provision of care and support for older persons is only of a "subsidiary nature",¹⁹² national government can still be required to create an appropriate legislative framework for the care and support of older persons and introduce appropriate control and supportive mechanisms.¹⁹³ The needs of a vulnerable group such as older persons whose families and communities are not in a position to provide care and support must

¹⁹¹ Section 27(1)(c) read with s 27(2) of the Bill of Rights.

¹⁹² See Dekker and Olivier "Informal forms of social security and informal sector social security" in Olivier et al (eds) (2004) *Introduction to social security* 93.

¹⁹³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 40.

not be ignored in the interests of government policy focused on the long-term objective of family or community-based care for older persons.¹⁹⁴

If government is serious about the notion that communities should bear more of the burden of supporting older persons, more should be done to assist community organisations in providing care to older persons. Currently not enough resources are made available for community support programmes, as social development and social services budgets are consumed by grants for older persons and subsidies for residential homes.¹⁹⁵ What is needed is increased priority given to community support programmes in the Department of Social Development budget,¹⁹⁶ which is only likely to happen once the regulations in terms of the Older Persons Act are finalised and implemented. The promotion of community involvement in social services ought not, however, to serve as a smokescreen for the state not fulfilling its obligations in terms of section 27 of the Constitution, nor should the state be allowed to relegate the duty to provide for older persons to “the private market, the individual, the family, women and impoverished communities”.¹⁹⁷

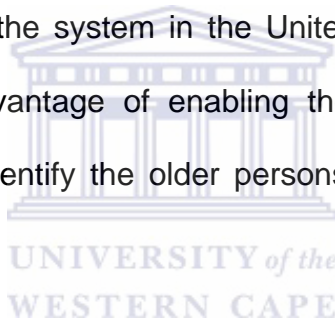
¹⁹⁴ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 66.

¹⁹⁵ In the 2009 national budget, social assistance made up 93% of the social development budget (*Budget Speech 2009* <http://www.info.gov.za/speeches/budget/speech2009.pdf> (accessed 02/04/2009)). See also National Report (2002) 55; IOL “Older persons bill is ‘pretty pathetic’” <http://www.iol.co.za> (accessed on 08/10/2009).

¹⁹⁶ The exact percentage of the department’s budget to be allocated to care and support for older persons is for national government to decide. *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 66.

¹⁹⁷ Patel (1992) *Restructuring Social Welfare: Options for South Africa* 109.

Some of the discussion documents on the social security reforms currently under way have made reference to a pillar dedicated to community and state non-cash support to enhance the well-being of older persons, including housing and medical care, within the proposed multi-pillar system.¹⁹⁸ It is imperative that the reformed retirement system includes measures of solidarity with older persons who have experienced breakdowns in family support or who lack resources to pay for the additional medical and care costs that are associated with ageing. It is submitted that a system that integrates financial and non-cash support to older persons may be the best expression of intergenerational solidarity. As will be seen from the overview of the system in the United Kingdom,¹⁹⁹ an integrated system has the added advantage of enabling the state to use the national pension system to easily identify the older persons most in need of additional assistance.



The discussion of some of the key issues regarding financial and non-cash support for older persons above thus gives rise to a number of unanswered questions. South African law currently lacks provision for matters such as financial assistance to family members caring for older persons, retirement insurance for workers in the informal sector or retirement insurance for family caregivers. A comparative overview of how these and other matters are dealt with in other jurisdictions will therefore be beneficial and follows below.²⁰⁰

¹⁹⁸ See above at 6.3.3.3.

¹⁹⁹ See below at 7.3.4.

²⁰⁰ See Chapter 7 below.

CHAPTER 7

INTERNATIONAL AND COMPARATIVE PERSPECTIVES ON PROVIDING CARE AND SUPPORT FOR OLDER PERSONS

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7.1 INTRODUCTION

The first aim of this chapter is to measure South African legislation and policies on providing care and support to older persons against the benchmarks set in international human rights and social security standards. Hence, the current policy of regarding the family as the primary source of care for older persons will be measured against international standards. The relative importance ascribed to solidarity as the basis for social security in international standards will also be examined.

Secondly, the social security systems in selected countries, particularly provision in those countries for financial and non-cash support and care for older persons, will be analysed to determine the possibility of their adaptation to South African circumstances. The comparative study also aims to determine the extent to which intergenerational solidarity plays a role in other countries' social security legislation.

7.2 INTERNATIONAL STANDARDS

7.2.1 *Importance of international standards*

“Poverty anywhere constitutes a danger to prosperity everywhere.”¹

In this age of globalisation no country can claim that the social obstacles faced by its citizens are to be regarded as an internal matter only, as can be seen from the quotation above. All countries should, therefore, strive to attain the standards set by the relevant international institutions.²

In South Africa an international treaty signed by the executive becomes legally binding only once it is ratified by Parliament and enacted into law by national legislation.³ Even in the absence of ratification, however, international standards can play an important role. The South African Constitution requires any court, tribunal or forum to consider international law when interpreting the Bill of Rights.⁴ When courts are interpreting any other legislation, a reasonable interpretation that is in line with international law must receive preference over

¹ ILO Declaration of Philadelphia of 1944 (Declaration concerning the aims and purposes of the International Labour Organisation) Art I(c).

² Jansen van Rensburg and Olivier “International standards” in Olivier et al (eds) (2004) *Introduction to social security* 164.

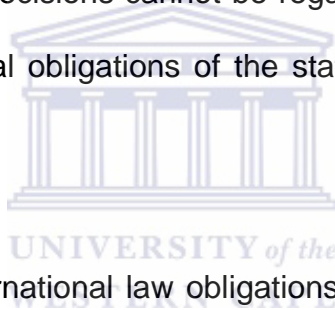
³ Section 231(1), (2) and (4) of the Constitution, 1996. The exceptions to this rule are mentioned in s 231(3) and (4).

⁴ Section 39(1)(b). See *Prince v The President of the Law Society, Cape of Good Hope and Others* 1998 8 BCLR 976 (C) 985. I.t.o. s 232 of the Constitution, customary international law e.g. the Universal Declaration of Human Rights is automatically binding law in South Africa, “unless it is inconsistent with the Constitution or an Act of Parliament”. International law can be used to determine whether a limitation of a right is “reasonable and justifiable in an open and democratic society” as required by s 36(1) of the Constitution (Jansen van Rensburg and Olivier “International standards” in Olivier et al (eds) (2004) *Introduction to social security* 164).

alternative interpretations that are inconsistent with international law.⁵ Even non-binding international law must also be considered,⁶ although no corresponding obligation to apply said international law exists.⁷

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.⁸

The role of international human rights instruments, therefore, is to act as an “interpretive aide” for national judiciaries in “formulating any decisions relating to violations of economic, social and cultural rights”.⁹ Domestic courts must therefore ensure that their decisions cannot be regarded as officially sanctioning violations of the international obligations of the state related to socio-economic rights.¹⁰



South Africa has direct international law obligations to give effect to the right to social security in terms of ratified instruments such as the Convention for the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women,¹¹ a number of International Labour Organisation Conventions,¹² and the African (Banjul) Charter on Human and Peoples’ Rights.¹³

⁵ Section 233.

⁶ *S v Makwanyane and Another* 1995 3 SA 391 (CC) 413-414, para 35; *Prince v The President of the Law Society, Cape of Good Hope and Others* 1998 8 BCLR 976 (C) 989.

⁷ Rautenbach and Malherbe (2009) *Constitutional law* 45.

⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) 1185 para 26; *S v Makwanyane and Another* 1995 3 SA 391 (CC) 415, para 39.

⁹ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), clause 24.

¹⁰ *Ibid.*

¹¹ See 7.2.2.3 below.

¹² South Africa has ratified the Unemployment Convention 2 of 1919; Equality of Treatment (Accident Compensation) Convention 19 of 1925; Workmen’s Compensation (Occupational Diseases) Convention (Revised) 42 of 1934; Occupational Safety and Health Convention 155 of

7.2.2 *United Nations Instruments*

7.2.2.1 Universal Declaration of Human Rights

In terms of the Universal Declaration of Human Rights (UDHR),¹⁴ every person has the right to

- “social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”,¹⁵
- “a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”.¹⁶

These two clauses, read together, demonstrate the international community's view on some of the key issues highlighted in the previous chapters, such as

- the importance of social security rights in protecting older persons' dignity;
- the fact that social insurance alone is not sufficient to achieve an adequate standard of living, but that older persons may also require the provision of food, housing, medical care and social services.

1981; and Safety and Health in Mines Convention 176 of 1995, but has not ratified any of the core social security conventions (see below at 7.2.4).

¹³ Discussed below at 7.2.5.1.

¹⁴ Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

¹⁵ Art 22.

¹⁶ Art 25(1).

Even though the UDHR is a non-binding declaration, it still has great significance in the context of social security reforms since it serves as inspiration for the interpretation of international and African human rights standards.¹⁷

7.2.2.2 The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁸ provides for “the right of everyone to social security, including social insurance”.¹⁹

In addition to the right to social security, provision is also made for

the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Like most other international human rights instruments²⁰, it regards the family as the fundamental group unit of society²¹ and, therefore, affords particular protection to families.

¹⁷ The African (Banjul) Charter on Human and Peoples’ Rights (see below at 7.2.5.1) recognises the UDHR as one of the international human rights standards that may serve as guidelines for the interpretation of the Charter (Art 60). According to Malan and Jansen van Rensburg “Social security as a human right and the exclusion of marginalized groups: An international perspective” in Olivier et al (eds) (2001) *The extension of social security protection in South Africa* 98 it is generally accepted that the UDHR has attained the status of customary international law with the result that its provisions have been invoked by “judicial authorities in the domestic arena as well as legislative drafters in the evolution of authoritative legal norms”.

¹⁸ U.N. Doc. A/6316 (1966). South Africa became a signatory to the ICESCR in 1994, but it has not been ratified yet. By signing the ICESCR South Africa has undertaken to refrain from steps designed to be in breach of the ICESCR.

¹⁹ Art 9. This formulation differs from that in the South African Bill of Rights in that it guarantees the *right to* social security, as opposed to the *right of access to* social security afforded by s 27(1)(c) of the Constitution (see above at 3.2.2.1). Therefore, the extent to which the ICESCR can be used as an interpretive guide will be affected by the differences in the wording of the relevant clauses.

²⁰ See e.g. CEDAW (7.2.2.3 below) and the African (Banjul) Charter (7.2.5.1 below).

The UN Committee on Economic, Social and Cultural Rights (UNCESCR) has a supervisory role which entails monitoring compliance by State parties with their obligations in terms of the ICESCR. To assess the degree to which State parties comply with their duties under the ICESCR, reports that outline legislative and other measures taken to ensure the fulfillment of the rights in the ICESCR have to be submitted to the UNCESCR.²² The UNCESCR's role with regard to older persons is particularly important, as there is no international convention dedicated to the rights of older persons equivalent to the conventions specific to the rights of children and women.²³

As part of their duty to clarify the content of the rights contained in the ICESCR, the UNCESCR has produced General Comments²⁴ that, together with the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights²⁵ and the Maastricht Guidelines on

²¹ Art 10, ICESCR.

²² For more on the role of the UNCESCR, see Jansen van Rensburg "The role of supervisory bodies in enforcing social security rights" in Olivier et al (eds) (2001) *The extension of social security protection in South Africa* 125-130.

²³ UNCESCR General Comment 6 (1995) *The economic, social and cultural rights of older persons* para 13.

²⁴ Eg General Comment 6 (1995) which deals with the economic, social and cultural rights of older persons and General Comment 19 (2008) dealing with social security rights. See below at 7.2.2.2.1 for an overview of the interpretation of older persons' social security rights in the General Comments.

²⁵ For example, one of the most important principles garnered from the Limburg Principles of 1986 (UN doc. E/CN.4/1987/17, Annex) is that even though improved laws are required for the implementation of State parties' obligations i.t.o. the ICESCR, this in itself would not suffice and "administrative, judicial, economic, social and educational measures, consistent with the nature of the rights" will also have to be taken by States parties (principle 17); Malan and Jansen van Rensburg "Social security as a human right and the exclusion of marginalized groups: An international perspective" in Olivier et al (eds) (2001) *The extension of social security protection in South Africa* 102. The worth of this principle lies in the guidance it provides regarding the state's

Violations of Economic, Social and Cultural Rights of 1997, have become authoritative guidelines on the scope and content of socio-economic rights. The interpretation of older person's social security rights in the General Comments is considered below.

7.2.2.2.1 The interpretation of older persons' social security rights in the UNCESCR General Comments

Older persons “feature prominently among the most vulnerable, marginal and unprotected groups. In times of recession and of restructuring the economy, older persons are particularly at risk.”²⁶ Read with paragraph 12 of General Comment 3 that obliges States parties to protect vulnerable members of society even when facing resource constraints, it means that older persons are entitled to protection by the state even when resources are limited.²⁷

In order to promote the right to social security, States parties are required to “institute non-contributory old-age benefits or other assistance for all persons, regardless of their sex, who find themselves without resources on attaining an age specified in national legislation”.²⁸ These measures are particularly aimed at giving the required attention to the often dire situation of older women whose

constitutional duty to take “legislative or other measures” to fulfil the right of access to social security (s 27(2) of the Constitution, 1996).

²⁶ General Comment 6 (1995) para 17. Older persons are also included in the list in Art 20 of the Maastricht guidelines of groups that are disproportionately victims of violations of socio-economic rights.

²⁷ See also paras 31 and 51 of General Comment 19 (2008).

²⁸ General Comment 6 (1995) para 21. See also para 30.

caregiving responsibilities had kept them from engaging in remunerated activity that would have enabled them to receive retirement benefits.²⁹ South Africa has an older person's grant system that is unequalled in other developing countries,³⁰ with the result that the general requirement of statutory social assistance for older persons expressed in the General Comments is easily met. Whether South Africa meets the requirement of giving additional attention to social assistance needs of older women can be questioned. Before 2008, the Social Assistance Act³¹ set the pensionable age for social assistance for women at 60 and men at 65. It is suggested that the amendment of the Social Assistance Act in 2008³² in order to equalise the pensionable age for men and women at 60 years, done in the name of elimination of unfair discrimination, may be contrary to the guidelines set in paragraph 20 of General Comment 6. Paragraph 20 interprets the right of women and men to equal enjoyment of socio-economic rights in the context of States parties' obligation to "pay particular attention to older women who, because they have spent all or part of their lives caring for their families without engaging in a remunerated activity entitling them to an old-age pension, and who are also not entitled to a widow's pension, are often in critical situations".

²⁹ General Comment 6 (1995) para 20. The "disproportionate burden of reproductive and caregiving work performed by women" was also regarded as one of the main barriers to women gaining access to social security by the United Nations Division for the Advancement of Women, Expert Group Meeting (1997) *Promoting women's enjoyment of their economic and social rights* arts 18 and 48.

³⁰ See above at 4.3.1.1.

³¹ Act 13 of 2004, s 10.

³² Social Assistance Amendment Act 6 of 2008.

The meaning of “social security” for the purposes of article 9 of the ICESCR is clarified to cover “all the risks involved in the loss of means of subsistence for reasons beyond a person’s control”.³³ As a result, the additional costs faced by older persons due to deteriorating health and a need for care are regarded as social security.

States parties are required to “take appropriate measures to establish general regimes of compulsory old-age insurance”.³⁴ The trend toward privatisation of old-age insurance schemes in many countries raises serious concerns regarding the enjoyment of article 9 rights.³⁵ The voluntary nature of the current South African retirement funding system may also be one of the reasons why South Africa has not yet ratified the ICESCR.³⁶ However, the proposals for the reform of the retirement funding system all make provision for a compulsory retirement insurance pillar,³⁷ thereby showing intent to dispose of this obstacle to complying with article 9 of the ICESCR.

In addition to social security, older persons should also have access to “adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help” in order to give effect to their right to

³³ General Comment 6 para 26.

³⁴ General Comment 6 para 27.

³⁵ Malan and Jansen van Rensburg “Social security as a human right and the exclusion of marginalized groups: An international perspective” in Olivier et al (eds) (2001) *The extension of social security protection in South Africa* 99. See below at 7.3 for the attempts at privatisation of retirement benefits in Sweden, the United States and Chile.

³⁶ See above at 3.3.2 and 5.5 for more on the current voluntary retirement insurance system in South Africa.

³⁷ See above at 5.2, 5.5 and 5.8.

an adequate standards of living in terms of article 11 of the ICESCR.³⁸ The UNCESCR, therefore, views measures to assist older persons in attaining an adequate standard of living as an obligation shared between the state, family, communities and the individual him- or herself.

States parties are required to institute national policies in order to help older persons to continue to live in their own homes as long as possible.³⁹ In South Africa, the Older Persons Act (OPA)⁴⁰ aims to enable older persons to live at home and/or in their communities as long as possible and meets the standard set by General Comment 6 in this respect.

Health care policies should take a comprehensive view in realising the right of older persons to the enjoyment of a satisfactory standard of physical and mental health,⁴¹ making provision for health care services ranging from prevention and rehabilitation to the care of terminally ill older persons.⁴² The current health care laws and policies fall short of this benchmark as the maternal and child health care are prioritised, thereby marginalising older persons' health care needs.⁴³

³⁸ UN General Assembly Resolution 24/92 of 16 December 1991 *Implementation of the International Plan of Action on Ageing and related activities A/RES/46/91* Annex, principle 1; General Comment 6 (1995) para 32.

³⁹ General Comment 6 (1995) para 33.

⁴⁰ Act 13 of 2006.

⁴¹ I.t.o. Art 12 of the ICESCR.

⁴² General Comment 6 para 34.

⁴³ See above at 6.3.4.

General Comment 19⁴⁴ defines the right to social security in terms of article 9 of the ICESCR as

the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.

Social security programmes for the purposes of General Comment 19 include social insurance and social assistance schemes,⁴⁵ as well as community-based schemes.⁴⁶

States parties are obliged to adopt legislative measures, national strategies and plans of action to realise the right to social security.⁴⁷ It does not matter whether States parties have single social security systems or a variety of systems to provide for various contingencies, as long as public authorities “take responsibility for the effective administration or supervision of the system”.⁴⁸ More importantly for present purposes, the emphasis in the General Comment on sustainability of the social security system “in order to ensure that the right can

⁴⁴ “The right to social security (art.9)” E/C.12/GC/19, para 2.

⁴⁵ Para 4. See above at 2.2 for the difference between social insurance and social assistance schemes.

⁴⁶ Para 5.

⁴⁷ Paras 67 and 68.

⁴⁸ Para 11, and 46 where it is stated: “Where social security schemes ... are operated or controlled by third parties, States parties retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security.” The state is responsible for ensuring that qualifying conditions for benefits are reasonable and transparent and that the withdrawal, reduction or suspensions of benefits are kept to the minimum (para 24). It is also the state’s duty to ensure that social security beneficiaries have physical access to benefits, particularly those beneficiaries living in remote areas (para 27).

be realized for present and future generations”⁴⁹ is in accordance with the notion of intergenerational solidarity. Whatever social security model a State party decides on must be implemented in a manner that takes all generations into account.

It is also clear from General Comment 19 that the UNCESCR does not regard social assistance as the only form of non-contributory social security. States parties are also required to provide “social services and other assistance” to older persons with no other resources.⁵⁰ Where family members care for adult dependants, including older persons, General Comment 19 states the view of the UNCESCR that they should then be entitled to support from the state in the form of family benefits.⁵¹ In addition, States parties are required to take factors such as family obligations that prevent women from making equal contributions to retirement schemes into account and to consider periods of child-rearing or care for adult dependants for pension entitlements.⁵²

Because of strong similarity in the wording of many of the provisions of the ICESCR and the South African Bill of Rights, the ICESCR and General Comments are useful as a guide to the interpretation of local constitutional

⁴⁹ Para 11.

⁵⁰ Para 15 and 28.

⁵¹ Para 18. I.t.o. para 18 the family benefits should include cash benefits and social services to the family where the older person is being cared for, similar to benefits payable to families to maintain children.

⁵² Para 32.

provisions.⁵³ Although the legislative framework for meeting the obligations stated in the ICESCR has been created by the Social Assistance Act (SAA)⁵⁴ and the OPA, a number of shortcomings have been listed above and, it is therefore imperative that these are addressed as a matter of urgency so that South Africa can ratify the ICESCR.

7.2.2.2.2 *Interpretive guidance provided by the General Comments:
Conclusion*

Apart from the ICESCR being “the most authoritative international standard” for socio-economic rights,⁵⁵ it is also important in the context of one of the research questions asked in this thesis; that is, with whom the ultimate obligation to support and care for older persons lays. The interpretation of the ICESCR in the General Comments provides guidance on this issue by emphasising that older persons are a vulnerable group entitled to preferential protection like other vulnerable groups; recognising that social services and care for older persons constitute social security for which the state is responsible;⁵⁶ and, finally, stating that where family members care for older persons they are entitled to support from the state in the form of family benefits or other support.

⁵³ Brand and Bekker “Hard cases: A review of cases and international developments” (1998) 1 (3) *ESR Review* 16.

⁵⁴ Act 13 of 2004.

⁵⁵ Chapman “Monitoring socio-economic rights: A ‘violations approach’” (1998) 1 (3) *ESR Review* 2.

⁵⁶ General Comment 19, read with principle 17 of the Limburg Principles, which requires the state to take “administrative, judicial, economic, social and educational measures” in addition to legislative measures to implement its obligations (see fn 25 above), therefore suggests that it is the state’s responsibility i.t.o. the ICESCR to ensure that adequate social services and care is provided to older persons.

7.2.2.3 South Africa's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵⁷ was adopted in 1979 and ratified by South Africa in 1995. CEDAW *inter alia* makes provision for gender equality in social security benefits.

Article 11 of CEDAW refers to the elimination of discrimination in the field of employment. It makes provision for equal social security rights, “particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work”.⁵⁸ To protect women’s right to work they are to be protected against loss of benefits due to marriage or pregnancy. Of particular interest to women raising children is the requirement that States parties should implement measures “to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities”.⁵⁹

As far as women in rural areas are concerned, CEDAW makes specific reference to their contribution to the economic survival of their families and requires States

⁵⁷ G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

⁵⁸ Art 11(1)(e) CEDAW.

⁵⁹ Art 11(2)(c) CEDAW. Art 13(a) makes provision for measures to ensure the right to family benefits for women.

parties to provide for measures that give rural women direct access to social security benefits.⁶⁰

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) is responsible for supervising States parties' obligations under CEDAW. It has the power to consider reports submitted to it and make recommendations to the State party concerned.⁶¹ A State party is obliged to submit a report on legislative, judicial, administrative or other measures that have been adopted to give effect to CEDAW to the CEDAW Committee within one year after entry of force of CEDAW in that country, and thereafter at least every four years.⁶²



South Africa submitted a first report in 1997 that noted a number of deficiencies in the social assistance system.⁶³ Measured against the CEDAW requirements, South African provision for the social security rights of women falls short by a good measure. As was illustrated above,⁶⁴ working women who choose to take time off work to raise their children or care for older family members do so in the knowledge that they have to sacrifice a significant portion of their income as well as social insurance benefits. Far from making special provision for rural women

⁶⁰ Art 14.

⁶¹ Art 21.

⁶² Art 18(1).

⁶³ CEDAW (1998) *Initial report of States parties: South Africa* CEDAW/C/ZAF/1 90-92.

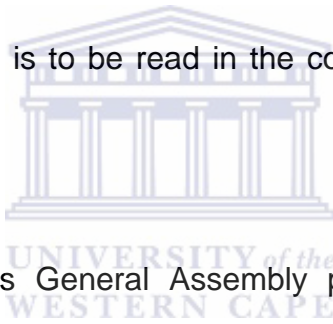
⁶⁴ At 5.6.2 and 6.2.4.2.

as required by article 14 of CEDAW, the current social security system relegates them to beneficiaries of state grants.⁶⁵

7.2.3 United Nations initiatives on ageing

7.2.3.1 Summary of United Nations initiatives on ageing

The first World Assembly on Ageing was held in Vienna in 1982 and resulted in the Vienna International Plan of Action on Ageing. The Vienna Plan of Action on Ageing is part of the international framework of strategies developed by the international community and is to be read in the context of international human rights standards.⁶⁶



In 1991 the United Nations General Assembly passed a resolution on the *Implementation of the International Plan of Action on Ageing and related activities*, that included the United Nations Principles for Older Persons giving effect to the Vienna Plan of Action on Ageing.⁶⁷ The principles include the promotion of independence of older persons through “access to adequate food, water, shelter, clothing and health care through the provision of income, family

⁶⁵ See CEDAW (1998) *Initial report of States parties: South Africa* CEDAW/C/ZAF/1 99.

⁶⁶ Vienna International Plan on Ageing (1982), foreword.

⁶⁷ UN General Assembly, Res 46/91, 16 December 1991 *Implementation of the International Plan of Action on Ageing and related activities* A/RES/46/91, annex (United Nations Principles for Older Persons).

and community support and self-help”,⁶⁸ provision of care to older persons⁶⁹ and the protection of the dignity of older persons.⁷⁰

The UN General Assembly designated 1999 the International Year of Older Persons by means of Resolution 47/5 of 16 October 1992.⁷¹ The General Assembly used this opportunity to urge that national initiatives on ageing, aimed at supporting and expanding policies which enhance the role of the state, voluntary sector and private groups, be supported by the international community.⁷² It also declared its support for national initiatives ensuring that “older persons are viewed as contributors to their societies and not as a burden”.⁷³ The importance of intergenerational programmes wherein “old and young generations cooperate in creating a balance between tradition and innovation in economic, social and cultural development” was also stressed.⁷⁴ The need for support of national initiatives in encouraging families to provide care and support to older family members and, more importantly, supporting families in providing such care, was emphasised.⁷⁵

Although Resolution 47/5 merely illustrated the resolve of the international community to support programmes aimed at emphasising the positive role that

⁶⁸ United Nations Principles for Older Persons (1991), para 1.

⁶⁹ United Nations Principles for Older Persons (1991), paras 10-14.

⁷⁰ By protecting them against abuse and unfair discrimination (paras 17-18).

⁷¹ UN General Assembly *Proclamation on ageing* Res 47/5.

⁷² Res 47/5, Art 2(b).

⁷³ Res 47/5, Art 2(d).

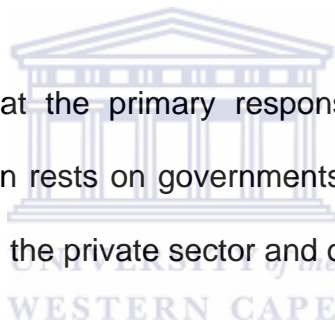
⁷⁴ Res 47/5, Art 2(f).

⁷⁵ Res 47/5, Art 2(k).

older persons play in society and improving the lives of older persons, it was the impetus for many of the initiatives in South Africa for promoting the dignity of and respect for older persons.⁷⁶

On the occasion of the Second World Assembly on Ageing held in 2002 in Madrid, Spain, the Madrid International Plan of Action on Ageing (the Madrid Plan) was adopted.⁷⁷ The intention of the Madrid Plan is that it should serve as a “practical tool to assist policy makers to focus on the key priorities associated with individual and population ageing”.⁷⁸

The Madrid Plan states that the primary responsibility for implementing the recommendations of the plan rests on governments, but that they may do so in partnership with civil society, the private sector and older persons themselves.⁷⁹



⁷⁶ See above at 6.4.2.

⁷⁷ United Nations (2002) Report on the Second World Assembly on Ageing Madrid 8-12 April 2002 A/CONF.197/9.

⁷⁸ Madrid Plan (2002), para 10. The key issues addressed in the Madrid Plan are listed in para 12 and are, inter alia:

- The realisation of human rights (and particularly socio-economic rights) of all older persons;
- The eradication of poverty in old age;
- Gender equality among older persons;
- Recognition by the international community of the “crucial importance of families, intergenerational interdependence, solidarity and reciprocity” for social development;
- Provision of health care to older persons.

⁷⁹ Madrid Plan (2002), paras 12(i) and 116; UN Report on the Second World Assembly on Ageing, Madrid A/CONF.197/9 (2002) Annex 1, Political Declaration, Art 17. Each country is required to create a Country Strategy for Action on Ageing. According to the South African Deputy Minister of Social Development in her 2009 Budget Speech, the department will during the 2009-2010 budget year “operationalise the country Plan of Action on Ageing to give effect to the Madrid Plan of Action commitments”. See South African Government Information “Budget speech by Ms Bathabile Dlamini, Deputy Minister of Social Development to the National Assembly”, 3 July 2009; National Report (2002) 56-57.

The abovementioned declarations and plans of action are not binding international law instruments, but serve to illustrate the position of the international community on various key issues being examined in this thesis, such as the interaction between family- and community care for older persons and institutional care, the level of support family caregivers can expect from the state and the crucial issue of the relevance of intergenerational solidarity in providing for older persons.

7.2.3.2 The United Nations position on the interaction between family and community care and institutional care

The United Nations' position is that home care for older persons should be promoted, as the ideal position is that older persons should remain at home in their communities as long as possible.⁸⁰ It is therefore of the view that "children should be encouraged to support their parents".⁸¹ Where institutional care is required, it should always be "appropriate to the needs of the elderly".⁸² Provision should also be made for the protection of older persons' rights while in

⁸⁰ Vienna International Plan on Ageing (1982), recommendation 13. Hence, national governments should take the housing needs of older persons into account when adopting housing policies (recommendation 21). See also Madrid Plan (2002), paras 98 and 105(b).

⁸¹ Vienna International Plan on Ageing (1982), recommendation 28. The Madrid Plan (2002), para 43, also emphasised the importance of attempting to strengthen family intergenerational ties, but recognised that not all older persons prefer to live with the younger generation.

⁸² Vienna International Plan on Ageing (1982), recommendation 10. See also recommendation 34 on the quality of institutional care; UN Principles for Older Persons, United Nations General Assembly, Res 46/91, 16 December 1991 Implementation of the International Plan of Action on Ageing and related activities A/RES/46/91 annex (hereafter "UN Principles for Older Persons (1991)") para 13. States should take legislative measures to set standards for residential care (Madrid Plan (2002), para 105(g)).

institutional care.⁸³ Community-based care and institutional care for older persons should be seen as complementary services and older persons should be entitled to the type of care most appropriate to their needs at a particular time.⁸⁴

In cases where the older person wishes to live in the family home, the UN advocates an “age/family-integrated approach” to development taking into account the special needs of older persons and their families.⁸⁵ To this end,

governments and non-governmental bodies should be encouraged to establish social services to support the whole family when there are elderly people at home and to implement measures especially for low-income families who wish to keep elderly people at home.⁸⁶

Older persons are hence entitled to “benefit from family and community care and protection in accordance with each society’s system of cultural values”.⁸⁷ States should take steps to provide economic and legislative support to family caregivers, particularly community-based support.⁸⁸

⁸³ UN Principles for Older Persons (1991), para 14.

⁸⁴ That residential care may in some cases be the better option is explained as follows in the Madrid Plan (2002), para 104: “In the last two decades, community care and ageing in place have become the policy objective of many Governments. Sometimes the underlying rationale has been financial, because, based on the assumption that families will supply the bulk of care, community care is expected to cost less than residential care. Without adequate assistance, family caregivers can be overburdened. In addition, formal community care systems, even where they exist, often lack sufficient capacity because they are poorly resourced and coordinated. As a result, residential care may be the preferred option of either the frail older person or the caregiver. In view of this range of issues, a continuum of affordable care options, from family to institutional, is desirable. Ultimately, the participation of older persons in assessing their own needs and monitoring service delivery is crucial to the choice of the most effective option.”

⁸⁵ Vienna International Plan on Ageing (1982), recommendation 28. It recommends that the diminishing traditional support of older persons in developing countries be taken into account when the needs of older persons are evaluated (recommendation 26).

⁸⁶ Vienna International Plan on Ageing (1982), recommendation 29.

⁸⁷ UN Principles for Older Persons, para 10. See also Vienna International Plan on Ageing, recommendation 25. This principle has been echoed in s 10(c) OPA.

⁸⁸ Madrid Plan (2002), para 105 (a) and (c).

7.2.3.3 The United Nations view on family versus state responsibility for older persons

At the Second World Assembly on Ageing a “Political declaration” was issued which stressed that, in the UN’s view, governments are regarded as having the primary responsibility for “promoting, providing and ensuring access to basic social services to older persons”.⁸⁹ The role of families, volunteers and communities in providing support and care to older persons *in addition to* services provided by Governments was recognised.⁹⁰ In addition, the Madrid Plan requires States to develop measures to support families in taking care of older family members.⁹¹ Thus, where families are providing care for older family members, they should be entitled to state support. Family care in itself “does not absolve society of its responsibility for high-quality care” for older persons.⁹²



In terms of the Madrid Plan, it was resolved that older persons who are not in receipt of the informal family or community care mentioned above are entitled to support from the state.⁹³ In particular, actions by States to improve the lives of older persons in rural areas who have to live without the traditional family support

⁸⁹ UN Report on the Second World Assembly on Ageing, Madrid A/CONF.197/9 (2002) Annex 1, *Political Declaration*, Art 13.

⁹⁰ UN Report on the Second World Assembly on Ageing, Madrid A/CONF.197/9 (2002) Annex 1, *Political Declaration*, Art 15.

⁹¹ Madrid Plan (2002), para 105(h). The Vienna International Plan on Ageing (1982), recommendation 36 stated that if some states find it difficult to meet the primary goal of universal social security coverage for all older persons, they should aim to provide benefits in kind and financial assistance to families or community organisations.

⁹² United Nations (1991) *Overview of recent research findings on population aging and the family* Report to the United Nations International Conference on Aging Populations in the Context of the Family, Kitakyushu, Japan, as quoted by Hoskins “Combining work and care for the elderly: An overview of the issues” (1993) 132 *International Labour Review* 348.

⁹³ Madrid Plan (2002), para 105(d).

as a result of the “exodus” of younger adults to the urban areas are given careful consideration.⁹⁴

7.2.3.4 The United Nations position on family caregivers

The Madrid International Plan of Action on Ageing recognised that the ideal situation in most countries would be that older persons age in their own communities, but acknowledged that the situation becomes less ideal when family care is expected without any compensation to the caregiver. It also acknowledged that family caregiving leads to a financial penalty to female caregivers in most instances as they work fewer hours in formal employment due to their caregiving responsibilities and consequently make lower pension contributions.⁹⁵ The Madrid Plan makes a general suggestion that special provision be made for the generation of people that have to care for parents as well as their children.⁹⁶ Older women should also be supported in their role as caregivers⁹⁷ by measures designed to:

- “(a) Encourage the provision of social support, including respite services, advice and information for both older caregivers and the families under their care;
- (b) Identify how to assist older persons, in particular older women, in caregiving and address their specific social, economic and psychological needs;
- (c) Reinforce the positive role of grandparents in raising grandchildren;
- (d) Take account of the growing numbers of older caregivers in service provision plans.”⁹⁸

⁹⁴ Madrid Plan (2002), paras 29-34.

⁹⁵ Madrid Plan (2002), para 102. The Madrid Plan does not seem to address the position of the very many women outside formal employment who care for older persons.

⁹⁶ Madrid Plan (2002), para 44(e).

⁹⁷ Madrid Plan (2002), para 103.

⁹⁸ Madrid Plan (2002), para 106.

7.2.3.5 The United Nations view on intergenerational solidarity

One of the most significant statements made in the “Political Declaration” of the Second World Assembly on Ageing in Madrid in 2002 was the recognition of

the need to strengthen solidarity among generations and intergenerational partnerships, keeping in mind the particular needs of both older and younger ones, and to encourage mutually responsive relationships between generations.

The Madrid Plan⁹⁹ reiterates the importance of nurturing “the reciprocal relationship between and among generations”. It is stated that

[s]olidarity between generations at all levels, in families, communities and nations, is fundamental for the achievement of a society for all ages. Solidarity is also a major prerequisite for social cohesion and a foundation of formal public welfare and informal care systems. Changing demographic, social and economic circumstances require the adjustment of pension, social security, health and longterm care systems to sustain economic growth and development and to ensure adequate and effective income maintenance and service provision.¹⁰⁰

One of the objectives of the Madrid Plan is the “strengthening of solidarity through equity and reciprocity between generations,” and States are required to review existing policies in order to foster intergenerational solidarity.¹⁰¹

Related to the promotion of intergenerational solidarity is the UN’s view that States should ensure that older persons are treated fairly and with dignity,¹⁰² and

⁹⁹ Madrid Plan (2002), para 13.

¹⁰⁰ Madrid Plan (2002), para 42.

¹⁰¹ Madrid Plan (2002), para 44(b) and (f).

¹⁰² Madrid Plan (2002), para 21 (g) and (h). In particular, the Madrid Plan advocates the implementation of human rights instruments to ensure older persons’ full enjoyment of human rights (para 21(a)) and the enactment of legislation with the objective of the elimination of all forms of abuse and neglect of older persons (para 110(c)).

that the role of older persons in their families and communities must be given formal recognition and support by the state.¹⁰³

7.2.3.6 The United Nations position on reducing poverty among older persons

One of the objectives of the Madrid Plan is to reduce poverty among older persons through the promotion of access to social protection to all older persons in order to provide “adequate economic and social protection” during retirement.¹⁰⁴ States are in particular called upon to ensure the “sustainability, solvency and transparency” of retirement funding schemes.¹⁰⁵ The emphasis on sustainability of schemes relates to the importance attributed to intergenerational solidarity and reciprocity in retirement schemes by the Madrid Plan.¹⁰⁶ States are required to ensure “minimum income” for older persons not covered by the aforementioned retirement schemes and who have no other means of support.¹⁰⁷

¹⁰³ See Madrid Plan (2002), paras 19, 21(b) and 113, calling for the “enhancement of public recognition of the authority, wisdom, productivity and other important contributions of older persons”.

¹⁰⁴ Madrid Plan (2002), para 52(a). States are called upon to “ensure, where appropriate, that social protection / social security systems cover an increasing proportion of the formal and informal working population” (para 52(f)).

¹⁰⁵ Madrid Plan (2002) para 52 (f).

¹⁰⁶ See above at 7.2.3.5. The ageing of the global population (see above at 1.1) has also raised the profile of sustainability of national retirement fund schemes as a major concern for policy and lawmakers.

¹⁰⁷ Madrid Plan (2002), para 53 (b).

7.2.3.7 The United Nations and intergenerational solidarity: Conclusion

The UN declarations and plans of action for ageing that were referred to in the paragraphs above support the main arguments of this thesis, which are that intergenerational solidarity should form the backbone of the social security provision for older persons and that, while it is recognised that families and communities are the primary source of non-cash support and care for older persons, the state has a fundamental responsibility towards older persons and their families.

The Madrid Plan, in particular, has had a significant impact on South African legislation as many of the provisions of the plan are included in the OPA. For example, the guiding principles for the provision of services to older persons in the OPA include the recognition of the social, cultural and economic contribution of older persons¹⁰⁸ and the participation of older persons in decision-making processes at all levels.¹⁰⁹

7.2.4 International Labour Organisation Conventions

International social security standards can fulfil a twofold purpose:

- International standards on social security can serve as guidelines for legislation and social security reforms of member States;

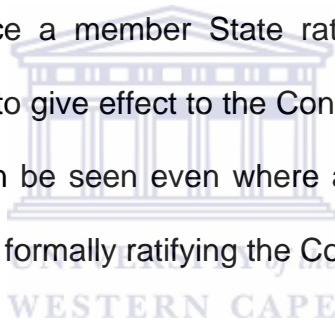
¹⁰⁸ Section 9(a) OPA and Madrid Plan, para 21.

¹⁰⁹ Section 9(b) OPA and Madrid Plan, para 22.

- Once international standards are ratified they should act as guarantees against regression in the protection offered by social security legislation.¹¹⁰

The International Labour Organisation (ILO) has, since its creation in 1919 as an organisation dealing mainly with international labour standards, also developed a number of social security standards.

ILO Conventions are adopted by the International Labour Conference of the ILO.¹¹¹ Member States then have to bring the Conventions to the notice of their legislative authorities. Once a member State ratifies a Convention, national legislation must be enacted to give effect to the Convention. The influence of the ILO in setting standards can be seen even where a State following a particular Convention does not end up formally ratifying the Convention.¹¹²



ILO Recommendations are detailed international standards that are not subject to ratification and are not binding, but merely have a persuasive and explanatory effect.¹¹³ A Convention's accompanying Recommendation usually contains stricter and more detailed requirements than the Convention.¹¹⁴

¹¹⁰ Otting "International labour standards: A framework for social security" (1993) 132 *International Labour Review* 163.

¹¹¹ For more on the history, structure and functions of the ILO, see ILO (1984) *Introduction to social security* 163 – 175.

¹¹² ILO (1984) *Introduction to social security* 8. See *S v Makwanyane and Another* 1995 3 SA CC para 35 where reference is made to the interpretative guidance that ILO instruments can provide in appropriate cases.

¹¹³ ILO (1984) *Introduction to social security* 164.

¹¹⁴ ILO (1984) *Introduction to social security* 8.

ILO Conventions and Recommendations are relevant as they provide benchmarks against which the current system and social security reforms can be evaluated. The ILO has an important role to play, particularly in providing guidance in respect of pension reforms, due to its “decades of experience in the field of planning, implementing and monitoring social security schemes in all the continents”.¹¹⁵

7.2.4.1 ILO Social Security (Minimum Standards) Convention

The aim of the landmark Social Security (Minimum Standards) Convention 102 of 1952 (“Convention 102”) is the establishment of a basic level of social security to be accomplished internationally, whatever the state of economic development in a given country.¹¹⁶ The Convention “brought together in one comprehensive document the policies to which the then member States were prepared to subscribe, and defined the range of benefits which form the core of social security”.¹¹⁷

The Convention lists nine branches of social security benefits: medical care; sickness benefit; unemployment benefit; old-age benefit; employment injury benefit; family benefit; maternity benefit; invalidity benefit; and survivors’

¹¹⁵ Gruat (1997) *Adequacy and social security principles in pension reform* 13. See also Fenwick, Kalula and Landau (2007) *Labour law: A Southern African perspective* 7.

¹¹⁶ Otting “International labour standards” (1993) 132 *International Labour Review* 166; Malan and Jansen van Rensburg “Social security as a human right and the exclusion of marginalized groups: An international perspective” in Olivier et al (eds) (2001) *The extension of social security protection in South Africa* 95.

¹¹⁷ ILO (1984) *Introduction to social security* 8.

benefit.¹¹⁸ A State party that has ratified the Convention must comply with at least three of the branches.¹¹⁹

The Convention differs from the UN instruments discussed above in that it focuses on the provision of social security benefits in general. Of the nine branches of social security it refers to, all but medical care consist mainly of the payment of cash benefits.¹²⁰ Old age is included as one of the social risks that could lead to loss of income or additional expenses.¹²¹

The Convention requires ratifying States to protect a specified percentage of the population through social security measures.¹²² However, Article 3(1) allows a State with an “insufficiently developed” economy and medical facilities to be temporarily exempt from reaching the coverage targets set by the Convention. While it may seem that the provision stating the minimum percentage of the population to be covered by social security violates the right to equality by merely providing for social security for a percentage of the population, thereby excluding the remainder of the potential beneficiaries, it is important to note that the Convention merely aims to set minimum standards and therefore allows for

¹¹⁸ Listed as parts II to X of the Convention.

¹¹⁹ Art 2(a)(ii).

¹²⁰ Two of the branches, employment injury benefits and maternity benefits, also include a measure of medical care, and family benefits may “comprise a variety of components” (ILO (1984) *Introduction to social security* 177).

¹²¹ Part V of the Convention. The contingency covered in the case of old-age benefits is “survival beyond a prescribed age” (Art 26(1)).

¹²² In terms of Art 27 of the Convention persons protected by old-age benefits must comprise certain minimum percentages of all employees or of the active population.

progressive realisation of the right of access to social security¹²³ and must be understood in that context.

The Convention sets minimum requirements for the level of retirement benefits and requires that after 30 years of coverage the retirement pension should not represent less than 40% of previous earnings.¹²⁴

The flexibility written into the Convention enables member States to comply with the minimum standards set by it, as “it is left to each State to build up its own programme according to its own needs and its stage of development”.¹²⁵ One example of this flexibility, and of great importance for old-age benefits, is the various options offered to ratifying States when determining the value of cash benefits. The options to calculate the level of old-age benefits are:

- taking a percentage of the previous earnings of the beneficiary into account;¹²⁶
- basing the benefit on the average minimum wage;¹²⁷ or
- paying a flat -rate means-tested benefit.¹²⁸

¹²³ As will be seen below at 7.2.4.2, Convention 102 is supplemented by Convention 128 and Recommendation 131 which lay down progressively increasing benchmarks for percentage of economically active population protected by retirement benefits and the minimum benefit rates.

¹²⁴ Art 29, read with Arts 65 and 66 and the schedule to the Convention.

¹²⁵ ILO (1984) *Introduction to social security* 165. Convention 102, therefore, does not attempt to set a theoretical benchmark which some countries will never be able to reach, but rather attempts to set standards in line with a given country's ability to reach those standards (Malherbe “The co-ordination of social security rights in Southern Africa: Comparisons with (and possible lessons to be learnt from) the European experience” (2004)1 *LDD* 78).

¹²⁶ Art 65 of Convention 102.

¹²⁷ Art 66.

¹²⁸ Art 67.

The levels of old-age benefits must be regularly reviewed “following substantial changes in the general level of earnings where these result from substantial changes in the cost of living”.¹²⁹

South Africa has not ratified this Convention and it is recommended that steps be taken to effect ratification as soon as possible. The flexibility inherent in Convention 102 suggests that the social security reform process currently under way should be informed by the standards for the minimum level of retirement benefits set in the Convention as outlined above so that the reforms result in a system that will comply with the benchmarks set in the convention.

7.2.4.2 Branch-specific conventions

The Social Security (Minimum Standards) Convention 102 has been supplemented by other conventions setting out more precise provisions with wider coverage than Convention 102. The most important of these conventions in the context of social security for older persons is the Invalidity, Old-age and Survivors' Benefits Convention 128 of 1967 (“Convention 128”).¹³⁰

¹²⁹ Art 65, para 10 and Art 66, para 8. Given the flexible approach taken in Convention 102, ratification levels, particularly in Southern Africa, are surprisingly low (Ben-Israel “Social security in the Year 2000: Potentialities and problems” ISLLSS XIVth World Congress 1994, 13).

¹³⁰ It is not necessary to discuss this convention in detail, as it follows the same pattern as Convention 102. Only the provisions of Convention 128 that provide for higher standards than Convention 102 will be highlighted below.

The majority of the provisions of Convention 128 correspond to the minimum requirements for old-age benefits set by Convention 102.¹³¹ However, Convention 128 extends the scope of application of retirement benefits to all employees, even apprentices, and raises the percentage of the economically active population protected by retirement benefits.¹³² The percentage of previous earnings that constitutes a minimum benefit is also higher in Convention 128.¹³³

The Convention has been supplemented by the Invalidity, Old-Age and Survivors' Benefits Recommendation 131 of 1967 ("Recommendation 131"), which aims at the progressive extension of the scope of legislation on old-age benefits to include casual employees and "all economically active persons".¹³⁴ It also recommends reduced qualifying periods,¹³⁵ increased minimum benefit rates,¹³⁶ cost of living adjustments¹³⁷ and that minimum benefits be fixed by legislation "so as to ensure a minimum standard of living".¹³⁸

The most significant measure in Recommendation 131 for the purposes of this thesis is that it suggests that Member states enact legislation creating, and

¹³¹ Art 15 regarding the contingency covered corresponds to Art 26, Convention 102; Art 17 to Art 28, Convention 102; Art 18 to Art 29, Convention 102 and Art 19 to Art 30, Convention 102.

¹³² Art 16 of Convention 128 extends the coverage of retirement benefits to a minimum of 75% of the economically active population, which is an increase on the 50% of the economically active population detailed in Art 27 of Convention 102.

¹³³ The Schedule to Convention 128 provides for a minimum benefit of 45% of previous earnings after 30 years of coverage compared to the 40% minimum of Convention 102.

¹³⁴ Recommendation 131, Art 2.

¹³⁵ Art 16.

¹³⁶ Art 22.

¹³⁷ Art 24.

¹³⁸ Art 23.

stating conditions for, supplementary or special benefits for pensioners who require “the constant help or attendance of another person”.¹³⁹

The Workers with Family Responsibilities Convention 156 of 1981 (“Convention 156”) recognises that “the problems of workers with family responsibilities are aspects of wider issues regarding the family and society which should be taken into account in national policies” and that “many of the problems facing all workers are aggravated in the case of workers with family responsibilities”.¹⁴⁰

This Convention provides the international standard-setting backdrop for national legislation to support workers with the responsibility to care for family members.

Although the Convention is aimed at the full scope of family responsibilities, including child care, it is worded in such a way as to indirectly include workers with responsibilities for the care of the frail and dependent older persons.¹⁴¹

In terms of the Convention, the social security needs of workers with family responsibilities must be addressed and measures should be taken to develop community services to assist such workers, such as family services and facilities.¹⁴²

¹³⁹ Art 25.

¹⁴⁰ Convention 156, preamble.

¹⁴¹ Convention 156 applies to all workers with responsibilities to family members “who clearly need their care or support” and where such family responsibilities “restrict their possibilities of preparing for, entering, participating in or advancing in economic activity” (Art 1.2). See Hoskins “Combining work and care for the elderly: An overview of the issues” (1993) 132 *International Labour Review* 348.

¹⁴² Convention 156, para 4 and 5.

Convention 156 is supplemented by the Workers with Family Responsibilities Recommendation 165 of 1981 (“Recommendation 165”) which provides that “it should be possible for a worker with family responsibilities to obtain leave of absence in the case of illness of another member of the worker’s immediate family who needs that worker’s care or support”.¹⁴³ It also provides that, where necessary, provision should be made for access to social security benefits for workers with family responsibilities.¹⁴⁴ In addition, all possible public and private measures needed to lighten the burden of workers’ family responsibilities should be taken, including the development of home-care services to provide workers with family responsibilities with “qualified assistance at a reasonable charge in accordance with their ability to pay”.¹⁴⁵ Recommendation 165 therefore addresses the problems associated with family caregiving and, even though it is not binding, serves as a helpful guideline for the development of measures intended to alleviate the burden of workers with family responsibilities.

7.2.4.3 Evaluation of South African social security law in terms of ILO conventions

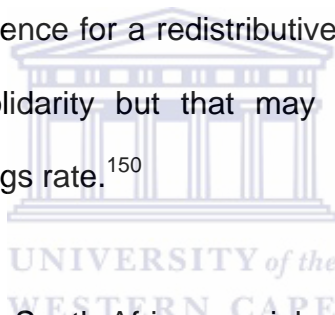
The ILO Conventions discussed above require a measure of “risk-pooling” - for example, the requirement of the provision of minimum benefits by national social

¹⁴³ Recommendation 165, para 23(2). “Social security benefits” are the benefits listed in Convention 102 (see above at 7.2.4.1).

¹⁴⁴ Para 27(1).

¹⁴⁵ Para 32.

security schemes.¹⁴⁶ These measures ensure “solidarity between those affected by a contingency and those not affected” without which “the aims of the Conventions cannot be fully achieved”.¹⁴⁷ For the ILO, solidarity is “a central value implying that income security in old age is not an individual task but requires a generational contract”.¹⁴⁸ Most importantly, accordingly to Maier-Rigaud,¹⁴⁹ the ILO “explicitly refutes laissez-faire philosophy, where the state has no responsibility for the retirement income”. The influence of the abovementioned ILO standards and views on the South African retirement insurance reform process is apparent from the Department of Social Development’s stated preference for a redistributive and solidarity-based system over systems that lack solidarity but that may serve other goals such as increasing the national savings rate.¹⁵⁰



When evaluating the current South African social security law and the proposed social security reforms against the requirements of the Conventions above, the following points of concern regarding the South African system arise:

- The legislation allowing for the lump sum benefits paid by provident funds in South Africa¹⁵¹ does not comply with the provisions of Convention 128, which requires that retirement benefits be periodical payments paid “throughout the contingency”, therefore lifelong benefits.¹⁵²

¹⁴⁶ Art 66 and 67, read with the Schedule of Convention 102; Art 26, read with the Schedule of Convention 128.

¹⁴⁷ Otting “International labour standards: A framework for social security” (1993) 132 *International Labour Review* 171.

¹⁴⁸ Maier-Rigaud (1995) “Implications of pension ideas for organised labour” 19.

¹⁴⁹ Maier-Rigaud (1995) “Implications of pension ideas for organised labour” 20.

¹⁵⁰ DSD Discussion document (2007) 94 and 107.

¹⁵³ See 2.5 (for definition of provident funds), 3.3.2.1 (for legislation on provident funds) and 5.3.2.

¹⁵² Art 17, read with Art 19.

- In terms of article 72 of Convention 102 and article 35 of Convention 128, the state has the general responsibility for the provision of, implementation of, and proper administration of retirement benefits. The current retirement funding system in South Africa does not conform to these requirements to the extent that the abovementioned functions are fulfilled by occupational funds and the state merely regulates the pension fund industry.¹⁵³
- South African labour law¹⁵⁴ currently only makes provision for family responsibility leave in the case of illness of the employee's child, and not for illness of other family members, including dependent older persons as provided for in Convention 156.¹⁵⁵

Social protection for older persons will have to become a national spending priority before the branch-specific conventions containing provisions regarding retirement benefits and assistance to workers with family responsibilities can be ratified. There is no such impediment to ratifying Convention 102, as the flexibility inherent in the convention allows the state to adapt social security system to the economic and social conditions prevailing in South Africa and it should be ratified as soon as possible.¹⁵⁶ In the interim, the benchmarks set by these instruments serve as helpful guidelines for the social security reform process and the resultant legislation. It is recommended that the emphasis on solidarity and risk-pooling in the ILO standards be set as a statutory norm in future social security legislation in South Africa.

¹⁵³ See 3.3.2 above for a description of the current South African retirement funding system and legislation.

¹⁵⁴ Section 27 of the Basic Conditions of Employment Act 75 of 1997.

¹⁵⁵ As well as Recommendation 165.

¹⁵⁶ Jansen van Rensburg and Olivier "International and supra-national law" in Olivier (eds) (2003) *Social security: A legal analysis* 646.

7.2.5 Regional standards

7.2.5.1 African (Banjul) Charter on Human and Peoples' Rights¹⁵⁷

7.2.5.1.1 Introduction

The African (Banjul) Charter on Human and Peoples' Rights (the African Charter) is unique among human rights standards in a number of respects. Firstly, while reference is made to other human rights instruments, the African Charter aims to be a truly African instrument. In the preamble to the Charter, States parties are required to "take into consideration the virtues of their historical traditions and values of African civilization which should inspire and characterise their reflection on the concept of human and peoples' rights".

Secondly, the Charter includes socio-economic rights and civil and political rights in one instrument with the same enforcement methods¹⁵⁸ for both types of rights.¹⁵⁹

¹⁵⁷ OAU Doc. CAB/LEG/67/3/Rev. 5 (1981), entered into force 1986. The African Charter has been ratified by South Africa and all other SADC countries.

¹⁵⁸ Enforcement measures i.t.o. the Charter include: a bi-annual report on the implementation of the Charter (Art 62); complaints by States parties regarding violations of the Charter by other States parties (Art 47-54); and individual complaints ("other communications" i.t.o. Art 55-58). A detailed analysis of the measures to enforce the African Charter falls outside the scope of this thesis. For more on ways of enforcing the Charter and the interpretation of the Charter, see De Vos "A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples' Rights" (2004) 1 *LDD* 1-24.

¹⁵⁹ The preamble to the African Charter states that "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the

7.2.5.1.2 *The African Charter and older persons' rights*

The African Charter contains various provisions on socio-economic rights, but makes no explicit reference to social security rights.¹⁶⁰ However, it contains rights that are indirectly linked to social security, such as the right of every individual to work under equitable and satisfactory conditions¹⁶¹ and the right to enjoy the best attainable state of health.¹⁶²

Even though the African Charter does not directly provide for a right to social security, it is still of significance to South African social security measures aimed at improving the lives of older persons, as it emphasises the importance of the family as the natural unit of society to be protected by the State.¹⁶³ In terms of Article 18, the state has the duty to assist the family.¹⁶⁴ This is in line with policy developments in South Africa, for instance the White Paper for Social Welfare¹⁶⁵ which regards the family as the main support system for older persons in South Africa. It is submitted that the particular function of the family should be recognised in the current reforms of the South African social security system and that cognisance be taken of the duty of every individual “to preserve the

satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”.

¹⁶⁰ Oloka-Onyanga “Beyond the rhetoric: Reinvigorating the struggle for economic and social rights in Africa (1995) 26 (1) *California Western International Law Journal* 77 criticises the Charter for the absence of many of the socio-economic rights guaranteed in the ICESCR, including the right to social security.

¹⁶¹ Art 15.

¹⁶² Art 16.

¹⁶³ Art 18(1).

¹⁶⁴ Art 18(2).

¹⁶⁵ GN 1108 in GG 18166 of 8 August 1997. See above at 4.2 and 6.2.1.

harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need".¹⁶⁶ However, the individual duty to maintain older family members must be read in the context of Article 18 requiring the state to provide protection and assistance to families.

In addition, older persons are guaranteed "the right to special measures of protection in keeping with their physical or moral needs".

It is of great significance for the promotion of older persons' rights and the concept of intergenerational solidarity in South Africa that the African Charter recognises socio-economic rights "within the context of group solidarity".¹⁶⁷ It is, therefore, clear from the African Charter that the provision of social protection to older persons is not the duty of the state alone, but that families and communities share the duty to improve the welfare of their respective members with the state.¹⁶⁸

De Vos disagrees with commentators who consider the individual duties imposed by the Charter, such as the duty towards the family, as "too onerous". He argues:

¹⁶⁶ Art 29(1). In terms of Art 27(1) "every individual shall have duties towards his family and society". The inclusion of a set of individual duties is one of the unique aspects of the African Charter.

¹⁶⁷ Jansen van Rensburg and Olivier "International Standards" in Olivier et al eds) (2004) *Introduction to social security* 169.

¹⁶⁸ Jansen van Rensburg and Olivier (2004) 170.

While there has been little action undertaken to test this aspect of the Charter, it is quite clear that the concept of duties is not necessarily antithetical to the respect of human rights. What is clear is that the overall observation and protection of individual rights is not undermined by an undue emphasis on duties. This is especially true of the aspect of the Charter dealing with economic, social and cultural rights and their connection to the pursuit of sustainable human development.¹⁶⁹

The duty of individuals to respect their parents and maintain them in the case of need as established by Roman-Dutch principles¹⁷⁰ has been confirmed as part of South African law as a result of the ratification of the Charter. Legislation is required to shape this duty,¹⁷¹ for example to require families *who are able to do so* to care for older family members.

Bearing in mind the state's duty to assist the family in terms of Article 18 of the African Charter, the proposed legislation should also provide for financial and other support for families complying with the duty to care for their parents.

It is submitted that the emphasis in the African Charter on the individual's duty to his or her family should not be interpreted so as to absolve the state of its duty toward older persons. The ILO instruments discussed above stress the need for the state to take steps to create a solidarity-based social security system. Similar provisions are found in the UN Madrid Plan of Action and in the General Comments on the interpretation of the ICESCR. The African Charter's focus on

¹⁶⁹ De Vos "A new beginning? The enforcement of social, economic and cultural rights under the African Charter on Human and Peoples' Rights" (2004)1 *LDD* 7.

¹⁷⁰ See above at 3.3.4.2 and 6.2.1.

¹⁷¹ To improve on the existing common law filial responsibility and customary law duty to support older family members. See above at 6.2.1 - 6.2.3 for reasons why the existing position is not ideal and why legislation to enforce the duty of families to support and care for older family members is required.

the family and individual family members' duty to provide support to older persons is in contrast with the other instruments discussed above that provide for direct state support to older persons. However, what all of these instruments have in common is the provision that where the family is in fact providing care and support to older family members, the state has the duty to provide assistance.

7.2.5.1.3 *Specific protection for women*

In the context of the duty of families to support and care for older family members and the resultant obstacle female caregivers may face in providing for their own old age, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa¹⁷² is significant as it contains various provisions which require States parties to take cognisance of women's role as caregivers and to enact specific social security measures to assist women in recognition of the value of their work in the home.

The African Women's Protocol requires that the state takes action to ensure that substantive equality is reached between men and women.¹⁷³ Article 13 specifically requires State parties to enact "legislative and other measures to guarantee women equal opportunities in work, career advancement and other

¹⁷² Adopted by the 2nd Ordinary Session of the Assembly of the Union, in Maputo, Mozambique on 11 July 2003. Hereafter referred to as the "African Women's Protocol". South Africa has ratified the African Women's Protocol on 17 December 2004.

¹⁷³ Art 2(1)(d) requires State Parties to "take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist."

economic opportunities”. States are required to, amongst others, “establish a system of protection and social insurance for women in the informal sector”;¹⁷⁴ and, to “take the necessary measures to recognise the economic value of the work of women in the home”.¹⁷⁵

Article 13 deals with the situation where women are capable of working (in terms of age) but, at the same time, are not capable of working because of various social factors, one being their caregiving role. Article 22, on the other hand, is dedicated to the ‘special protection of elderly women’. In terms of this Article States parties undertake to “provide protection to elderly women and take specific measures commensurate with their physical, economic and social needs as well as their access to employment and professional training”.¹⁷⁶ States parties are thus required to take specific measures to protect older women, especially with regard to their economic and social needs.

7.2.5.2 The Treaty of the South African Development Community

The objectives of the Southern African Development Community (SADC) are listed in Article 5 of the SADC Treaty.¹⁷⁷ The priority of social protection from a SADC perspective can be seen from the first objective on the list, which is regional integration in order to

¹⁷⁴ Art 13(f).

¹⁷⁵ Art 13(h).

¹⁷⁶ Art 22(a).

¹⁷⁷ The Treaty of the South African Development Community, as amended (2001) <http://www.sadc.int> (accessed 07/07/2009).

support sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standards and quality of life of the people of Southern Africa and support the socially disadvantaged.¹⁷⁸

SADC member States have undertaken to cooperate in the areas of social and human development and social welfare.¹⁷⁹

Although the SADC treaty makes no express mention of social protection for older persons, this is implied by efforts to support the “socially disadvantaged” in terms of Article 5.

7.2.5.3 Charter of Fundamental Social Rights

A vital step in meeting the objectives of SADC as set out in article 5 of the SADC Treaty was the adoption of the Charter of Fundamental Social Rights.¹⁸⁰ Article 2 sets out the objectives of the Charter that include the promotion of establishment and harmonisation of social security schemes.¹⁸¹ The Charter provides for adequate social insurance or social assistance, depending upon circumstances, for every worker in the SADC region.¹⁸²

¹⁷⁸ Art 5(1)(a).

¹⁷⁹ Art 21(3)(d) and (g). See Malherbe “The co-ordination of social security rights in Southern Africa” 2004(1) *LDD* 59-84 for more on social security co-ordination in the SADC region.

¹⁸⁰ Charter of Fundamental Social Rights in SADC (2003) <http://www.sadc.int> (accessed 07/07/2009).

¹⁸¹ Art 2(e).

¹⁸² Art 10.

Older persons are singled out in the Charter as a group worthy of protection. Article 8 makes provision for retirement insurance schemes that would afford every worker in the SADC region “a decent standard of living” upon retirement. In addition, it makes provision for adequate social assistance for older persons, catering for basic needs such as medical care.¹⁸³

Read with the requirement that member States “take appropriate action to ratify and implement relevant ILO instruments”,¹⁸⁴ the abovementioned provisions of the Charter signify that SADC member States are motivated to improve social security provision to older persons. However, the practical implementation of the provisions in a coordinated fashion may prove difficult due to the different administrative, political, socio-economic (particularly social security) structures and legislative frameworks in the SADC member States.¹⁸⁵

7.2.6 Conclusion

The ultimate influence of international standards on South African social security was highlighted by Jansen van Rensburg and Olivier where they stated that “on account of the human rights and constitutional dimensions of social security, the

¹⁸³ Art 8(a) and (b).

¹⁸⁴ Art 5(b).

¹⁸⁵ Taylor Committee Report No.14: Social security within a regional context (2001) 566.

state cannot escape responsibility for the good functioning of the system, whether private or public”.¹⁸⁶

In terms of CEDAW the state must make special provision for support to women with caregiving responsibilities and for direct access to social security for rural women.¹⁸⁷

The ICESCR requires the state to take a central role in realising the right to social security, which according to General Comments 6 and 19 includes the implementation of a solidarity-based retirement funding system, including both social assistance and social insurance measures.¹⁸⁸ The UN’s view as expressed in the Madrid Plan is that the state is obliged to take positive steps to foster intergenerational solidarity as the backbone of programmes to provide economic security for older persons. The ILO standards discussed above focus on the social security rights of employed persons and state a clear preference for solidarity-based national social security schemes.

The ICESCR, the relevant UN declarations and the abovementioned ILO standards require the state to create the legal framework granting older persons the right to social security measures relevant to their needs, protection by the state and family support. In addition, these standards together with the SADC

¹⁸⁶ Jansen van Rensburg and Olivier “International standards” in Olivier et al (eds) (2004) *Introduction to social security* 165.

¹⁸⁷ See above at 7.2.2.3.

¹⁸⁸ See above at 7.2.2.2.1.

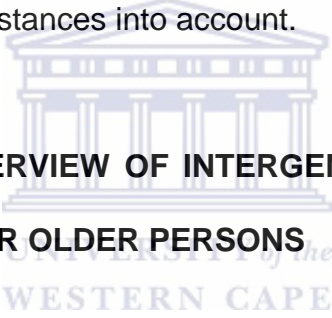
Charter of Fundamental Social Rights require the state to implement measures aimed at assisting older persons in realising their rights.¹⁸⁹

The African Charter makes no reference of social security rights and national social security schemes, but focuses instead on the importance of the family as the main support system for older persons. In terms of the Charter the state has the duty to assist the family. The emphasis in the African Charter is on the duty of individual family members and of the family as a group to provide support to older persons. While the ILO and the UN instruments and plans of action discussed above all recognise the important role of the family in the provision of care and support to older persons, they all require programmes to provide state support to families that are supporting older persons. Although the African Charter reflects a different view of the balance between the state and the family's role in supporting older persons from that expressed in the other instruments discussed above, all the instruments share the view that families that are providing care and support to older persons are entitled to state support and protection.

A positive step toward realising the social security rights of older persons in South Africa would thus be to align South African social security legislation and other legislation on older persons with international standards. In some respects this has already occurred, for instance, legislation such as the SAA gives effect to

¹⁸⁹ See Malan and Jansen van Rensburg "Social security as a human right and the exclusion of marginalized groups: An international perspective" in Olivier et al (eds) (2001) *The extension of social security protection in South Africa* 76.

the right of access to social security as expressed in the international standards discussed above. The influence of the UN Principles for Older Persons and the Madrid Plan is evident in the language adopted in the OPA, particularly with regard to the importance of state support for family and community care for older persons.¹⁹⁰ However, the current fragmented legislative framework for the provision of financial and non-cash support to older persons does not conform to international standards and, in particular, lacks a solidarity-based retirement funding scheme. The aim is to create an integrated legal framework to protect older persons' rights that meets international standards whilst still taking the uniquely South Africa circumstances into account.



7.3 COMPARATIVE OVERVIEW OF INTERGENERATIONAL SOLIDARITY AND PROVISION FOR OLDER PERSONS

7.3.1 Introduction

Substantial reform of pension systems worldwide, mainly to meet challenges posed by demographic ageing and concerns regarding sustainability and affordability of existing systems, has occurred over the last three decades. The aim of the comparative portion of this thesis is to determine whether potential solutions to the problems with the current South African social security system and legislation highlighted in chapters 4 to 6 above have been found in other

¹⁹⁰ See e.g. s 10 OPA that echoes para 10 of the UN Principles for Older Persons.

jurisdictions. However, any comparative study of other countries' systems must always be carried out subject to the proviso that all countries face unique challenges in providing for older persons and that no country has a perfect system.¹⁹¹ The comparative portion of this thesis therefore aims to determine to what extent the solutions found in other countries could be suitable and viable in the South African context.

As far as statutory reform of the South African retirement funding system is concerned, it has to be borne in mind that South Africa's starting position is significantly different from that of most other countries that have recently completed pension reforms. South Africa currently has a "private" occupational system and aims to move to a compulsory system with increased state involvement.¹⁹² Most other countries with significant pension reforms had a compulsory state-run system and sought to change to a system with increased private market participation. Thus, "while international experience carries important lessons, South Africa's social security reform challenge is unusual in several respects"¹⁹³ and the reform process and resultant legislation will have to reflect the uniqueness of the South African situation.¹⁹⁴

¹⁹¹ Cameron "SA's new retirement structure takes shape" *Personal Finance* 20 January 2008 <http://www.persfin.co.za> (accessed 05/02/2009).

¹⁹² See above at 3.3.2 for a description of the SA occupational retirement funding system and at 5.2 for an overview of the current pension reform process.

¹⁹³ National Treasury (2007) *Budget Review 2007* 110.

¹⁹⁴ DSD discussion document (2007) 16 explains the difference between reforms in other countries and the SA reforms as follows: "Whereas most developed and developing countries want to shift from single- to multi-pillar retirement systems, South Africa sits at the opposite extreme with almost no social security elements apart from social assistance."

The South African reform process may also differ from similar processes in other countries due to the constitutional imperative¹⁹⁵ to ensure that reforms provide for progressive realisation of social security rights and that they do not deny individuals access to social security.

Even though socio-economic conditions in South Africa are not very similar to those in developed countries, a comparative overview of legislation and policy¹⁹⁶ in countries such as Sweden, the United Kingdom and the United States of America is not completely irrelevant,¹⁹⁷ as measures should be taken in the reform process at least to ensure that South Africa does not repeat the mistakes made in these countries in developing and reforming their retirement benefit systems. Then again, there are parallels between the socio-economic circumstances in South Africa and Chile and therefore a comparison between the South African and Chilean systems may point to defects in the South African system and serve as advance warning of possible pitfalls in the South African pension reform process.¹⁹⁸

Internationally, increasing attention is being paid to the question of how to balance the growing needs of older persons between their families and the state.

¹⁹⁵ Sections 27(2) and 27(1)(c) of the Constitution, 1996.

¹⁹⁶ Due to length constraints analysis of the case law in the countries selected for the comparative study falls outside the scope of this thesis.

¹⁹⁷ See Fenwick and Kalula "Law and labour market regulation in East Asia and Southern Africa: Comparative perspectives" (2005) 2 *International Journal of Comparative Labour Law and Industrial Relations* 198 - 204 for an analysis of the different views on "transplanting" labour laws from one jurisdiction to another.

¹⁹⁸ See above at 1.5 for the rationale behind the selection of these four countries for a comparative study.

In industrialised countries the concern is for the sustainability of existing public care systems, whereas the need to allocate “already limited resources” toward new programmes providing state support to older persons is the main concern in developing countries.¹⁹⁹

Because women fulfil a multitude of caregiving roles, the global rise in employment of women has given rise to conflicts between their multiple roles.²⁰⁰ Attention is being given worldwide to steps to assist women in balancing their caregiving and income generating roles. Increasingly, credits for years spent caregiving are being introduced into pension systems to accommodate caregivers.²⁰¹ The statutory provisions for caregiving credits are usually couched in gender-neutral terms to accommodate male caregivers and avoid trespassing on the right to equality, but it is largely women who benefit from these provisions.

7.3.2 The World Bank “multipillar” model

What has become known as the ‘World Bank model’ is a list of criteria set by the World Bank before it is prepared to support pension reform in any given country. The ‘World Bank model’ is not intended as a universal “blueprint” and is only

¹⁹⁹ Myers and Agree “The world ages, the family changes – a demographic perspective” (1994) 21 (1) *Aging International* 11.

²⁰⁰ Myers and Agree (1994) 21 (1) *Aging International* 15.

²⁰¹ See 7.3.3.5, 7.3.4.4, 7.3.5.7 and 7.3.6.4 below for measures to provide care and support to older persons and assistance to caregivers in the countries selected for the comparative overview.

supposed to serve as a point of reference taking into account country-specific circumstances.²⁰²

The World Bank model originally consisted of three ‘pillars’ of retirement funding, based on the idea that “several distinct pillars diversify risk”:²⁰³

- Pillar one consists of a universal public benefit programme funded from general government revenue that aims to prevent poverty in old age.
- The second pillar is made up of a typically privately managed, fully or partially funded, mandatory scheme that gives an individual the opportunity to save for his or her own retirement.
- Voluntary savings for retirement on a fully funded basis²⁰⁴ constitute the third pillar.

This three-pillar model does not allow for a traditional earnings-related PAYG social insurance scheme.²⁰⁵

In South Africa the older person’s grant²⁰⁶ is a means tested non-contributory source of income for men and women over 60²⁰⁷ with low or no income,

²⁰² Holzmann et al “Comments on rethinking pension reform” in Holzmann and Stiglitz (eds) (2001) *New ideas about old age security* 61; Holzmann and Hinz (2005) *Old-age income support in the 21st century* 53 and 63; Maier-Rigaud (2005) “Implications of pension ideas for organized labour” 11.

²⁰³ Maier-Rigaud (2005) “Implications of pension ideas for organized labour” 10.

²⁰⁴ See above at 2.7 for the distinction between fully funded and PAYG retirement funds.

²⁰⁵ Maier-Rigaud (2005) “Implications of pension ideas for organized labour” 10; National Treasury (2004) *Retirement fund reform: a discussion paper* (hereafter “National Treasury (2004) Discussion paper”) 11. See World Bank (1994) *Averting the old age crisis: policies to protect the old and promote growth* for a discussion of the original three-pillared retirement funding model.

²⁰⁶ Currently a maximum payment of R1010 per month.

constitutes the first pillar of the system providing income in retirement. The second pillar is made up of voluntary, occupational retirement funds that can be either pension or provident funds.²⁰⁸ The third pillar consists of voluntary savings vehicles for retirement for self-employed persons who are excluded from occupational retirement funds and is also used by members of occupational retirement funds who wish to supplement their retirement income.²⁰⁹ The current South African pension system thus also consists of three 'pillars', corresponding to a great extent with the World Bank's 'three pillar' approach, except that the second pillar is not mandatory as prescribed by the World Bank.

The World Bank's three-pillared pension model influenced pension reforms in many countries, most notably in Chile, where the public pension system was privatised in the 1980s to conform to the World Bank model's second pillar.²¹⁰ However, the World Bank's original three pillared' approach has evolved into a "multi-pillared" system in recognition of the diversity of methods to secure income for retirement.²¹¹ The original first pillar, made up of social assistance benefits, is now renamed the "zero pillar". An earnings-related contributory scheme now constitutes the new pillar 1. Pillars 2 and 3 remain basically the same. Informal family and community support has been added as the final pillar.²¹²

²⁰⁷ See above at 2.8 for the past differentiation in pensionable age between men and women which is set to be phased out by 2010.

²⁰⁸ South African occupational funds and the relevant legislation is discussed above at 3.3.2.

²⁰⁹ National Treasury (2004) *Discussion paper* 11-12.

²¹⁰ See below at 7.3.3.2 for an overview of the Chilean pension system.

²¹¹ Holzmann and Hinz (2005) *Old-age income support in the 21st century* 1; Maier-Rigaud (2005) "Implications of pension ideas for organized labour" 10.

²¹² Holzmann and Hinz (2005) *Old-age income support in the 21st century* 2; Maier-Rigaud (2005) "Implications of pension ideas for organized labour" 10.

The revised multi-pillared approach has been adopted in some Organisation for Economic Co-operation and Development (OECD) countries to include the following measures:

- Poverty prevention to low-income older persons;
- A compulsory national contributory system;
- Occupational pension plans with tax incentives;
- Voluntary individual retirement savings accounts;
- Private savings;
- Health and long-term care programmes; and
- Informal transfers of resources within families.²¹³

In many OECD countries several items on this list are normally not regarded as retirement income pillars, particularly health and long-term care programmes and transfers within families. Despite this, these measures have increased in importance as the recognition of the interrelatedness of various methods of ensuring financial security during retirement years has grown.²¹⁴

The World Bank model's original emphasis on funding and individual accounts²¹⁵ must be viewed in the context of the World Bank's aim of utilising pension

²¹³ Blommestein, Hicks and Vanston (1997) Retirement-income reforms in the context of OECD work on ageing 13.

²¹⁴ "There would be merit in giving fuller recognition to the diversity of pillars that exist, in a better understanding of their interactions and in assessing the policy implications of changes in both the number of pillars and their weight." (Blommestein, Hicks and Vanston (1997) *Retirement-income reforms* 13).

²¹⁵ Two of the three original 'pillars' were based on individual accounts that were fully funded.

systems to stimulate economic growth.²¹⁶ The significance of the original 'three pillar' model lies in its reliance on the market instead of the state to provide retirement income and its shift from an intergenerational solidarity approach to individual responsibility to secure retirement income.²¹⁷ It therefore serves as a counterpoint to the view that pension systems should be based on intergenerational solidarity,²¹⁸ specifically as it regards the state's role in pension provision as merely "residual".²¹⁹

Before the adoption of the "multi-pillar" model, the World Bank attached great importance to the financial sustainability of a pension system. According to Maier-Rigaud it claimed that "the solidarity of social insurance is flawed because it is not sustainable".²²⁰ Basing its argument on 'intergenerational equity', it claimed that systems based on solidarity will require increased contributions by future generations to meet their pension liabilities and that, therefore, pension reforms are vital to ensure that future generations will not be burdened excessively.²²¹ It is submitted that the inclusion by the World Bank of an earnings-related national contributory scheme as 'pillar 1' of its new multi-pillar

²¹⁶ As can be seen from the 1994 report titled *Averting the old age crisis: policies to protect the old and promote growth* (my emphasis).

²¹⁷ Maier-Rigaud (2005) "Implications of pension ideas for organized labour" 10.

²¹⁸ According to Maier-Rigaud "Implications of pension ideas for organized labour" (2005) 2, the World Bank's pension model must be understood in the context of the "powerful neoliberal paradigm" behind the pension model, as opposed to the human rights based approach of the ILO. See 7.2.4 above for more on the ILO's approach to retirement funding).

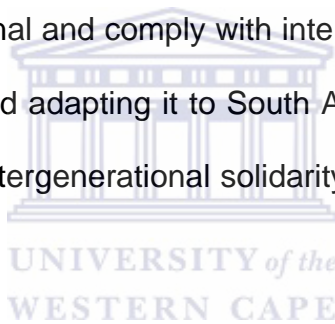
²¹⁹ Maier-Rigaud "Implications of pension ideas for organized labour" (2005) 11. Cf the African Charter's emphasis on the family's duty to support older persons, with the state's role merely residual (see above at 7.2.5.1).

²²⁰ "Implications of pension ideas for organised labour" (2005) 12.

²²¹ See above at 6.4.4 for a discussion of the "intergenerational equity" point of view.

model is a significant move toward acknowledgement of the importance of solidarity by an organisation that has traditionally been mistrustful of it.

Given that the World Bank's pension models were initially built on a paradigm of 'intergenerational equity' and 'neo-liberalism', any attempt by South African law- or policymakers to adopt the World Bank model without addressing the problem of the fundamental differences in approach between the World Bank and international standard-setting organisations may be doomed from the start. The new pension system will have to be introduced and regulated by legislation that, in turn, has to be constitutional and comply with international law. Adopting parts of the World Bank model and adapting it to South African circumstances without considering the impact on intergenerational solidarity would lead to a system that is inherently contradictory.



It is therefore submitted that the approach of both the National Treasury and the Department of Social Development in their policy documents is quite heartening: the notion of a multiplicity of pillars is taken from the World Bank model, but the reform proposals are built on principles that are in line with the guidelines set by international standards, such as pooling of risks, mandatory participation, administrative efficiency and solidarity.²²²

²²² National Treasury (2007) *Social security and retirement reform: second discussion paper* (hereafter "2nd discussion paper" 6-7; National Treasury (2007) *Budget Review 2007* 110. See also DSD discussion document (2007) 92-93. See above at 7.2 for the guidelines set by international standards.

7.3.3 Chile

7.3.3.1 Introduction

The Chilean social insurance system is interesting from a comparative perspective as Chile's compulsory private funded schemes are often cited as an example of multi-pillar system well worth copying.²²³ In particular, the major changes made to pension provisions by the military dictatorship in the early 1980s resulted in a reformed pension system that became a point of reference for many other pension reforms.²²⁴ In the words of Ben Braham: "While each reform should be analyzed with the specificities of each country, the Chilean experience provides a good benchmark, at least to avoid its mistakes."²²⁵

In addition, the high level of inequality in Chilean society is comparable to that of inequality in South Africa²²⁶ and the steps taken by law and policy makers in Chile since the change to democracy to address the situation of indigent older persons makes the Chilean system valuable from a comparative point of view.²²⁷

²²³ Heller (1998) Rethinking public pension reform initiatives 4.

²²⁴ Schwarz and Demircuc-Kunt (1999) Taking stock of pension reforms around the world 6; Diamond (1993) Privatization of social security: lessons from Chile 26

²²⁵ (2007) Structural pension reform: The Chilean experience 19.

²²⁶ South Africa's gini coefficient has risen from 0,593 in 1998 to 0,666 for 2008 (The Presidency (2009) *Development Indicators 2009*), compared to 0,571 for Chile in 2003 (Earth Trends (2003) "Economic Indicators: Chile" 2). More recent indicators are not available for Chile. A country's gini coefficient is stated as a number between 0 and 1, with 0 reflecting the lowest and 1 the highest levels of inequality. See Agostini and Brown (2007) *Local distributional effects of government cash transfers in Chile* 11 and 17; Galasso (2006) "With their effort and one opportunity" *Alleviating extreme poverty in Chile* 2.

²²⁷ See Palma and Urzúa (2005) Anti-poverty policies and citizenry: The "Chile Solidario" experience 8.

Before 1981, the public pension system in Chile was defined-benefit PAYG.²²⁸ Salaried employees in private employment had a separate pension scheme from wage earners and the self-employed. Benefits were based on wages during the final years of working multiplied by the number of years worked. Separate schemes also existed for railroad employees, public employees and the armed forces.²²⁹ This system was replaced by a defined contributions funded system with individual accounts for members during the 1980 pension reforms.

7.3.3.2 Pension privatisation in Chile

Chile introduced compulsory private funded schemes in 1980 as a result of the reform process referred to above.²³⁰ One of the reasons why reform was required in Chile, in other countries in Latin America and other developed countries was that publicly funded social security benefits offered high pensions in relation to pre-retirement income. Due to the ageing of population and other factors²³¹ the number of people working and therefore contributing was declining relative to people retiring. Consequently, an onerous tax burden on the working population was expected if the system was not reformed. The idea was that

²²⁸ In PAYG systems current contributions are utilised for the system's current pension liabilities. See 2.7 above for a distinction between PAYG and fully funded systems.

²²⁹ Mesa-Lago "Social protection in Chile: Reforms to improve equity" (2008) 147 (4) *International Labour Review* 391; Rosenfeld and Marre (1997) "Chile's rich" *NACLA Report on the Americas* <http://www.hartfords-hwp.com/archives/42a/100.html> (accessed 29/06/2009); Diamond (1993) *Privatization of social security: lessons from Chile* 3.

²³⁰ Decree No. 3,500 of 1980.

²³¹ E.g. legislation that provided for better benefits for members of the armed forces and public functionaries. See Rosenfeld and Marre (1997) "Chile's rich" *NACLA Report on the Americas* <http://www.hartfords-hwp.com/archives/42a/100.html> (accessed 29/06/2009).

employees would become less reliant on the public scheme as the private scheme developed.²³²

One of the most important aspects of the privatised system is that each member contributes to an individual account managed by one of a number of individual pension fund management companies.²³³ The involvement of private asset management funds in many cases entails that the government's role is restricted to regulation and supervision of the funds²³⁴ by setting prudent investment ceilings, prosecuting fraud and regulating business practices.²³⁵ This situation is quite similar to the current occupational retirement fund system in South Africa.

Members' pensions are determined by the amount that they are able to accumulate in their individual accounts during their working years.²³⁶ The post-1980 private retirement insurance system in Chile is, therefore, similar to defined contribution funds in South Africa²³⁷ as the insured person receives his or her own contribution plus accrued interest and investment returns, less administrative

²³² National Treasury (2004) *Discussion paper 18*; Rodriguez "Chile's Hot Pensions" The Cato Institute *Daily Commentary* 30 October 1999 http://www.cato.org/pub_display.php?pub_id=4951 (accessed 30/10/2008). In 2006 the pension system's coverage of the labour force was approximately 61% (Mesa-Lago "Social protection in Chile: Reforms to improve equity" (2008) 147(4) *International Labour Review* 388).

²³³ *Administradoras de Fondos de Pensiones* (AFPs) are private profit-orientated entities focusing exclusively on running and paying benefits for the private retirement insurance system (Mesa-Lago "Social protection in Chile: Reforms to improve equity" (2008) 147 (4) *International Labour Review* 387).

²³⁴ Heller (1998) Rethinking public pension reform initiatives 7.

²³⁵ Piñera (2004) "Empowering workers in Chile" http://www.josepinera.com/pag/pag_tex_empowering.htm (accessed 10/07/2009)

²³⁶ ISSA (2007) "Chile: Scheme description" <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Americas/Chile#> (accessed 30/06/2009). Retirement age for men is 65 and women can receive benefits from age 60.

²³⁷ See above at 2.6 for a description of defined contribution funds and how benefits in terms of these funds are calculated.

fees. However, there are some important points of difference from the South African system; for example, that employers do not contribute to the private system and each member is required to contribute at least 10% of his or her wage or salary towards the pension system.²³⁸ In South Africa, defined contribution benefits are determined by taking into account the member's and the employer's contributions plus investment returns on the contributions.

In addition, the non-contributory social assistance scheme that existed before the reforms continues to pay benefits to pensioners who meet the income requirements.²³⁹ Recipients of social assistance pensions also automatically have access to public health services.²⁴⁰

Self-employed persons may participate voluntarily, with the result that some informal workers who previously were excluded now have the opportunity to save for their retirement.²⁴¹

²³⁸ Mesa-Lago "Social protection in Chile: Reforms to improve equity" (2008) 147 (4) *International Labour Review* 391; Diamond (1993) *Privatization of social security: lessons from Chile* 4. The lack of employer contributions is contrary to art 71(2) of the ILO Social Security (Minimum Standards) Convention 102 of 1952 in terms of which "the total of the insurance contributions borne by the employees protected shall not exceed 50 per cent of the total of the financial resources allocated to the protection of employees and their wives and children".

²³⁹ Mesa-Lago "Social protection in Chile: Reforms to improve equity" (2008) 147 (4) *International Labour Review* 387-388.

²⁴⁰ Agostini and Brown (2007) Local distributional effects of government cash transfers in Chile 9.

²⁴¹ However, Mesa-Lago "Social protection in Chile: Reforms to improve equity" (2008) 147 (4) *International Labour Review* 389, points out that despite the fact that self-employed persons have the option to join the scheme, "only a small percentage of the self-employed are affiliated and contribute, mainly professionals on relatively high incomes".

7.3.3.3 Evaluation of Chile's private pension scheme post-1980

Advocates of the pension privatisation implemented in Chile hailed it as one of the most significant breakthroughs in the evolution of social security schemes.²⁴²

Some of the perceived positive aspects of the privatised system are:

- Privatisation and the individual account system have provided many Chilean workers with the opportunity to accumulate wealth.²⁴³
- The growth of the Chilean economy and of efficient finance markets and institutions has been attributed to pension privatisation.²⁴⁴
- One of the main reasons for privatisation was the demographical problems posed by the pre-reform PAYG system. Under the reformed system there is less scope for intergenerational conflict as the working population is not paying for the retired population, but rather saving for their own retirement.²⁴⁵
- Privatisation has been equated with depolitisation of the pension system and the fact that the government and other special interest groups are seen to have limited influence over the determination of benefits paid, is regarded as a major advantage.²⁴⁶

²⁴² See Ben Braham (2007) Structural pension reform: The Chilean experience 4,

²⁴³ Piñera (2004) "Empowering workers in Chile" http://www.josepinera.com/pag/pag_tex_empowering.htm (accessed 10/07/2009).

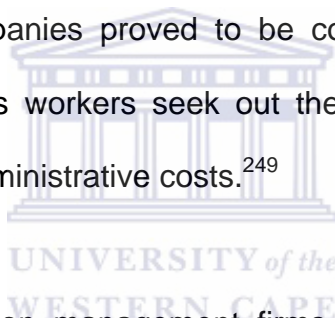
²⁴⁴ Ibid.

²⁴⁵ See Malherbe "Inter-generational solidarity and caring for the aged" in Olivier et al (eds) (2001) *The extension of social security protection in South Africa – a legal inquiry* 189.

²⁴⁶ Diamond (1993) Privatization of social security: lessons from Chile 3 and 19.

Despite the optimism regarding the privatisation of pensions in Chile,²⁴⁷ a number of problems have arisen, many of which may serve as a warning to other countries not to follow the Chilean example.

Individual account management by specialised fund management companies proved to be expensive. The idea initially was that the pension fund management companies should be competitive and profit-oriented. Competition between the different pension management companies was therefore held up as an advantage over public managed funds. In reality, the competition between the pension management companies proved to be costly as it led to “excessive switching of accounts”²⁴⁸ as workers seek out the pension fund management company with the lowest administrative costs.²⁴⁹



From the outset, the pension management firms were intended to be profit-making concerns, leading to a number of unforeseen problems. In countries that have adopted schemes ran by pension management companies, the management companies have created hidden marketing and management costs for the pension schemes.²⁵⁰ As a result, high costs and the particular pension

²⁴⁷ See Schwarz and Demirguc-Kunt (1999) Taking stock of pension reforms around the world 6.

²⁴⁸ Blommestein, Hicks and Vanston (1997) Retirement-income reforms in the context of OECD work on ageing 17.

²⁴⁹ See Diamond (1993) Privatization of social security: lessons from Chile 5.

²⁵⁰ The high administrative costs paid by workers include commissions and premiums charged by the pension fund management companies. See Mesa-Lago “Social protection in Chile: Reforms to improve equity” (2008) 147 (4) *International Labour Review* 391; Ben Braham (2007) *Structural pension reform: The Chilean experience* 13. Contra Rodriguez “Chile’s Hot Pensions” The Cato Institute *Daily Commentary* 30 October 1999 <http://www.cato.org> (accessed 28/06/2009), in whose view administrative costs in Chile are on par with other PAYG public pension systems such as the USA.

management firm's investment strategy may lead to significantly lower than expected rate of return on an individual's contributions. The reasons for low returns may also include possible fraud, poor quality of investment managers or an inappropriate portfolio mix, all of which could be minimised by adequate government regulation.²⁵¹ Finally, because the pension management companies aim to make a profit they set stringent eligibility requirements. Workers who cannot meet these requirements have no access to pensions and end up relying on the state for social assistance.²⁵²

It is also incorrect to assume that the change from a former PAYG system to a fully funded one meant a saving for the state, as the costs of transition²⁵³ had to be paid entirely by the state.²⁵⁴

A guaranteed minimum pension was also introduced by the reforms in the 1980s.²⁵⁵ However, many of the members of the private retirement system were not able to meet the 20 year contribution requirement to receive the minimum

²⁵¹ Heller (1998) *Rethinking public pension reform initiatives* 9. Contra Rodriguez "Chile's Hot Pensions" The Cato Institute *Daily Commentary* 30 October 1999 <http://www.cato.org> (accessed 28/06/2009), who regards the excessive government regulation of e.g. commissions paid to fund managers as the single largest problem facing the Chilean pension system. See also Schwarz and Demircuc-Kunt (1999) *Taking stock of pension reforms around the world* 11.

²⁵² According to the World Bank (2001) *World development Report 2000/2001* 154, more than 40% of the poorest workers in Chile have not been able to participate in the private pension system.

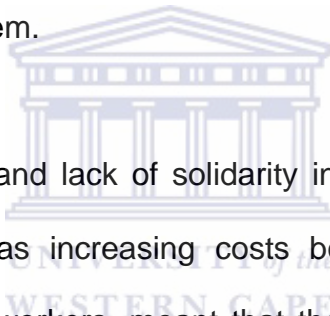
²⁵³ Particularly the pensions of members of the old PAYG system.

²⁵⁴ Mesa-Lago "Social protection in Chile: Reforms to improve equity" (2008) 147 (4) *International Labour Review* 391; Diamond (1993) *Privatisation of social security: lessons from Chile* 15-17.

²⁵⁵ Ståhlberg et al (2008) Retirement income security for men and women 16.

pension, which left them dependent on the social assistance payment by the state.²⁵⁶

In the final analysis, the greatest problem associated with the privatised pension system in Chile after the 1980 reforms has been the lack of solidarity in the private system.²⁵⁷ Each member's contribution is intended for his or her own retirement only and no provision is made for redistribution to the retired population.²⁵⁸ Hence the state has had to finance the minimum pensions as well as the non-contributory social assistance for persons not eligible to become members of the private system.



The inequalities in funding and lack of solidarity in the private pension system described above, as well as increasing costs borne by the state to assist excluded and marginalised workers, meant that the private pension system did not live up to the promises made when it was established.²⁵⁹ Furthermore, it did not meet the requirements of the Chilean constitution regarding the right to social security which provides: “The action of the State shall be intended to guarantee access of all inhabitants to uniform basic benefits whether granted by public or

²⁵⁶ Mesa-Lago “Social protection in Chile: Reforms to improve equity” 147(4) *International Labour Review* (2008) 391 estimates that at least half of the persons insured by the private system cannot meet the 20 years contribution requirement. See also James. Edwards and Wong (2003) *The gender impact of pension reform: a cross-country analysis* 22.

²⁵⁷ Borzutzky “Anti-poverty policies in Chile: a preliminary assessment of the Chile Solidario program” (2009) 1 (1) *Poverty & Public Policy* 1.

²⁵⁸ Barreto (2009) 4 summarises the problem with the privatised system as follows: “In reality the answer to the problem is not only to generate wealth, but to redistribute it with some sense of fairness.”

²⁵⁹ Barreto (2009) “A report on the status of older rights in Latin America” 10 is of the view that the 1980 reforms “did not resolve the problem but on the contrary created more instability”.

private institutions. ... The State shall supervise the adequate exercise of the right to social security.”²⁶⁰

7.3.3.4 2008 Law on Pension Reform

Despite resistance from the pension fund management companies, the failings of the private pension system during the recent decade became too obvious to ignore and in 2006 President Bachelet appointed an Advisory Council on pension reforms.²⁶¹

The Advisory Council consulted with a number of organisations, including the ILO. The ILO suggested that a redesigned pension system be built on “a strong central image of solidarity based on this component as the foundation and cornerstone for all others”.²⁶² The Advisory Council proposed a three-pillar pension system composed of a solidarity pillar, a contributory pillar²⁶³ and a voluntary pillar. The aim was that the combination of three pillars would enable older persons to live with dignity.²⁶⁴

²⁶⁰ Art 19(18) Chile Constitution, Decree No. 1,150 of 1980.

²⁶¹ I.t.o. Supreme Decree No.336 of 17 March 2006.

²⁶² ISSA “Creation of the Presidential Advisory Council for Pension Fund Reform (2006) <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Americas/Chile#> (accessed 30/06/2009).

²⁶³ The privatised system would live on as the contributory pillar to the reformed system.

²⁶⁴ ISSA “Proposed reform of the Chilean pension system” (2006) <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Americas/Chile#> (accessed 30/06/2009).

The Law on Pension Reform²⁶⁵ was passed in March 2008 and came into force in July 2008. The major point of reform was the new emphasis on solidarity, best illustrated by the creation of a basic, non-contributory old age pension,²⁶⁶ financed by the state, in place of the social assistance pension. The basic solidarity pension is paid to persons with no self-financed pensions.²⁶⁷ In addition, the previous minimum pension guarantee has been implicitly replaced by a solidarity-based top-up benefit that is intended to “supplement the contributory pension of persons aged over 65 whose income is low, regardless of their contribution record”.²⁶⁸

The inability of many women to build up sufficient income for retirement in their pension accounts as a result of breaks in their career due to child-rearing is addressed by the creation of a universal maternity grant credited to a mother’s pension account on the child’s date of birth. It is effectively a special bonus of contributions paid by the state on a mother’s behalf for every child born. The

²⁶⁵ Law on Pension Reform 20,255 of 2008.

²⁶⁶ The *pensión básica solidaria* (PBS). See Mesa-Lago “Social protection in Chile: Reforms to improve equity” (2008) 147 (4) *International Labour Review* 392. The PBS is similar to the South African older person’s grant but operates as part of the retirement funding system, rather than a separate social assistance scheme, as is the case in South Africa.

²⁶⁷ It is targeted at the poorest 40% of the population, to be extended to 60% of the poorest households by 2012. Retirement age is equalised at 65 for men and women. See Ben Braham (2007) *Structural pension reform: The Chilean experience* 18; ISSA (2008) “Proposed reform of the Chilean pension system” (2006); “Creation of a basic old-age pension” <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Americas/Chile#> (accessed 30/06/2009).

²⁶⁸ Mesa-Lago “Social protection in Chile: Reforms to improve equity” (2008) 147 (4) *International Labour Review* 393.

amount of the grant, plus interest thereon, is added to the woman's pension at age 65.²⁶⁹

Self-employed persons are encouraged to join the reformed system and coverage of self-employed persons will become mandatory from 2012.²⁷⁰

To reduce administrative costs, the fixed commissions paid to the pension management companies have been replaced by a tendering process taking place every 18 months whereby new members can join the pension management company charging the lowest commission.²⁷¹

It is submitted that the major improvements brought about by the 2008 Law on Pension Reform are the universality of protection to the poor and low-income groups by the basic non-contributory pension and the emphasis on solidarity-based benefits such as the "top-up" benefit that replaced the minimum pension guarantee. Hence, the 2008 Law on Pension Reform has been described as a "counter-reform"²⁷² to reintroduce solidarity into social security.²⁷³

²⁶⁹ ISSA "Creation of a basic old-age pension" (2008) <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Americas/Chile#> (accessed 30/06/2009); Mesa-Lago "Social protection in Chile: Reforms to improve equity" (2008) 147 (4) *International Labour Review* 394.

²⁷⁰ Ibid.

²⁷¹ Existing members of the winning pension management company also benefit as they pay the same commission as the new members. ISSA "Creation of a basic old-age pension" (2008) <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Americas/Chile#> (accessed 30/06/2009); Mesa-Lago "Social protection in Chile: Reforms to improve equity" (2008) 147 (4) *International Labour Review* 395.

²⁷² I.e. a reversal of the measures introduced in 1980.

²⁷³ Barreto (2009) "A report on the status of older people's rights in Latin America" 10.

7.3.3.5 Provision of care and support to older persons

To address the marginalisation of older persons in Chilean society, Act 19,828 creating the National Service for Older Persons²⁷⁴ was passed in 2002. The function of the National Service for Older Persons is to propose policies targeted at the attainment of effective family and social integration of older persons. It also acts as an advisory body on policies to protect older persons from neglect and poverty and to ensure that older persons can exercise their rights in terms of the Chilean Constitution.²⁷⁵

The Chilean Constitution²⁷⁶ declares the family as “the basic core of society”.

However, the Constitution also creates an obligation for the state to

contribute to the creation of the social conditions which permit each and every one of the members of the national community to achieve the greatest possible spiritual and material fulfillment with full respect for the rights and guarantees established in this Constitution.²⁷⁷

The International Year of Older Persons in 1999 was the stimulus for increased attention being paid to ageing in Latin America.²⁷⁸ In the same vein, the UN Principles of Older Persons²⁷⁹ and the Madrid Plan of Action on Ageing²⁸⁰ have

²⁷⁴ Servicio Nacional del Adulto Mayor.

²⁷⁵ UN General Assembly (2006) Follow-up to the Second World Assembly on Ageing, para 18.

²⁷⁶ Decree No.1,150 of 1980, art 1.

²⁷⁷ Ibid.

²⁷⁸ Barreto (2009) “A report on the status of older people’s rights in Latin America” 4. See above at 7.2.3.1 for the significance of the International Year of the Older Persons for the promotion of older persons’ rights internationally.

²⁷⁹ See above at 7.2.3 for a summary of the UN Principles of Older Persons.

²⁸⁰ See above at 7.2.3 for the provisions of the Madrid Plan.

served as a framework for the formulation of laws on older persons in Latin America.²⁸¹

An occupation-based family allowance is paid to employed persons with one or more eligible dependents, which could include a disabled or elderly parent.²⁸²

In 2002, *Chile Solidario*, a programme targeted at the very poor in Chile was introduced.²⁸³ The main aim of the programme was to enable indigent families to develop their ability to access benefits, subsidies and services that they were not able to access before.²⁸⁴ Participation is needs-based and targeting is done through a poverty score to ensure that the poorest families gain access to the programme. *Chile Solidario* provides assistance through training and provision of identity cards in addition to a number of small subsidies, all of which aim to assist families to exit poverty.²⁸⁵ A conditional cash transfer programme makes provision for payments to families with older family members.²⁸⁶ This subsidy is paid in addition to the social assistance pension paid to older persons over 65.²⁸⁷

²⁸¹ Barreto (2009) "A report on the status of older people's rights in Latin America" 6.

²⁸² Law 150 of 1981 as amended by Law 20, 172 of 2007.

²⁸³ It became law by way of Law 19,949 of 2004.

²⁸⁴ Borzutsky "Anti-poverty policies in Chile: a preliminary assessment of the Chile Solidario program" (2009) 1 (1) *Poverty & Public Policy* 4; Palma and Urzúa (2005) *Anti-poverty policies and citizenry: The "Chile Solidario" experience* 8 and 18. *Chile Solidario* targets indigent families and is provided to households rather than individuals (Agostini and Brown (2007) *Local distributional effects of government cash transfers in Chile* 9).

²⁸⁵ Borzutsky "Anti-poverty policies in Chile: a preliminary assessment of the Chile Solidario program" (2009) 1 (1) *Poverty & Public Policy* 4.

²⁸⁶ Barreto (2009) "A report on the status of older people's rights in Latin America" 9.

²⁸⁷ Borzutsky "Anti-poverty policies in Chile: a preliminary assessment of the Chile Solidario program" (2009) 1 (1) *Poverty & Public Policy* 5.

Two characteristics of *Chile Solidario* stand out as potential models for South African care and support systems. Firstly, participation in *Chile Solidario* is only temporary and no family can be in the intensive programme for more than two years.²⁸⁸ The second aspect is that it is a conditional programme and families have to agree to meet a list of 53 conditions that will help them to overcome poverty.²⁸⁹ The participating families, therefore, agree to use the opportunities offered by the programme to overcome poverty and the state agrees to supply them with the necessary support services and resources.²⁹⁰

7.3.3.6 Chilean reforms: lessons for South Africa

The well-developed social insurance scheme in Chile has reduced the poverty rates among older persons as a group.²⁹¹ Unfortunately, high levels of inequality still persist and this was one of the reasons for the reform of the Chilean pension system in 2008.

The Chilean private pension system that operated from 1980 to 2008 is similar to South African defined contribution schemes.²⁹² The reasons why the Chilean

²⁸⁸ Although families have preferential access to available assistance and cash benefits for three years after the initial two-year period. See Galasso (2006) *“With their effort and one opportunity”: Alleviating extreme poverty in Chile* 3.

²⁸⁹ Borzutsky “Anti-poverty policies in Chile: a preliminary assessment of the Chile Solidario program” (2009) 1 (1) *Poverty & Public Policy* 6; Palma and Urzúa (2005) *Anti-poverty policies and citizenry: The “Chile Solidario” experience* 6.

²⁹⁰ Palma and Urzúa (2005) *Anti-poverty policies and citizenry: The “Chile Solidario” experience* 21.

²⁹¹ Agostini and Brown (2007) *Local distributional effects of government cash transfers in Chile* 16.

²⁹² Apart from the guaranteed minimum pension that was payable in Chile. See above at 7.3.3.3.

government felt compelled to reform the pension system in 2008 can prove helpful as comparative pointers on why reform is required in South Africa and which pitfalls to avoid in the reform of the South African system. Consequently, the 2008 reforms in Chile may be helpful from a comparative perspective for the South African reforms, as a privately managed system was substituted by a multi-pillar system with increased state participation in Chile and similar reforms are underway in South Africa.

The recent reforms of the Chilean system are particularly significant to South African social security reforms for four reasons. Firstly, both South Africa and Chile are young democracies and are counted among the countries with the highest levels of inequality in the world.²⁹³ The adoption in South Africa of a system with a substantial solidarity-based pillar, in addition to social assistance to older persons, such as the recently reformed Chilean system, may go a long way in ensuring that a larger number of people, as well as a wider range of people, benefit from retirement insurance.²⁹⁴ It is submitted that such a reform can be regarded as the state taking a reasonable measure to ensure progressive realisation of the right of access to social security.

Secondly, the prominence of solidarity-based measures as replacements for private measures in the newly reformed Chilean system corresponds with the importance of intergenerational solidarity and state participation in pension

²⁹³.See fn 226 above.

²⁹⁴ The Department of Social Development strongly supports the inclusion of a redistributive pillar in the reformed pension scheme – see above at 5.3.5.

schemes in international social security standards and international plans of action on ageing.²⁹⁵ The Chilean reforms of 2008 signal a legislative move from 'neo-liberal' notions of using social security to increase national economic growth and individual savings rates to providing access to pensions for increased numbers of older persons through solidarity-based state measures.

Thirdly, the high administrative costs and extensive government regulation that are part and parcel of privately managed funds in Chile and South Africa alike serve as warnings against generalisations about the dangers of public retirement funds. Public governance of pension schemes "could be both cheaper to administer and safer for retirement funds than private funds".²⁹⁶

Finally, the Chilean government has not completely done away with the private pension system and the pension fund management companies as a pillar of the reformed system, thereby allaying the fears of too much political influence over the running of pension plans. All the proposals for reform of the South African pension system foresee a continued role for (some of the) current occupational funds, not as the primary source of retirement funding but as sources of additional funding.

In the context of care and support of older persons, the *Chile Solidario* programme and legislation are in line with the Chilean constitutional principle that

²⁹⁵ See above at 7.2.4 and 7.2.3 respectively.

²⁹⁶ DSD discussion document (2007) 24 and 30.

policies should be family centered. *Chile Solidario* provides state assistance to families with live-in older members. It requires families to improve their own situation, but with assistance from the state, and takes an integrated approach to families in extreme poverty by providing cash benefits as well as skills development.

A programme like *Chile Solidario* improves access to existing social assistance to participating families. A similar programme in South Africa, improving access to social security will meet the requirements of section 27(1)(c) and (2) of the South African Constitution requiring the state to take reasonable measures within available resources to progressively provide access to social security.



7.3.4 The United Kingdom

7.3.4.1 Introduction

The statutory provisions made in the United Kingdom (UK) for pensions, as well as care and support for older persons are important from a comparative perspective as the systems in the UK and South Africa have much in common. Many of the South African social security systems have their roots in British systems that were implemented under British colonial rule.²⁹⁷ Law and policies

²⁹⁷ Dekker (2005) *Informal social security: A legal analysis* (UNISA LLD thesis) 22. See also Fenwick and Kalula "Law and labour market regulation in East Asia and Southern Africa: Comparative perspectives" (2005) 2 *International Journal of Comparative Labour Law and*

on social security and the balance between state and family care and support for older persons in both the UK and South Africa originated from, amongst others, the Poor Law of 1601²⁹⁸ and the Beveridge Report of 1942.²⁹⁹

The pension system in the UK “is traditionally seen as offering a good example to other countries, having features such as low social security pension expenditures as well as a high coverage of well-financed voluntary private schemes”.³⁰⁰ For these reasons, it may be helpful to examine the UK pension system, particularly to determine the adequacies of the system and whether the recent reforms discussed below have improved benefit structures and coverage of previously excluded persons. The UK efforts to ensure the sustainability of the pension system whilst still ensuring that redistribution of income to vulnerable older persons continues may offer some comparative pointers. In particular, UK laws regarding assistance to family caregivers will be illustrative.

However, the major difference between the two legal systems - that is, the fact that the English legal system is based on the idea of parliamentary sovereignty whereas the Constitution is the supreme law in South Africa - must be taken into account. A comparative study must always be undertaken subject to the proviso

Industrial Relations 193 – 226 on the different views on “transplanting” laws from colonising states to colonies and the contradictions inherent in that.

²⁹⁸ See below at 7.3.4.4.1.

²⁹⁹ See Olivier “The concept of social security” in Olivier et al (eds) (2004) *Introduction to social security* 18 for more on the Beveridge approach to social security. The influence of the Beveridge Report on the pre-2007 UK pensions system is most clearly evidenced by the lack of attention to the position of women and caregivers, as the system in place before the 2007 reform was “rooted in the society of the 1940s” (Department of Works and Pensions (hereafter “DWP”) (2006) *Security in Retirement: Towards a new pensions system* Executive Summary 12).

³⁰⁰ Davis (2004) Is there a pensions crisis in the UK? 2.

that legislation in South Africa must be interpreted in such a manner as to promote the spirit, purport and objects of the Bill of Rights.³⁰¹ There are also differences in the international and regional standards applicable in the UK and South Africa.³⁰²

7.3.4.2 The UK pension system and recent reforms

The UK boasts an advanced pension system and legislation and many of its characteristics have been adopted by other countries. Nevertheless, a new round of pension reforms culminated in legislation enacted in 2007-2008 in reaction to a number of factors that were perceived as threatening the status quo.

Firstly, social and demographic changes such as the 'ageing' of society have played a major role in the perceived need for pension reform, just as they have done in the rest of the world.³⁰³ The second reason for the reforms was to

³⁰¹ *Low v BP Southern Africa Pension Fund & BP Southern Africa (Pty) Ltd* PFA/WE/9/98 33.

³⁰² The UK has ratified the ICESCR, although it has limited impact in UK domestic law as human rights treaties only gain legal force in the UK when incorporated into UK law. The extent to which socio-economic rights i.t.o. the ICESCR are to be protected by UK legislation is, therefore, "determined by Parliament and the Executive" (Joint Committee on Human Rights (2004) *Twenty-first Report* <http://www.publications.parliament.uk/pa/jt200304/jtselect/jrights/183/18305.htm> (accessed 27/06/2009)). The UK has also ratified ILO Convention 102 of 1952 (see above at 7.2.4.1 for the relevant provisions of Convention 102). Obviously, different regional standards apply, e.g. the UK has ratified the European Charter (Ministry of Justice (2007) *International Covenant on Economic and Cultural Rights* Fifth Periodic Report from the United Kingdom, the Crown Dependencies, the British Overseas Territories <http://www.justice.gov.uk/publications/docs/ICESCR-whole-report.pdf> (accessed 26/06/2008)).

³⁰³ See Turner and Hughes (2008) Large declines in defined benefit plans are not inevitable: The experience of Canada, Ireland, the United Kingdom, and the United States 5-8; DWP (2006) Security in retirement: Towards a new pensions system Executive summary, Foreword v. According to DWP (2006) Personal accounts: a new way to save, the pressures of ageing society mean that without an increase in private saving, future generations may be worse off than the current, "and poorer than they expect to be" (at 17).

address a general lack of or under-saving for retirement.³⁰⁴ Thirdly, reforms were required to simplify the UK pensions system.³⁰⁵ Finally, the major role that the state was playing in the provision of retirement income was perceived to be unsustainable in the long run and, therefore, reforms were required to strike “a new balance ... between State, employers and individuals to save and provide for the future” and thereby to secure the sustainability of the pensions system.³⁰⁶

The UK pensions system integrates aspects of social assistance and social insurance in one system.³⁰⁷ Employees contribute to a national retirement insurance scheme (social insurance), which also pays some means-tested benefits or “credits” (usually associated with social assistance).³⁰⁸ Whereas employees and employers contribute towards the contributory pension scheme, the state is responsible for paying the means-tested and contributory benefits³⁰⁹

All employees with weekly earnings ranging from minimum to maximum bands specified in legislation are required to contribute to a national old-age, disability

³⁰⁴ DWP (2006) *Security in retirement: Towards a new pensions system* Executive Summary 11.

³⁰⁵ According to the DWP White Paper (2006) *Security in Retirement: Towards a new pensions system* Executive Summary 12, “a long-standing feature of the UK pensions system has been its complexity, which can confuse both employers and individuals trying to make the best financial decisions for the long term.” The high levels of under-saving can also partly be ascribed to the complexity of the pensions system (at 11).

³⁰⁶ DWP (2006) *Security in retirement: Towards a new pensions system* Executive summary, Foreword v.

³⁰⁷ Unlike in South Africa, where the older person’s grant is a social assistance scheme separately administered and regulated from the occupational retirement funds.

³⁰⁸ See the description of the Pension Credit system below.

³⁰⁹ The state is also responsible for shortfalls in the national contributory pension scheme. ISSA (2008) “Old age, disability and survivors: financing” <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed 26/06/2009)

and survivor insurance system.³¹⁰ Self-employed persons with earnings in a specified range may participate voluntarily.³¹¹ Pensioners³¹² with the minimum qualifying years of contributions³¹³ will receive a full weekly Basic State Pension (BSP), whereas pensions of employees with a shorter contribution period would be proportionally reduced.

Employees are rewarded for extending the savings period, as those who choose to defer payment of their pension until they turn 70 will receive a larger weekly BSP.³¹⁴ Once pensioners reach the age of 80 they are entitled to an increase in pension.³¹⁵

In addition, a non-contributory means-tested benefit named the “Over 80 Pension” is paid to persons aged 80 or older with little or no BSP.³¹⁶ To receive this social assistance type benefit, older persons must have resided in the UK for at least 10 years after they turned 60.³¹⁷

³¹⁰ Employers also pay a specified percentage of their employees’ earnings as a contribution.

³¹¹ ISSA (2008) “Old age, disability and survivors: coverage: United Kingdom” <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed 26/06/2009).

³¹² Currently men aged 65 and women aged 60, but to be gradually equalised from 2010 – 2020, and thereafter to be gradually increased for both men and women to 68 by 2046 (Schedule 3 to the Pensions Act 2007).

³¹³ The minimum qualifying years of contributions are set in legislation. The Pensions Act 2007 reduced the qualifying years of contributions to 30 years for men and women (from April 2010). See below for the reforms introduced by the Pensions Act 2007.

³¹⁴ DWP (2006) Personal accounts: a new way to save 19.

³¹⁵ Section 79 of Social Security Contributions and Benefits Act 1992 (c. 4)

³¹⁶ As the benefit is means tested, the amount of BSP received will affect the level of the Over 80 Pension.

³¹⁷ The Pension Service (2009) “Over 80 Pension” <http://www.thepensionsservice.gov.uk/state-pension/over-80-pension.asp> (accessed 26/06/2008)

The national scheme also offers an additional earnings-related pension called the State Second Pension (S2P), a PAYG social security scheme, for employees with low to moderate earnings who fall within a band of indexed earnings set by legislation.³¹⁸ As the S2P is earnings-related, the employee's retirement benefit will depend on his or her work history. All employees who qualify according to their earnings and their employers must contribute unless they are contracted out of S2P through

- occupational pensions being either defined benefit or defined contribution plans³¹⁹ provided by their employer.³²⁰ Employees may choose to make additional contributions over and above the minimum contributions determined by the rules of their occupational pension funds.³²¹
- appropriate personal pension plans in the form of defined contribution plans offered by financial institutions such as banks, unit trust groups, insurance companies and friendly societies³²²; and

³¹⁸ The S2P was introduced by part II, chapter I of the Child Support, Pensions and Social Security Act 2000 (Chapter 19)

³¹⁹ In terms of the Pensions Act 2007 the option of defined contribution opting-out arrangements will be phased out from April 2012.

³²⁰ Membership of occupational pension plans is voluntary and may not be made a condition of employment. Hence, employees must always be given the option to participate in S2P instead (ISSA (2008) "Plan profile: UK" <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed 26/06/2009)). All occupational pension plans must register with the Pensions Regulator (tPR), a supervisory authority created i.t.o. s 1 of the Pensions Act 2004 (c. 35) to protect members' benefits and to ensure compliance with the relevant legislation.

³²¹ Tax relief on contributions made is limited to a specified "Annual Allowance" amount (HM Revenue & Customs "Tax relief on pension contributions" <http://www.hmrc.gov.uk/incometax/relief-pension.htm> (accessed 24/06/2009)).

³²² ISSA (2008) "Plan profile – Types of plans"; "Institutional framework" <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed 26/06/2009). Financial institutions that are pension plan providers are regulated i.t.o. the Financial Services and Markets Act 2000 (Chapter 8) which created the Financial Services Authority (FSA). The main disadvantage of personal pension plans is that no matching contribution is payable by the employer (DWP (2006) *Personal accounts: a new way to save* Foreword 5).

- stakeholder pensions.³²³ Employers that do not provide occupational pension plans must offer access to stakeholder plans to employees with earnings in a specified earnings band.³²⁴

Employees who contract out of the S2P, relinquish S2P benefits in return for contribution rebates.³²⁵ Whatever the form of the alternative pension arrangement, it must meet a minimum standard and at least ensure that the employee is not worse off for contracting out of the S2P.³²⁶ Ultimately, all employees with earnings above a certain level must be covered by the S2P or alternatives such as occupational pension plans or personal pension plans.³²⁷

A means-tested pension credit³²⁸ was introduced in 2002 and can take the form of either a “guarantee credit” or a “savings credit”.³²⁹ Low-income pensioners are guaranteed a minimum pension amount, which includes the BSP, through a

³²³ Stakeholder pensions are private pension plans that employees can gain access to through their employers. Stakeholder pensions were introduced by the Welfare Reform and Pensions Act 1999 (c. 30).

³²⁴ Although stakeholder plans are available to everybody who wish to participate. The idea with the creation of stakeholder pensions was to provide “access to good value and flexible personal pensions” (DWP (2006) *Personal accounts: a new way to save* 18).

³²⁵ The rebates are to be used to finance benefits from contracted out occupational pension plans. In the case of personal pension plans the rebate is paid directly into the individual’s pension account. ISSA (2008) “Other sources of funds” <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed 26/06/2009).

³²⁶ ISSA (2008) “Plan profile – types of plans” <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed 26/06/2009).

³²⁷ The benefit structure of defined benefit occupational pension plans corresponds with South African pension funds in that only a percentage (25% in the case of UK occupational pension plans) of the benefit may be taken as a lump sum and the rest paid as a pension. Personal pension plans are similar to South African retirement annuity funds, with maximum 25% of the benefit being paid as a lump sum and the rest used to purchase an annuity. HM Revenue & Customs “Tax relief on pension contributions” <http://www.hmrc.gov.uk/incometax/relief-pension.htm> (accessed 24/06/2009). See above at 3.3.3.1 for the rules regarding the benefit structure of South African pension funds and retirement annuity funds.

³²⁸ Hereafter “the Pension Credit”.

³²⁹ Introduced by the State Pension Credit Act 2002 (c. 16).

“guarantee credit”. The “guarantee credit” can be increased where the pensioner has greater needs, such as being a carer, but decreases proportionately to other retirement income received. Pensioners over the age of 65 who have made some provision for their own retirement³³⁰ qualify for a cash reward in the form of a “savings credit”.³³¹ An older person is entitled to the Pension Credit even if he or she lives with his or her family. The Pension Credit gives an older person access to other benefits such as a housing benefit, Cold Weather Payment, Winter Fuel Payment and a community care grant.³³²

To address the problem of under-saving for retirement, the Pensions Act 2008³³³ introduced a system of defined contribution personal accounts which gives people who have not been able to save for their retirement “a straight-forward opportunity to contribute to a high-quality low-cost savings vehicle”.³³⁴ As of 2012, employers are required to auto-enrol all jobholders³³⁵ into either the personal accounts system or into other qualifying schemes.³³⁶ Allowing

³³⁰ E.g. BSP, S2P, savings or non-state pension (Directgov (2009) “Income, benefits and Pension Credit” http://www.direct.gov.uk/en/Pensionsand_retirementplanning/PensionCredit/DG_180168 (accessed 29/06/2009)).

³³¹ ISSA (2002) “Pension credit proposed” <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Europe/United-Kingdom> (accessed 26/06/2009).

³³² See below at 7.3.4.3 for an overview of additional benefits payable to older persons in the UK.

³³³ Pensions Act 2008 (c. 30).

³³⁴ DWP (2006) *Security in Retirement: Towards a new pensions system* Executive Summary 15. According to DWP (2006) *Personal accounts: a new way to save* 12, many individuals currently are unable to save for their retirement as it is not “economic for providers to sell individual personal pensions to consumers on low and moderate incomes”.

³³⁵ Workers in Great Britain between the ages of 16 and 75 and whose earnings fall between approximately £5,000 and £33,500 are “jobholders” for the purposes of the Pensions Act 2008, s 1 read with ss 13 and 14.

³³⁶ Section 3 Pensions Act 2008. Occupational pension schemes i.t.o. the Pension Schemes Act 1993 and personal pension schemes are regarded as “qualifying schemes” for the purposes of auto-enrolment (s 16(1) read with ss18 and 19). Only jobholders of 22 years of age and older are required to be auto-enrolled (s 3(2)). Auto-enrolment is required to force employers to participate

employers to continue enrolling employees into qualifying schemes other than personal accounts is in line with the view that “personal accounts should complement, rather than compete with, existing good-quality pension provision”.³³⁷ Jobholders are entitled to opt out of the personal accounts scheme,³³⁸ making it their personal responsibility if they choose not to make use of this low-cost savings opportunity.³³⁹

Jobholders have to contribute 4% of their qualifying earnings, to be matched by a 3% minimum contribution by employers³⁴⁰ and 1% tax relief.

The personal accounts system is intended to operate as a “large, multi-employer occupational scheme”.³⁴¹ The Pension Commission, just like the Chilean government in the 1980s³⁴² and the South African government currently,³⁴³ grappled with the choice between a model based on a single organisation, the

as “[e]mployers’ willingness voluntarily to provide pensions is falling and initiatives to stimulate personal pension saving have not worked”. (Turner (2005) *A new settlement for the Twenty-first century – The Second Report of the Pensions Commission* Vol 1 Executive Summary 2). See also DWP (2006) *Personal accounts: a new way to save* 34; Bridgen and Meyer (2005) *Towards a ‘balanced’ approach to pensions reform? Individuals, the state and employers in the restructuring of post-retirement income in the UK* 13. Employers who fail to auto-enrol jobholders commit an offence (s 45 of Pensions Act 2008). Likewise, employers contravene the provisions of the Pensions Act when they induce workers to give up scheme membership or opt out without becoming members of other qualifying schemes (s 54(1)).

³³⁷ DWP (2006) *Personal accounts: a new way to save* 38.

³³⁸ Section 8, Pensions Act 2008.

³³⁹ DWP (2006) *Security in Retirement: Towards a new pensions system* Executive Summary 16. The objects of the personal accounts system were summarised in the “Foreword” to the DWP White Paper *Personal accounts: a new way to save* as follows: “Combined with mandatory matching employer contributions, tax relief and automatic enrolment, the new personal accounts will radically improve access for many on moderate to low incomes who do not currently save in a private pension.”

³⁴⁰ Sections 20 and 26 Pensions Act 2008.

³⁴¹ DWP (2006) *Personal accounts: a new way to save* 21.

³⁴² See above at 7.3.3.2 and 7.3.3.4 for the two major pension reforms in Chile.

³⁴³ See above at 5.2 for an overview of the current South African pension reform process.

National Pension Savings Scheme (NPSS), and one where consumers can choose between a number of providers.³⁴⁴ Based on the experience in other countries³⁴⁵ it was proposed that the NPSS be created as the default provider, provided that a choice of funds is made available for those employees who want it. One large-scale scheme was deemed to be simpler and more cost-effective.³⁴⁶ It is submitted that, in light of the experience of high administrative costs in the Chilean private pension management system that necessitated reforms,³⁴⁷ entrusting the personal account system to one organisation may prove to have been a wise choice.

Steps have been taken to protect jobholders against failure of the personal accounts system. The Personal Accounts Delivery Authority (PADA) has been created to design and introduce the infrastructure for the personal accounts scheme.³⁴⁸ Once the personal accounts system is operational, PADA will be

³⁴⁴ DWP (2006) *Personal accounts: a new way to save* 22.

³⁴⁵ E.g. the Thrift Savings Plan in the USA which has demonstrated that limited choice may lead to lower costs (see below at 7.3.5.2) and the Swedish PPM system which illustrates that “pension schemes on this scale can be implemented successfully” (DWP (2006) *Personal accounts: a new way to save* 24). See below at 7.3.6.2.2 for a description of the Swedish PPM system.

³⁴⁶ DWP (2006) *Personal accounts: a new way to save* 23-24. It is therefore envisaged that “personal accounts will be delivered by a modern type of organisation: managed independently and for its members, though within a framework set by the Government; not delivered by the State, but by the private sector” (DWP (2006) *Personal accounts: a new way to save* 41).

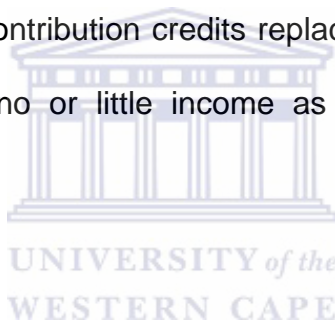
³⁴⁷ See above at 7.3.3.3 - 7.3.3.4 for an outline of the Chilean privatised pension system and the problems inherent to multiple pension fund management firms that created a need for reform of that system.

³⁴⁸ PADA was created i.t.o. s 79 of the Pensions Act 2008. The principles that PADA have to take into account in carrying out its functions are listed in s 80(2) as:

- (a) participation in qualifying schemes should be encouraged and facilitated;
- (b) the burdens imposed on employers as a result of this Part should be minimised;
- (c) any adverse effects on qualifying schemes, and members and future members of those schemes ... of this Part should be minimised;
- (d) the cost of membership of a scheme ... should be minimised;

replaced by the Personal Accounts Board which will be responsible for “oversight and prudent management of the scheme” and ensuring that the scheme operates efficiently and within the set legislative framework.³⁴⁹ Jobholders will in addition be able to rely on the protection afforded by the Pensions Regulator.³⁵⁰

Another significant reform of the pensions system is the recognition given to carers³⁵¹ contributions to society “while retaining the link between rights and responsibilities”.³⁵² In terms of the Pensions Act 2007 carers receive weekly credits on their State Pension contributions³⁵³ to compensate for their shorter contribution periods. The contribution credits replace the Home Responsibilities Protection for carers with no or little income as a result of their caregiving responsibilities.³⁵⁴



(e) the preferences of members and future members should, so far as practicable, be taken into account in making any provision about investment choice in such a scheme; and

(f) diversity among members and future members of such a scheme should be respected.

See also DWP (2008) *Royal Assent – Workplace pension reform – 15 key facts* <http://dwp.gov.uk/docs/key-facts-royal-assent.pdf> (accessed 22/06/2009).

³⁴⁹ DWP (2006) Personal accounts: a new way to save 26.

³⁵⁰ See n 320 above.

³⁵¹ The term “carers” used in the UK includes both “caregivers” as used in the other chapters of this thesis and persons who care for children.

³⁵² DWP (2006) Security in Retirement: Towards a new pensions system Executive Summary 17.

³⁵³ Section 3(1) Pensions Act 2007 adds s 23A to Schedule 3 of the Social Security Contributions and Benefits Act 1992, chapter 4. To qualify as a “carer” for the contribution credit, a person has to care for a child, foster child or “be engaged in caring, within the meaning given by regulations” (which includes caring for an older person) (s 23A3(c)).

³⁵⁴ Directgov (2009) “Carer’s allowance” http://www.direct.gov.uk/en/MoneyTaxandBenefits/BenefitsTaxCreditsAndOtherSupport/Caringforsomeone/DG_10018705 (accessed 20/06/2009).

From April 2010 the minimum qualifying years of contributions to receive a full State Pension will be 30 years for men and women.³⁵⁵

7.3.4.3 Additional benefits

Apart from the Over 80 Pension, which is a non-contributory benefit,³⁵⁶ and the pension credit assisting low-income persons to gain access to the BSP, there are a number of other benefits paid to older persons in the UK.

The attendance allowance is a non-contributory tax-free benefit paid to an older person aged 65 or older who resides in the UK and who is so severely physically or mentally disabled that he or she needs attention, supervision or other care from another person.³⁵⁷ The allowance is paid for as long as the disability continues.³⁵⁸ The attendance allowance corresponds to the grant-in-aid payable in South Africa to older persons who need regular care,³⁵⁹ but is paid at a much higher level than its South African equivalent.³⁶⁰ Recipients of the attendance

³⁵⁵ Section 1(3) Pensions Act 2007 amended the Social Security Contributions and Benefits Act 1992 by adding s 5A.

³⁵⁶ See above at 7.3.4.2.

³⁵⁷ Section 64 of the Social Security Contributions and Benefits Act 1992 distinguishes between older persons needing assistance for a “day attendance condition” and a “night attendance condition” The level of the allowance is determined by the older person’s care needs.

³⁵⁸ Section 65 of the Social Security Contributions and Benefits Act 1992.

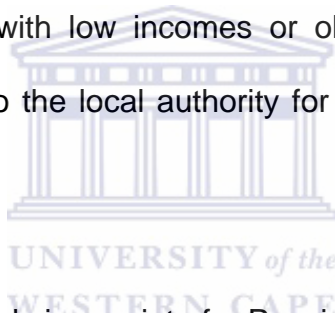
³⁵⁹ See above at 3.3.1.2.

³⁶⁰ The amount payable i.t.o. the attendance allowance ranges from £47.10 to £70.35 (Directgov “Attendance allowance” http://www.direct.gov.uk/en/DisabledPeople/FinancialSupport/DG_10012425 (accessed 11/11/2009)).

allowance may also receive an increased pension credit,³⁶¹ housing benefit and council tax benefit.³⁶²

The Winter Fuel Payment is an automatic annual tax-free payment to older persons who are receiving a state pension or other benefits.³⁶³ In addition, a Cold Weather Payment is available to recipients of Pension Credit for every week of very cold weather.³⁶⁴ A Christmas bonus is also paid in the first week of December to persons receiving the State Pension or Pension Credit.³⁶⁵

In addition, older persons with low incomes or older persons in receipt of a Pension Credit may apply to the local authority for assistance with their council tax bill.³⁶⁶



Older persons who are already in receipt of a Pension Credit, or are likely to start receiving it within a six-week period, and who require assistance to enable them to stay at home and not go into a care home, or who are moving out of residential care to live independently, may apply for a community care grant. The level of

³⁶¹ See above at 7.3.4.2 for a description of the Pension Credit.

³⁶² Directgov (2009) "Attendance allowance" <http://www.directgov.uk/en/MoneyTaxandBenefits/BenefitsTaxCreditsAndOtherSupport/Disabledpeople/DG-10018710> (accessed 29/05/2009).

³⁶³ The amount payable depends on the older person's circumstances at the time of the payment, e.g. the person's age, whether he or she receives a Pension Credit and whether he or she lives alone. See Directgov (2009) "Winter Fuel Payment" http://www.directgov.uk/en/Pensions_and_retirementplanning/BenefitsInRetirement/DG_10018657 (accessed 21/06/2009).

³⁶⁴ Directgov (2009) "Cold Weather Payment" http://www.directgov.uk/en/Pensionsandretirementplanning/Benefits/ConcessionsAndOtherHelp/DG_10018668 (accessed 21/06/2009).

³⁶⁵ The Pension Service (2009) "Christmas Bonus" <http://www.thepensionsservice.gov.uk> (accessed 21/06/2009).

³⁶⁶ The Pension Service (2009) "Council Tax Benefit" <http://www.thepensionsservice.gov.uk> (accessed 21/06/2009).

the community care grant will depend on the amount of the older person's savings. The community care grant may not be utilised for domestic help or respite care, medical items or services, or daily living expenses.³⁶⁷

7.3.4.4 Care and support for older persons

7.3.4.4.1 Introduction

In the UK there is no general familial responsibility to support older persons.³⁶⁸ In terms of the Poor Law of 1601 a responsibility to support kin, including older persons existed. Indigent older persons did not have a direct claim on their families but had to rely on local authorities for support. The local authority could then claim a contribution from the family for the support given to the older person.³⁶⁹ The Health and Social Care Act 2008³⁷⁰ abolished the maintenance liability of relatives and, therefore, relatives cease to be liable to the relevant local authority for the cost of assistance to older persons.

³⁶⁷ Directgov (2009) "Community care grants" http://www.direct.gov.uk/en/MoneyTaxandBenefits/BenefitsTaxCreditsandOtherSupport/Caringforsomeone/DG_10018921 (accessed 21/06/2009).

³⁶⁸ Twigg and Grand "Contrasting legal conceptions of family obligation and financial reciprocity in the support of older people: France and England" (1998) 18 *Aging and Society* 131.

³⁶⁹ Twigg and Grand (1998) 18 *Aging and Society* 138. For the text of the 1601 Act for the Relief of the Poor, see Higginbotham (2008) "The Workhouse - The 1601 Act for the Relief of the Poor" <http://www.workhouses.org/poorlaws.shtml> (accessed 12/04/2009).

³⁷⁰ Section 147, Health and Social Care Act 2008 (c.14).

A number of services related to the care and support of older persons are provided, some of them government-funded, but most require some payment by the older person concerned.

7.3.4.4.2 *Care homes*

Like South Africa,³⁷¹ the UK has comprehensive legislation in place regarding placement in and standards of services in care homes.³⁷²

Local authorities may, and in some cases are obliged to, arrange residential accommodation for older persons who “are in need of care and attention which is not otherwise available to them”.³⁷³ An older person’s stay in a care home can be long-term or permanent, or sometimes only short-term; for instance, care during a short illness or when the older person is released from hospital but has not recovered sufficiently to go home.³⁷⁴ Care homes with nursing care are available for older persons who need nursing care on a regular basis. Older persons gain access to care homes through their local authorities, regardless of

³⁷¹ See above at 3.3.4.5 for a discussion of the Older Persons Act 13 of 2006.

³⁷² Care homes are facilities that provide accommodation, nursing or personal care to, amongst others, ill persons, persons with mental disorders and persons who are disabled for infirm (s 3 Care Standards Act 2000). Thus, care homes are the UK equivalent of residential facilities in South Africa.

³⁷³ Section 21(1) National Assistance Act 1948 (c. 29) as amended.

³⁷⁴ Directgov (2009) “Support services” www.direct.gov.uk/en/CaringForSomeone/CaringAndSupportServices/DG_4000178 (accessed 21/06/2009).

whether the care home is actually run by the local authority or by voluntary organisations or private companies.³⁷⁵

As far as standards for care in care homes is concerned, the Health and Social Care Act 2008 established the Care Quality Commission (the Commission)³⁷⁶ as an independent body to “protect and promote the health, safety and welfare of people who use health and social care services”.³⁷⁷ All social care service providers must register with the Commission.³⁷⁸ The Commission may carry out inspections of care homes³⁷⁹ and take steps to have the care home’s registration suspended or cancelled if it does not meet the standards set by the Commission.

Older persons who choose to live independently but need help during emergencies may contact their local authority to determine whether there are any sheltered housing options available and whether they meet the eligibility criteria set by the local authority. With sheltered housing the older person lives on his or her own, but a scheme manager or warden can be contacted through an alarm system in case of an emergency. Care and support is not generally provided,

³⁷⁵ Ibid.

³⁷⁶ Section 1 Health and Social Care Act 2008..

³⁷⁷ Section 3(1) read with schedule 7, s 1, Health and Social Care Act. Its main functions are to register social care providers and to review and investigate their actions (s 2). While performing its functions it must have regard to the need to protect and promote the rights of the recipients social care services (s 4(d)).

³⁷⁸ Section 10. “Social care” for older persons i.t.o. the Act is “all forms of personal care and other practical assistance for individuals who by reason of age ... are in need of such care or other assistance” (s 9(3)).

³⁷⁹ Sections 60-65.

except in extra care housing for people who still want to live on their own, but are in need of care and support as they may not be able to manage on their own.³⁸⁰

Some older persons may find it difficult to pay the cost of care homes. When an older person applies for placement in a care home, a health and social care assessment as well as a financial assessment of the older person must be done by the relevant local authority.³⁸¹ Local authorities may charge for accommodation provided to older persons, but may reduce the amount payable by the older person if they are satisfied that the older person cannot pay the standard rate.³⁸² Older persons who have the means to do so may opt for more expensive accommodation but will then be required to make additional payments.³⁸³ When an older person has been allocated a place in a care home and opts to go to a more expensive home, a third party, for instance a family member, will have to pay the “top-up” fee.³⁸⁴ The older person cannot be held liable for fees in excess of what the financial assessment determined would be affordable to the older person.³⁸⁵ The extent to which relatives of the older person can be held liable for the costs is also limited, since the Health and Social

³⁸⁰ Directgov (2009) “Guide to supported housing schemes for over 50s” http://www.direct.gov.uk/en/Pensionsandretirementplanning/HomeAndCommunity/SupportedHousingAndCareHomes/DG_10028146 (accessed 21/06/2009).

³⁸¹ The financial assessment is based on capital and income and, therefore, all benefits such as the State Pension, Pension Credit and allowances are taken into account as the benefits will form part of the fees paid by the older person. DirectGov (2009) “Paying your care home fees” http://www.direct.gov.uk/en/HealthAndWellBeing/HealthServices/CareHomes/DG_10031525 (accessed 21/06/2009).

³⁸² Section 22 National Assistance Act 1948 as amended by s 44 National Health Service and Community Care Act 1990 (c.19).

³⁸³ Section 54 of the Health and Social Care Act 2001 (c.15).

³⁸⁴ Help the Aged (2008) Care homes and long-term care needs: Policy statement 3.

³⁸⁵ DirectGov (2009) “Paying your care home fees” http://www.direct.gov.uk/en/HealthAndWellBeing/HealthServices/CareHomes/DG_10031525 (accessed 21/06/2009).

Care Act 2008 has abolished the liability of relatives for costs of assistance. The local authority will be liable for the payment to the care home, and its only recourse may be to reassess the older person for the purpose of placement in more affordable care.

When an older person resides in a care home offering nursing services, the National Health Service normally contributes towards the fees for the nursing element.³⁸⁶

It is clear from the above that local authorities in the UK play a significant role in placing older persons in and assisting with the funding of stays in care homes. The direct role that the state plays in placement in and funding of care homes allows it to determine and enforce priorities for placement in residential care. Although, as is stated below³⁸⁷ it may presently not be feasible to adopt a similar system administered by local authorities in South Africa, the UK system offers valuable guidance on potential methods to ensure that the most vulnerable older persons receive the care they need.

7.3.4.4.3 Support services for older persons living at home

A variety of support services are available to older persons who still live at home but need support and care, and/or their carers.

³⁸⁶ Ibid

³⁸⁷ At 7.3.4.5.

When an older person approaches a local authority for community care services, the local authority is obliged to assess the older person's health and social care needs. The local authority will determine on the basis of the care assessment whether or not, and which, care services are required and then arrange for the relevant services to be provided.³⁸⁸ The local authority's resources are a factor in determining which services are to be provided, but once a service is provided to an older person and the local authority's resources decrease thereafter, it may not withdraw the services being delivered to the older person.³⁸⁹

In some instances, older persons who have been assessed as needing community care services may be entitled to direct payments from a local authority. Direct payments enable older persons to buy in care services rather than making use of services provided or arranged by the local authority.³⁹⁰ The older person may choose which services he or she needs provided the local authority is satisfied that the agreed support arrangements are being complied with.³⁹¹ Other benefits are not affected by direct payments.³⁹²

³⁸⁸ Section 47(1) National Health Service and Community Care Act 1990 (c.19).

³⁸⁹ *R v Sefton MBC ex parte Help the Aged & Others* CA [1997] 4 All ER 532.

³⁹⁰ Section 57 of the Health and Social Care Act 2001 (c.15) and extended by s 146 of the Health and Social Care Act 2008 (c.14).

³⁹¹ The older person may not use the direct payment to pay his or her spouse or family member for care or to pay for nursing care by a registered nurse. I.t.o. s 49 of the Health and Social Care Act 2001, nursing care at home by a registered nurse does not qualify as a community care service.

³⁹² Directgov (2009) "Direct payments – arranging your own care and services" http://www.direct.gov.uk/en/DisabledPeople/FinancialSupport/Introductiontofinancialsupport/DG_10016128 (accessed 21/06/2009).

A “domiciliary care agency” is an undertaking that arranges or provides personal care in the own homes of older persons who are unable to care for themselves without assistance.³⁹³ Domiciliary care agencies are responsible for much of the care provided to older persons at home. Other support services offered include respite care³⁹⁴ and day care centres³⁹⁵ to alleviate the burden on family carers.

It is submitted that the array of services for older persons living at home provided for in the legislation discussed above supports the ideal that older persons should live at home for as long as possible.

7.3.4.4.4 *Legal protection of and provision for carers*



The recent reforms of the pensions system providing carers with State Pension credits³⁹⁶ reflect the recognition in the UK of the value of carers to society and of the need to improve their circumstances.³⁹⁷

³⁹³ Section 4(3) Care Standards Act 2000.

³⁹⁴ Respite care is the provision of temporary care and relief in order that the family caregiver can take care of his or her other responsibilities.

³⁹⁵ Day care centres are defined by s 55(5) of the Care Standards Act 2000 as a place where nursing or personal care is provided but not accommodation.

³⁹⁶ See above at 7.3.4.2.

³⁹⁷ DWP (2006) *Security in Retirement: Towards a new pensions system* Executive Summary 7. For more general information on the initiatives to improve carers' circumstances see Department of Health (1999) *Caring for carers: a national strategy for carers* http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4006522 (accessed 22/04/2009); Department of Health (2008) *Carers at the heart of 21st century families and communities: a caring system on your side, a life of your own* http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085345

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085345 (accessed 22/04/2009).

A carer who provides or intends to provide a “substantial amount of care on a regular basis” to an older person may request the local authority carrying out the assessment of the older person’s community care needs to assess the carer’s needs as well before they make a decision on the services to provide to the older person.³⁹⁸ In fact, the local authority has the duty to inform the carer that he or she has the right to have his or her needs assessed before a decision on appropriate services is made.³⁹⁹ For instance, the availability of services such as respite care would play a role in the local authority’s decision on which services are appropriate.

A carer’s allowance is payable to a carer over the age of 16 who is “regularly and substantially engaged in caring”⁴⁰⁰ for a severely disabled relative who qualifies for an attendance allowance.⁴⁰¹ The allowance is reduced by the amount of other benefits and may affect other benefits.⁴⁰²

The abovementioned statutory provisions indicate that family carers in the UK can rely on the state for recognition for, as well as assistance in, their caregiving tasks.

³⁹⁸ Section 1(1) Carers (Recognition and Services) Act 1995 (c.12).

³⁹⁹ Section 1 Carers (Recognition and Services) Act 1995 (c.12), as amended by the Carers (Equal Opportunities) Act 2004 (c.15).

⁴⁰⁰ Section 70(1)(a) of the Social Security Contributions and Benefits Act 1992. The Act referred to an “invalid care allowance”, but it was renamed the “carer’s allowance” by the Regulatory Reform (Carer’s Allowance) Order 2002. A carer who is a full-time student or who earns GBP 95 a week or more after deductions is disqualified from receiving the allowance (Directgov (2009) “Carer’s allowance” http://www.direct.gov.uk/en/MoneyTaxandBenefits/BenefitsTaxCreditsAndOtherSupport/Caringforsomeone/DG_10018705 (accessed 20/06/2009)).

⁴⁰¹ Section 70 (1)(c) and (2). See above at 7.3.4.3 for a description of the attendance allowance.

⁴⁰² Such as the Home Responsibilities Protection that is being replaced by State Pension credits from April 2010. See above at 7.3.4.2.

7.3.4.5 Lessons for South Africa

The overall impression given by the UK's pension system is that of a solidarity-based system. The prominence of personal responsibility in the recent personal accounts scheme legislation in the UK should not be regarded as the re-emergence of 'neo-liberal' policies with an emphasis on the individual's own choices and responsibilities. The option to opt out of the personal accounts system may mean that some individuals may be worse off in retirement for choosing not to make use of the personal accounts savings option. However, the choice to opt out of the scheme is not its basis; auto-enrolment, an inclusive and solidarity-based measure, is the basis. The individual's personal responsibility to save for retirement is supported by increased contributions by employers and increased spending by the state, in search of "a fair balance between the responsibilities of the state, employer and individual".⁴⁰³ All employees are afforded access to this retirement savings vehicle which, it is submitted, would be sufficient to meet the constitutional requirement of providing "access to" social security if a similar scheme is adopted in South Africa.⁴⁰⁴

It is submitted that the inclusion of the option of auto-enrolment into a personal accounts scheme with the choice to opt out is worthwhile exploring in South

⁴⁰³ As advocated by Bridgen and Meyer (2005) Towards a 'balanced' approach to pensions reform? Individuals, the state and employers in the restructuring of post-retirement income in the UK 14-15. DWP (2006) Personal accounts: a new way to save 34.

⁴⁰⁴ Section 27(1)(c) of the Constitution, 1996.

Africa. The pitfalls of the current voluntary occupational fund system have been described above.⁴⁰⁵ A statutory obligation on employers to auto-enrol employees in a personal accounts scheme⁴⁰⁶ would simultaneously address employees' disinclination to save for retirement, as well as employers' reluctance to participate in retirement funding schemes.⁴⁰⁷ In the South African context, provision should also be made for compulsory consumer education programmes explaining the consequences of "opting out" of the national personal accounts scheme⁴⁰⁸ as well as the option to join the scheme at a later stage.

The variety of non-contributory benefits and allowances payable to older persons in the UK shows a commitment to promoting the dignity of older persons and improving their standard of living. Due to fiscal constraints the South African state may not be able to afford payment of a similar range of benefits. However, alternative measures could be undertaken to demonstrate a similar dedication to improving the conditions of older persons. For example, measures to provide older persons with access to cheaper or free electricity may bring relief comparable to the Winter Fuel Payment in the UK.

⁴⁰⁵ At 5.5.

⁴⁰⁶ Unless the employer can provide access to an occupational plan.

⁴⁰⁷ Compelling employers to participate in social security programmes is nothing new in South African legislation. Employers are not afforded a choice on whether they wish to participate in the statutory social insurance schemes created by the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Unemployment Insurance Act 63 of 2001.

⁴⁰⁸ The effect of high levels of debt or low earnings on employees' retirement savings decisions were outlined above at 5.4.

The UK has an interesting model with a range of care and support services for older persons provided or arranged by local authorities, ranging from care homes to community care and support for older persons living in their own homes. It is submitted that, although a need for similar state-supported services exists in South Africa,⁴⁰⁹ provisions that require action by local authorities will prove problematic as many local authorities do not have the infrastructure or competence to deliver such services. Under these circumstances delivery of state-supported care and support services may be better suited to local offices of the Department of Social Development.⁴¹⁰

South Africa currently lacks the coherence of the UK legislation on older persons. The UK pension and benefit system and care and support services are interrelated, ensuring that older persons receive the appropriate benefits in cash as well as non-cash support.⁴¹¹ It is submitted that the future adoption of legislation linking the reformed retirement income system in South Africa to the provision of care and support services to older persons is required to ensure that these services are allocated in an equitable manner and in line with the state's priorities for the provision of services. This implies that the feasibility of the

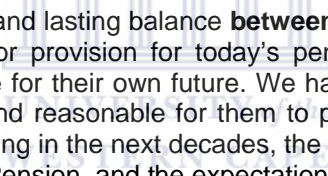
⁴⁰⁹ The community-based services in South Africa are run and funded by non-governmental and religious organisations. These services are regulated but not coordinated by the state and receive limited financial awards from the state. See above at 3.3.4 for an overview of community based care and support to older persons in South Africa and the relevant legislation.

⁴¹⁰ Under the supervision of the provincial department. The DSD is already tasked with the provision of social services to older persons, although at a far more limited scale than in the UK.

⁴¹¹ For example, an older person's State Pension, Pension Credit and other benefits are taken into account in the assessment of the older person's financial situation and ability to pay for services. See above at 7.3.4.4.2. Although many South African non-governmental organisations providing care and support services link their services to the older person's grant, they are not obliged by legislation to do so.

inclusion of care and support services for older persons as a “pillar” of the reformed pension system should be examined.

Finally, UK pensions legislation now incorporating the personal accounts system and contribution credits for women and carers clearly reflects the fact that fears for the financial sustainability of the pension system have not reduced the importance of intergenerational solidarity in that system. Instead, a balance between intergenerational solidarity and fairness toward the contributing generation has been found, as is evident from the following quote from the Department of Works; White Paper *Security in Retirement: Towards a new pensions system*:⁴¹²



We are also setting a fair and lasting balance **between the generations**. Current workers must both pay for provision for today's pensioners (through National Insurance) and save more for their own future. We have had to strike a balance between what it is right and reasonable for them to provide in order to improve the situation for those retiring in the next decades, the rate at which we can afford to uprate the basic State Pension, and the expectation on today's and tomorrow's workers to save more for themselves.

7.3.5 United States of America

7.3.5.1 Introduction

A comparison between the social security systems and care and support structures for older persons in the United States of America (USA) and South Africa may be worthwhile from a comparative perspective for a number of

⁴¹² DWP (2006) *Security in Retirement: Towards a new pensions system* Executive Summary 23.

reasons. Firstly, the future of the national old-age insurance and health care systems in the USA has been the focus of constant debate over the last two decades and in some instances even featured in presidential election campaigns.⁴¹³ Although the debates on social security reform are mainly based on technical points, such as increases in payroll taxes, their value for this thesis lies in the underlying views and concepts, particularly the balance between intergenerational solidarity and 'intergenerational equity'.⁴¹⁴

Secondly, the Medicaid programmes offering older persons means-tested protection against long-term care costs are worth examining as examples of a large-scale solidarity-based care and support measure.

Finally, the filial responsibility laws in a number of the states in the USA are interesting from a comparative perspective, particularly to determine the extent to which such laws are enforceable and the relationship between the filial responsibility laws and the Medicaid programmes.

The US constitution serves as its supreme law, similar to South Africa, although the US Constitution does not expressly include socio-economic rights. Indirect

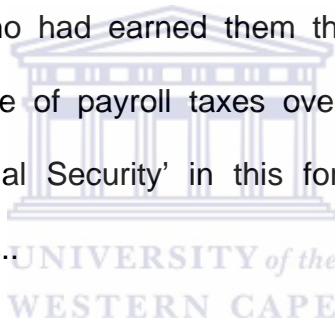
⁴¹³ Kollmann and Nuschler (2002) "Social Security Reform" http://www.policyalmanac.org/social_welfare/archive/crs_social_security_reform.shtml (accessed 02/05/2009).

⁴¹⁴ For the distinction between intergenerational solidarity and 'intergenerational equity' see 2.3 and 6.4.4 above.

protection of socio-economic rights has developed through the interpretation of the law, particularly equality jurisprudence.⁴¹⁵

7.3.5.2 'Social Security'

The Social Security Act⁴¹⁶ was signed into law by President Roosevelt in 1935 in reaction to the economic hardship caused by the Great Depression.⁴¹⁷ It created a federal contributory old age, survivors' and disability insurance system (OASDI) for employees in the USA. The belief that "U.S. citizens would readily approve of giving benefits to those who had earned them through contributions into the system" led to a preference of payroll taxes over funding based on general revenues.⁴¹⁸ Hence, 'Social Security' in this form reflects intergenerational solidarity among participants.



The basic purposes of the programmes created by the Social Security Act, as amended, and related legislation include the provision for "the material needs of individuals and families" and the protection of older persons and persons with

⁴¹⁵Malan and Jansen van Rensburg "Social security as a human right and the exclusion of marginalised groups: An international perspective" in Olivier et al (eds) (2001) *The extension of social security protection in South Africa* 112-113. See also Aka "Analyzing U.S. commitments to socio-economic human rights" (2006) 39 (2) *Akron Law Review* 417-463.

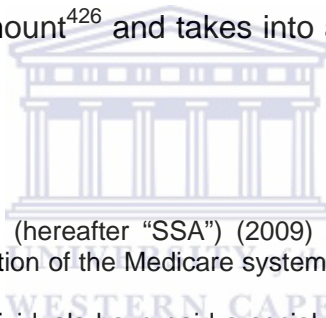
⁴¹⁶ Social Security Act of 1935, 49 Stat. 620; 42 U.S.C. §§ 301-1399 (2008). The Act has been amended a number of times – see below at 7.3.5.5.

⁴¹⁷ Kaufmann "An introduction to Old-Age, Survivors, and Disability Insurance and Supplemental Security Income" in National Center on Poverty Law *Poverty law manual for the new lawyer* (2002) 92.

⁴¹⁸ Quadagno "Generational equity and the politics of the welfare state" (1990) 20 (4) *International Journal of Health Services* 632. The idea behind the initial legislation creating Social Security was not so much to provide for the poor but rather to provide "wage stabilisation to the working and middle class" (at 642). Provision for the poor came later with the creation of the Supplemental Security Income system – see below at 7.3.5.6.

disabilities against “the expenses of illnesses that may otherwise use up their savings”.⁴¹⁹

Most employees or self-employed individuals⁴²⁰ working in the USA or for a US employer in another country are covered by the OASDI programme.⁴²¹ An individual’s eligibility is determined by his or her contributions to OASDI⁴²² and not by his or her income or resources. “Fully insured” individuals⁴²³ may be eligible for old age insurance benefits from age 62.⁴²⁴ However, full retirement benefits are only payable from age 67.⁴²⁵ The old age retirement benefit is based on the primary insurance amount⁴²⁶ and takes into account retirement age, other



⁴¹⁹ Social Security Administration (hereafter “SSA”) (2009) *Social Security Handbook* §100.1. See below at 7.3.5.4 for a description of the Medicare system providing health insurance to older persons.

⁴²⁰ Since 1954, self-employed individuals have paid a social security and hospital insurance tax on income derived from any “trade or business” carried on by the individual and are covered by Social Security (42 U.S.C. 411 read with the Self-Employment Contributions Act of 1954, 26 U.S.C. 1401).

⁴²¹ Except for state or local government employees who participate in their employers’ pension plan and who are not covered by a voluntary federal/state social security agreement for coverage of state or local government employees in the federal programme; as well as certain agricultural and domestic workers (42 U.S.C. 410(a)(C)(7) read with 418).

⁴²² Amounts equivalent to the contributions paid to OASDI are paid into the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund (Social Security Administration (2006) *Social Security Handbook* § 141).

⁴²³ A person’s insured status is determined by the number of credits (the term used in the Social Security Act is “quarter of coverage” (42 U.S.C. 413) built up doing his or her working career. The minimum number of credits required to be “fully insured” are 6 (the maximum is 40). Being “fully insured” is not the same as full retirement, and “fully insured” individuals may receive less benefits than persons who wait until age 67 to draw benefits. See SSA (2006) *Social Security Handbook* §203.4; SSA “Quarter of coverage” <http://www.ssa.gov/OACT/COLA/QC.html> (last modified 16/10/2008); Kaufmann (2002) “An introduction to Old-Age, Survivors, and Disability Insurance and Supplemental Security Income” in National Center on Poverty Law *Poverty law manual for the new lawyer* 95.

⁴²⁴ 42 U.S.C. 402.

⁴²⁵ The full retirement age is being gradually increased from 65 to 67 (42 U.S.C. 416). For a chart depicting the increase in retirement age, see Social Security Administration “Age to receive full Social Security benefits” <http://www.ssa.gov/mystatement/retchart.htm> (last modified 01/04/2009).

⁴²⁶ 42 U.S.C. 415.

sources of income and dependents eligible for benefits.⁴²⁷ Provision is also made for cost-of-living adjustments in benefits.⁴²⁸

7.3.5.3 Additional saving for retirement

Employees and self-employed persons have access to retirement plans operating similarly to South African occupational funds in addition to their participation in OASDI.⁴²⁹ All retirement plans are either defined contribution⁴³⁰ or defined benefit plans⁴³¹ and correspond closely to South African defined contribution and defined benefit funds.

A 401(k) plan⁴³² is an “individual account” plan into which the employer pays money in lieu of the cash that would have been paid to the employee. The

⁴²⁷ The Social Security Act, 42 U.S.C. 402 makes provision for payments to the eligible, dependent members of the insured person’s family. These payments do not affect the insured person’s benefits, but there is a maximum benefit payable per family (SSA (2006) *Social Security Handbook* §730.1; Kaufmann “An introduction to Old-Age, Survivors, and Disability Insurance and Supplemental Security Income” in National Center on Poverty Law (2002) *Poverty law manual for the new lawyer* 96.

⁴²⁸ 42 U.S.C. 415(i).

⁴²⁹ An exhaustive analysis of the types of retirement plans available in the USA, as well as the relevant legislation and the substantial body of case law on retirement plans falls outside the scope of this work. The following paragraphs only serve as an introductory overview of the aspects of US retirement plans most relevant to this thesis and to provide the context for later paragraphs on US pension reform attempts and the notion of ‘intergenerational equity’ – see below at 7.3.5.5.

⁴³⁰ 26 U.S.C. (the Internal Revenue Code) 414(i).

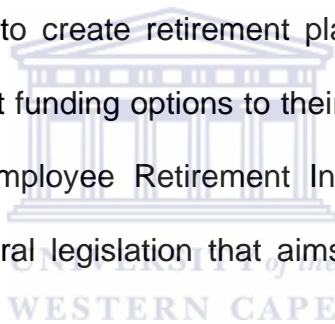
⁴³¹ I.t.o. 26 U.S.C. 414(j) all retirement plans that are not defined contribution plans are regarded as defined benefit plans for tax purposes.

⁴³² Created i.t.o. Internal Revenue Code s 401(k), hence “401(k)” plans. It operates similarly to deferred compensation schemes in South Africa – se 3.3.3.2 above.

employee is responsible for deciding in which of a “menu of investment options” the balance in his or her account is to be invested.⁴³³

Cash balance plans are defined benefit plans designed to look like defined contribution funds. The benefits payable in terms of cash balance plans are based on notional account balances in hypothetical accounts.⁴³⁴ Cash balance plans are usually more to the advantage of younger employees changing jobs frequently.⁴³⁵

Employers are not obliged to create retirement plans for their employees, but once they provide retirement funding options to their employees, they must meet the requirements of the Employee Retirement Income Security Act of 1974 (ERISA).⁴³⁶ ERISA is federal legislation that aims to “protect the interests of



⁴³³ Congressional Research Service (2008) *Summary of the Employee Retirement Income Security Act (ERISA)* 6. The federal Thrift Savings Plan (TSP) is a defined contribution retirement plan for federal workers. Although the TSP is a “unique arrangement that cannot fairly be compared with or duplicated by” private sector 401(k) plans, one of the reasons for the relatively lower administrative costs of the TSP is that it offers a limited number of investment options as compared to 401(k) plans (Investment Company Institute (2008) “The federal Thrift Savings Plan: A model for the private sector” 3 (available at http://www.ici.org/pdf/ppr_tsp.pdf)).

⁴³⁴ Moukawsher & Walsh, LLC (2000) *Cash balance plans: Terminology, advantages and disadvantages to employers and employees* 3. Cash balance plans are similar to the Swedish notional defined benefit income pension (see below at 7.3.6.2.1), as no real accounts exist and contributions are used to pay benefits to current retirees. “Cash balance” refers to the entitlement to benefits that the member builds by contributing to the plan.

⁴³⁵ According to Moody (2000) *Aging: Concepts and controversies* 167, “cash balance plans may erode the value of defined-benefit promises for many older workers”. For the disadvantages of cash balance plans for older and longer serving employees, see also AARP Press Center (2005) “Hybrid (cash balance) pension plans” Testimony before the Subcommittee on Retirement Security and Aging http://www.aarp.org/aarp/presscenter/testimony/articles/cash_balance.html (accessed 22/05/2009).

⁴³⁶ The provisions of ERISA are split between the Labor Code 29 U.S.C. 1001-1453 and the Internal Revenue Code 26 U.S.C. 401-415.

participants and beneficiaries in private-sector employee benefit plans”.⁴³⁷ Only employer-sponsored plans are covered by ERISA and, therefore, private retirement vehicles such as individual retirement accounts (IRAs)⁴³⁸ are excluded from its scope of application.

The following measures in ERISA designed to protect employees’ interests stand out:

- ERISA prohibits plan amendments that eliminate or reduce existing rights of participants in a retirement plan;⁴³⁹ and
- Title II of ERISA⁴⁴⁰ contains, *inter alia*, rules to prevent plans from favouring higher-earning employees over lower-earning employees.⁴⁴¹

ERISA established the Pension Benefit Guaranty Corporation (PBGC) within the Department of Labor to protect defined benefit plan participants against risks such as fund failures.⁴⁴² The PBGC ensures that private sector funded defined

⁴³⁷ Congressional Research Service (2008) *Summary of the Employee Retirement Income Security Act (ERISA)* 1. See 29 U.S.C. 1001 for the Congressional findings and policy declaration with regard to ERISA. ERISA supersedes “any and all state laws insofar as they may ... relate to any employee benefit plan” (s 514 ERISA, 29 U.S.C. 1144).

⁴³⁸ An individual retirement savings vehicle with tax benefits. See Moody (2000) *Aging: Concepts and controversies* 168.

⁴³⁹ 29 U.S.C. 1054(g), also known as the “anti-cutback rule”. See Congressional Research Service (2008) *Summary of the Employee Retirement Income Security Act (ERISA)* 13. In South Africa a similar “cutback” may potentially constitute a violation of the employee’s right of access to social security, as well as of the employee’s right not to be arbitrarily deprived of his or her property – see above at 3.2.4 for a discussion of pension benefits and the Bill of Rights.

⁴⁴⁰ Title II of ERISA is codified in the pension related provisions of the Internal Revenue Code.

⁴⁴¹ Retirement plans have to meet the “non-discrimination” test found in 26 U.S.C. 410(b). See 3.3.2.3.2 for the position regarding discriminatory occupational fund rules in South African law.

⁴⁴² The PBGC was created i.t.o. 29 U.S.C. 1302(a) –

“to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants;

to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which [subchapter III] applies, and

to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.”

benefit plans can meet their liabilities. The pension plans are required to pay an insurance premium per participant insuring against the risk of a plan defaulting on pension payments.⁴⁴³

7.3.5.4 Medicare

The Social Security Act was amended in 1965 to add title XVIII on Medicare and title XIX on Medicaid. Medicare and Medicaid are two different programmes. Medicare is a federal health insurance programme for persons aged 65 years or older,⁴⁴⁴ whereas Medicaid is state-run and provides for means-tested hospital and medical coverage of low-income older persons.⁴⁴⁵

Medicare is divided into four parts. The first, part A, is hospital insurance available to Social Security recipients aged 65 and over⁴⁴⁶ at no monthly premium.⁴⁴⁷ Medicare medical insurance for older persons (Part B) is a

The PBGC is primarily funded by premiums paid by employers who run defined benefit plans
⁴⁴³ 29 U.S.C. 1306. S 8101 of the Deficit Reduction Act of 2005 P.L. 109-171, 120 Stat. 4 (Feb. 8, 2006) addressed the looming deficit in the PBGC. See Heller (1998) *Rethinking public pension reform initiatives* 15-16. According to the South African National Treasury (2007) 2nd *discussion paper* 29, “further investigation is required on the viability and suitability of such a scheme in the South African context” and therefore other means of ensuring the protection of benefits have been prioritised.

⁴⁴⁴ A portion of the payroll taxes paid by employees and their employers towards Social Security is used to finance Medicare (Social Security Administration (2009) “Medicare” <http://www.ssa.gov/pubs/10043.html> (accessed 01/09/2009)).

⁴⁴⁵ The Centers for Medicare and Medicaid Services is in charge of the Medicare programme. Social Security Administration (2009) “Medicare” <http://www.ssa.gov/pubs/10043.html> (accessed 01/09/2009).

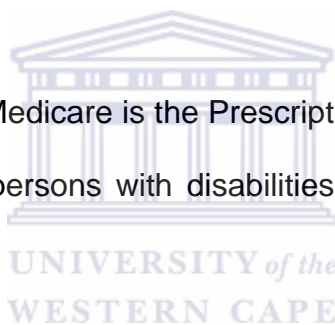
⁴⁴⁶ 42 U.S.C. 426. Social Security beneficiaries are automatically enrolled for hospital insurance. Other persons may sign up for Medicare hospital insurance for a monthly premium (42 U.S.C. 1395i-2).

⁴⁴⁷ Hospital insurance helps pay for the costs of hospital care, related post-hospital care (in skilled nursing homes), home health care and hospice care (42 U.S.C. 1395c and 1395d). Payments to

voluntary insurance program to provide medical insurance benefits ... for aged and disabled individuals who elect to enroll under such program, to be financed from premium payments by enrollees together with contributions from funds appropriated by the Federal Government.⁴⁴⁸

Medicare medical insurance benefits cover physician services, outpatient hospital services and physical therapy, other medical services, as well as supplies and equipment not covered by hospital insurance.⁴⁴⁹ In terms of Medicare Advantage Plans (Part C), older persons who are eligible for Part A and Part B benefits can choose to have their health care delivered by private companies that are contracted with Medicare to provide health services.⁴⁵⁰

The fourth and final part of Medicare is the Prescription Drug Benefit (Part D) that assists older persons and persons with disabilities to pay for their prescription drugs.⁴⁵¹



Although Medicare has undoubtedly assisted countless older persons in accessing health care that they otherwise would not have been able to get,⁴⁵² it

service providers are made from the Federal Hospital Insurance Trust Fund (42 U.S.C. 1395g read with 1395i).

⁴⁴⁸ 42 U.S.C. 1395j. Medicare Part B costs are partly paid from the Federal Support Medical Insurance Trust Fund (42 U.S.C. 1395i) and partly by the insured individual (see Social Security Administration (2006) *Social Security handbook* §138). Premiums for Medicare Part B are deducted from Social Security benefits (42 U.S.C. 1395s).

⁴⁴⁹ 42 U.S.C. 1395k. See also Social Security Administration (2006) *Social Security handbook* § 127.1. Nothing prevents an individual to take out other health insurance (42 U.S.C. 1395b).

⁴⁵⁰ 42 U.S.C. 1395w-21 read with 1395w-27.

⁴⁵¹ 42 U.S.C. 1395w-101 and 1395w-102.

⁴⁵² Medicare currently assists 43 million beneficiaries to deal with health care costs (Centers for Medicare & Medicaid Services (2009) "Medicare coverage – general information" <http://www.cms.hhs.gov/CoverageGenInfo> (accessed 01/08/2009)).

has to be said that, just like Social Security,⁴⁵³ the Medicare programme has become a victim of its own success and is currently experiencing severe financial difficulties. Growing numbers of beneficiaries in addition to increases in health care costs have led to a deficit in Medicare's Hospital Insurance Trust Fund and an increased burden on general revenue.⁴⁵⁴ The reform of Medicare and the health care system in general consequently has become one of President Obama's legislative priorities⁴⁵⁵ and it remains to be seen whether Medicare will survive in its current form.

In addition to Medicare, the Social Security Act also makes provision for Medicaid, a programme intended to enable states to as far as possible furnish

- (1) medical assistance on behalf of aged ... individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and
- (2) rehabilitation and other services to help such ... individuals attain or retain capability for independence or self-care.⁴⁵⁶

Medicaid therefore is a state-run programme, with federal assistance, providing medical assistance to low-income older persons with insufficient resources to meet their anticipated medical expenses.⁴⁵⁷ Each state has its own plan for medical assistance to older persons, but Medicaid services usually include hospital stays, nursing facility services, visits to doctors and dentists, home

⁴⁵³ See below at 7.3.5.5.

⁴⁵⁴ It is estimated that the Hospital Insurance Trust Fund will be exhausted by 2017 if its financial difficulties are not addressed. See Social Security and Medicare Boards of Trustees (2009) *A summary of the 2009 annual reports* <http://www.ssa.gov/OACT/TRSUM/index.html> (accessed 19/09/2009).

⁴⁵⁵ See *The New York Times* 23 February 2009 "Democrats resisting Obama on Social Security" <http://www.nytimes.com/2009/02/23/us/politics/23social.html> (accessed 21/06/2009).

⁴⁵⁶ 42 U.S.C. 1396.

⁴⁵⁷ 42 U.S.C. 1396d; Social Security Administration (2009) "Medicare" <http://www.ssa.gov/pubs/10043.html> (accessed 01/09/2009).

health care services, private nursing care, prescription drugs, hospice care, home and community care for functionally disabled older persons,⁴⁵⁸ community-supported living arrangement services, and personal care services if authorised by the older person's doctor.⁴⁵⁹

7.3.5.5 Social Security reforms and intergenerational equity

The Social Security Act has been amended on numerous occasions. In 1972, cost-of-living-adjustments (COLAs) were introduced to ensure that the value of older persons' benefits were not eroded by inflation.⁴⁶⁰ Ten years later, in 1982, the Social Security system was in deficit and had to borrow money to pay benefits.⁴⁶¹ As a result the 1983 Social Security Amendments introduced the taxation of Social Security benefits, Social Security tax rate increases and the gradual increase in the retirement age.⁴⁶²

⁴⁵⁸ "Home and community care services" for the purposes of Medicaid include homemaker services; chore services; personal care services; nursing care services; respite care; training for family members on providing care to the older person; adult day care; and day treatment for mental illness (24 U.S.C. 1396t). The home and community care services offered by Medicaid correspond to the examples of home-based care programmes listed in s 11(3) of the Older Persons Act 13 of 2006 in South Africa. See above at 3.3.4.5.4.

⁴⁵⁹ 42 U.S.C. 1396d.

⁴⁶⁰ Quadagno "Generational equity and the politics of the welfare state" (1990) 20 (4) *International Journal of Health Services* 633. 42 U.S.C. § 415(i) makes provision for cost-of-living increases in benefits.

⁴⁶¹ Quadagno "Generational equity and the politics of the welfare state" (1990) 20 (4) *International Journal of Health Services* 634.

⁴⁶² Social Security Amendment P.L. 98-21 (1983). See also Quadagno "Generational equity and the politics of the welfare state" (1990) 20 (4) *International Journal of Health Service* 635. She is of the opinion that lack of public information on how OASDI operated, contributed to the decrease in confidence during the 1980s by the public in Social Security's ability to pay their benefits when they retire (at 636).

Although Social Security is currently in relatively good shape financially,⁴⁶³ it is facing serious long-term financial difficulties. The annual surpluses in the Old-Age and Survivors and Disability Insurance Trust Fund are likely to turn into deficits in 2016 when the baby boom generation⁴⁶⁴ retires and the government needs to rely on the Trust Fund for funds to pay benefits. The PAYG nature of Social Security means that a deficit will be inevitable as the payroll taxes will be insufficient to cover the benefits for so many retirees. The Trust Fund is projected to be exhausted by 2037. Unpopular changes such as increases in the Social Security payroll tax or reduction in benefits may be required to ensure the solvency of the Social Security system.⁴⁶⁵

Various social security reform plans have been put forward by politicians and academics alike.⁴⁶⁶ The most notable attempt at reforming Social Security was the attempt at partial privatisation of Social Security by former President Bush in 2005. His reform proposal was based on funded private accounts in which participants could invest some of their payroll taxes. The reform proposal was targeted mostly at younger persons to whom the funded nature of the proposed system would seem more attractive than the notion of paying for current retirees' benefits in the hope that similar benefits would be available to them when they

⁴⁶³ According to the Social Security and Medicare Boards of Trustees (2009) *A summary of the 2009 annual reports* <http://www.ssa.gov/OACT/TRSUM/index.html> (accessed 18/09/2009), the old age insurance programme passes their "short-range test of financial adequacy".

⁴⁶⁴ Described as the cohort of people born between 1946 and 1964. The "baby boom" was the massive increase in births following World War II ("Baby Boom Generation" <http://www.u-s-history.com/pages/h2061.html> (accessed 02/05/2009)).

⁴⁶⁵ Social Security and Medicare Boards of Trustees (2009) *A summary of the 2009 annual report* <http://www.ssa.gov/OACT/TRSUM/index.html> (accessed 18/09/2009).

⁴⁶⁶ See Moody (2000) *Aging: Concepts and controversies* 235-237 for a summary of plans for Social Security reforms that included privatisation to some degree.

retire, which may or may not be the case, given the financial difficulties faced by Social Security.⁴⁶⁷ Large-scale opposition meant the end of President Bush's attempt to change the solidarity-based nature of Social Security.⁴⁶⁸

Even though Social Security has had its ups and downs it still seems to have considerable support in the USA.⁴⁶⁹ President Obama is already facing opposition to his attempts to address the looming deficit in Social Security.⁴⁷⁰

The various social security reform plans that have been put forward by lobbyists and academics in the USA fall outside the scope of this work. However, the underlying difference of opinion (whether a public pension scheme should be PAYG, and therefore based on intergenerational solidarity, or fully funded and hence satisfy the notion of “intergenerational equity”) as it has played out in the USA, is of significance.⁴⁷¹

⁴⁶⁷ See the testimony by James B Lockhart III, Deputy Commissioner, SSA, Hearing before Senate Committee on Aging, “Strengthening Social Security: ‘Can we learn from other nations?’” 18 May 2004 http://www.ssa.gov/legislation/testimony_051804.html (accessed 19/05/2009).

⁴⁶⁸ *The New York Times* 23 February 2009 “Democrats resisting Obama on Social Security” <http://www.nytimes.com/2009/02/23/us/politics/23social.html> (accessed 21/06/2009).

⁴⁶⁹ In 1990 Quadagno “Generational equity and the politics of the welfare state” (1990) 20 (4) *International Journal of Health Services* 641 wrote that “despite the proliferation of the generational equity theme, public support for entitlements remains high”. According to *The Gallup Poll* (2007) 72, Social Security was regarded as a public concern by only 5% of persons polled in 2005. See also Moody (2000) *Aging: Concepts & controversies* 178, 191 and 231-232.

⁴⁷⁰ With Republicans being opposed to increased payroll taxes and Democrats opposed to reductions in benefits. *The New York Times* 23 February 2009 “Democrats resisting Obama on Social Security” <http://www.nytimes.com/2009/02/23/us/politics/23social.html> (accessed 21/06/2009).

⁴⁷¹ See above at 2.3 (descriptions of the concepts), and 6.4.4 for an analysis of the significance of these concepts in the South African context.

Moody describes the intergenerational equity debate in the USA as “basically a controversy about whether older adults are receiving an excessive share of limited government resources in comparison with other age groups”.⁴⁷² The questions raised by proponents of intergenerational equity are:

- Are too many resources allocated to older persons compared to children?
- What is being done about the effect of payments to older persons on deficits in public programmes?
- Is the current PAYG nature of Social Security fair to younger persons?
- Will there be any resources left when the younger persons currently financing the system retire?⁴⁷³

The abovementioned concerns can be answered by shifting the focus to the interdependence between generations and the reciprocity involved in intergenerational transfers.⁴⁷⁴ Social Security should not be regarded as a one-way flow of resources that could have been used for children towards older persons.⁴⁷⁵ Minckler⁴⁷⁶ cautions against the “new victim blaming” inherent in the arguments by proponents of ‘intergenerational equity’, that the growing numbers of older persons are receiving a disproportionate part of public funding.

⁴⁷² Moody (2000) *Aging: Concepts and controversies* 185.

⁴⁷³ Ibid. See also Kingson, Cornman and Hirschorn “Ties that bind” in Moody (2000) *Aging: Concepts and controversies* 199.

⁴⁷⁴ Kingson, Cornman and Hirschorn “Ties that bind” in Moody (2000) *Aging: Concepts and controversies* 199 summarise the interdependence and reciprocity between generations as follows: “For any society to progress and prosper, each generation must provide assistance to, and receive assistance from, those that follow”. They also state (at 202) that “by framing policy issues in terms of competition and conflict between generations, the intergenerational inequity perspective implies that public benefits to the elderly are a one-way flow from young to old and that there is no reciprocity between generations. This simply is not the case.”

⁴⁷⁵ Kingson, Cornman and Hirschorn “Ties that bind” in Moody (2000) *Aging: Concepts and controversies* 205.

⁴⁷⁶ Minckler “‘Generational equity’ and the new victim blaming” in Moody (2000) *Aging: Concepts and controversies* 213.

Proponents of ‘intergenerational equity’ are said to take a “canes versus kids” approach to intergenerational transfers. Such an approach ignores the fact that Social Security payments to older persons relieve their adult children from having to support their parents financially⁴⁷⁷ and, in doing so, ensure that they have more money to spend on their own children.⁴⁷⁸

The continued support for Social Security by older and younger Americans alike belies the “conflict” that proponents of intergenerational equity warn against.⁴⁷⁹ It is submitted that any future attempts at Social Security reforms will have to take account of the support for the intergenerational solidarity basis of the system.



7.3.5.6 Supplemental Security Income

The Supplemental Security Income programme (SSI)⁴⁸⁰ provides for cash assistance to older persons⁴⁸¹ with limited income and resources.⁴⁸² It operates

⁴⁷⁷ See below at 7.3.5.7.3 for a discussion of the filial obligation laws in the USA.

⁴⁷⁸ Minckler “‘Generational equity’ and the new victim blaming” in Moody (2000) *Aging: Concepts and controversies* 209.

⁴⁷⁹ Minckler “‘Generational equity’ and the new victim blaming” 210-211; Moody (2000) *Aging: concepts and controversies* 191. As Burtless puts it: “If Social Security enjoys broad political support today, when comparatively few voters draw benefits, it is hard to believe the popularity of the program will disappear when a sharply higher percentage of voters reaches retirement age, beginning around 2010.” (Burtless “Private accounts – putting retirement at risk” in Moody (2000) *Aging: concepts and controversies* 243).

⁴⁸⁰ Title XVI of the Social Security Act (42 U.S.C. 1381 – 1383f).

⁴⁸¹ Aged 65 years and older, who are US citizens or qualifying aliens and who reside in the USA (42 U.S.C. 1382c).

⁴⁸² Benefits are also provided for blind or disabled persons.

similarly to the South African older person's grant and is also means tested.⁴⁸³

Once an older person meets the eligibility requirements on the basis of income and resources, he or she is entitled to SSI benefits.⁴⁸⁴

A person who otherwise would have been eligible for SSI benefits and who disposes of resources for less than the fair market value or within 36 months before claiming benefits is penalised by ineligibility for benefits for a period of time.⁴⁸⁵ The penalty is intended to ensure that claimants do not deliberately impoverish themselves in order to receive benefits.⁴⁸⁶

As with most means-tested benefits,⁴⁸⁷ older persons whose income and resources are too high for them to be eligible for SSI benefits, but who are not well off economically, are vulnerable to risks such as rent increases or long-term illnesses.⁴⁸⁸ Many of these older persons who are ineligible for SSI benefits have to rely on their families to support them. The next paragraph deals with family

⁴⁸³ 42 U.S.C. 1382. See above at 3.3.1.1 for a description of the South African older person's grant.

⁴⁸⁴ 42 U.S.C. 1381a. Income for the purposes of the means test includes earned income, unearned income (e.g. Social Security benefits) and in-kind income (42 U.S.C 1382a(2)(B)). Similar to the South African position (see above at 3.3.1.1), residents of state institutions and correctional facilities are ineligible for benefits (42 U.S.C. 1382(e)). Persons who are fleeing from the law and parole violators are also ineligible for benefits (42 U.S.C. 1382(e)(4)).

⁴⁸⁵ 42 U.S.C. 1382b(c)(1)(A). The period of ineligibility for benefits differs depending on the value of the assets disposed of relative to the benefit amount, but will not exceed 36 months. In South Africa, reg 19(5) GN R 898 in GG 31356 of 22 August 2008 does not provide for similar penalties, but provides that the assets the applicant disposed of in order to impoverish himself or herself would be taken into account for the means test.

⁴⁸⁶ 42 U.S.C. 1382b(c)(1)(C)(iii) and (iv) describe the circumstances under which a disposal of resources would not be penalised.

⁴⁸⁷ See above at 4.3.2 for the problems associated with means tested benefits.

⁴⁸⁸ Moody (2000) *Aging: Concepts and controversies* 187 refers to the economically insecure lower-middle-class older persons who face this dilemma as the "tweeners", as they fall above the poverty level but are not financially secure.

caregiving and support for older persons as well as the legal provisions related to care and support services to older persons.

7.3.5.7 Caring for older persons

7.3.5.7.1 *Introduction*

Older persons in the USA are economically vulnerable mainly because of the rising costs of health care. In particular, they experience greater health costs increases as a result of the increase in chronic diseases among older persons.⁴⁸⁹

7.3.5.7.2 *Long-term care: Medicare and Medicaid*

The ageing of the American population has led to an increased need for long-term care for older persons. “Long-term care” is a generic term for the variety of services, including medical and non-medical care, delivered to persons with chronic illnesses or disabilities. Long-term care may address older persons’ health needs, such as nursing home care or home health care,⁴⁹⁰ or take the form of “custodial care”⁴⁹¹ to help in the home with daily activities such as dressing and bathing. Long-term care may also be provided by community

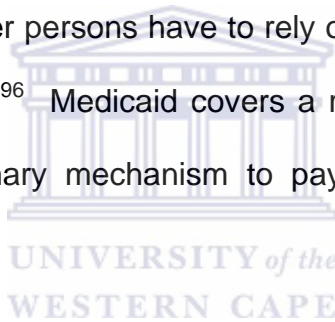
⁴⁸⁹ Binney and Estes “The retreat of the state and its transfer of responsibility: the intergenerational war” (1998) 18 (1) *International Journal of Health Services* 87.

⁴⁹⁰ Home health care is the skilled nursing care provided by professional nurses or other health services at the older person’s home. It includes intermittent (not on a full-time basis) skilled nursing care or physical therapy (About.com: Senior Health “What is home health care” <http://seniorhealth.about.com/library/eldercare/blhomecare.htm> (accessed 20/05/2009)).

⁴⁹¹ Also called “domiciliary care” (see above at 2.8).

programmes, such as adult day care, or assisted living services such as meals and health monitoring.⁴⁹²

Only a small percentage⁴⁹³ of older persons in need of long-term care live in nursing homes while the rest depend on assisted living and their families for care. Although many older persons prefer to live at home, the high cost of nursing home care is a major reason for the decline in the number of nursing home residents.⁴⁹⁴ As was seen above,⁴⁹⁵ Medicare does not cover general long-term nursing care; it only covers post-hospital care in skilled nursing homes. As a result many low-income older persons have to rely on Medicaid to assist with the cost of nursing home care.⁴⁹⁶ Medicaid covers a range of home care services and has “become the primary mechanism to pay for long-term care for the elderly”.⁴⁹⁷



However, Medicaid is a means tested benefit and applicants for Medicaid have to show that their “income and resources are insufficient to meet the costs of

⁴⁹² Medicare (2009) “Long-term care” <http://www.medicare.gov/longTermCare/static/home.asp> (accessed 02/07/2009). In South Africa, adult day care and assisted living programmes are included among the community-based and home-based programmes regulated i.t.o. the OPA (s 11).

⁴⁹³ In 2007 only about 7,4% of Americans aged 75 and older resided in nursing homes (about 1,8 million people). USA Today “Fewer seniors live in nursing homes” http://www.usatoday.com/news/nation/census/2007-09-27-nursing-homes_N.htm (last updated 27/09/2007).

⁴⁹⁴ The approximate annual cost of nursing home care was \$67,000 in 2007 - USA Today “Fewer seniors live in nursing homes” http://www.usatoday.com/news/nation/census/2007-09-27-nursing-homes_N.htm (last updated 27/09/2007).

⁴⁹⁵ See 7.3.5.4.

⁴⁹⁶ According to Moody (2000) *Aging: Concepts and controversies* 70, nearly 40% of Medicaid benefits are paid for older persons, chiefly for their nursing home care. See also Strauss and Lederman (1996) Medicaid and long-term care” in Moody (2000) *Aging: concepts and controversies* 73-74.

⁴⁹⁷ Moody (2000) *Aging: Concepts and controversies* 69.

necessary medical services”.⁴⁹⁸ Many older persons pay for care until their money runs out, but just as many have strategies to “spend down” in order to meet the strict eligibility criteria for Medicaid.⁴⁹⁹

7.3.5.7.3 *Filial responsibility laws*

The situation of older persons who do not qualify for Medicaid benefits is the point where public funding for long-term care and filial responsibility intersect and, depending on which state the older person resides in, their families may be held liable for their long-term care cost.

Many states in the USA have filial responsibility laws that hold the adult children of indigent older persons responsible for the care of their parents.⁵⁰⁰ Filial responsibility statutes are based on the Elizabethan Poor Laws of England⁵⁰¹ and share the same goal as the Poor Laws in aiming to protect public funds from liability for older persons with family who can provide them with care and

⁴⁹⁸ 42 U.S.C. 1396. This is just the general rule. States have different eligibility criteria.

⁴⁹⁹ “Spending down” consists of a number of strategies to legally diminish assets and income in order to comply with the means test for Medicaid. See Strauss and Lederman “Medicaid and long-term care” in Moody (2000) *Aging: Concepts and controversies* 73-75; Bates “Middle-class Medicaid” in Moody (2000) *Aging: Concepts and controversies* 76-78.

⁵⁰⁰ For a map showing the states with filial support laws, see AARP Bulletin Today “Paying for Mom: Little-known laws for families to fund parents’ care” http://bulletin.aarp.org/yourworld/family/articles/paying_for_mom_little_known_laws_force_families_to_fund_parents_care.html (accessed 30/08/2009).

⁵⁰¹ I.t.o. the 1601 Act for the Relief of the Poor, VII, family members and “children of every poor, old blind, lame and impotent Persons or other poor Person not able to work, being of a sufficient Ability, shall, at their own charges, relieve and maintain every such poor Person” (Higginbotham (2008) “The Workhouse - The 1601 Act for the Relief of the Poor” <http://www.workhouses.org/poorlaws.shtml> (accessed 12/04/2009)).

support.⁵⁰² Where older persons receive public assistance, filial responsibility statutes may require the older person's family to reimburse the relevant public fund.⁵⁰³

The filial responsibility statutes vary to a great extent on issues such as the definition of "indigent" older persons, whether only adult children have a filial responsibility or whether it is extended to all family members, the nature of the support arising from the filial responsibility, who is entitled to claim for parental support⁵⁰⁴ and enforcement measures.⁵⁰⁵

Many of the statutes make provision for nursing homes or other providers of care to sue adult children for the costs of care. The introduction of the Medicaid programme has led to a decline in the use of filial responsibility laws.⁵⁰⁶ However, in some states (such as Pennsylvania) filial responsibility laws are still used by nursing homes to pressure families to foot nursing home bills or to avoid the consequences of filial responsibility laws by becoming more involved in securing Medicaid cover for older family members.⁵⁰⁷

⁵⁰² De Giacomo (2008) "A comparative analysis of filial responsibility: Italy and United States" International Society of Family Law World Conference Vienna 8.

⁵⁰³ De Giacomo (2008) "A comparative analysis of filial responsibility" 9.

⁵⁰⁴ Ross "Taking care of our caretakers: using filial responsibility laws to support the elderly beyond the government's assistance" (2008) 16 *U. Illinois Elder Care Journal* 171.

⁵⁰⁵ "Filial responsibility laws" (2009) <http://family.jrank.org/pages/636/Filial-Responsibility.html> (accessed 05/09/2009).

⁵⁰⁶ De Giacomo (2008) "A comparative analysis of filial responsibility" 9.

⁵⁰⁷ AARP Bulletin Today "Paying for Mom: Little-known laws for families to fund parents' care" http://bulletin.aarp.org/yourworld/family/articles/paying_for_mom_little_known_laws_force_families_to_fund_parents_care.html (accessed 30/08/2009).

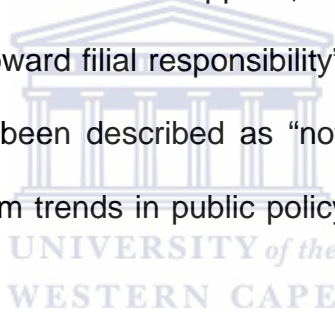
The Pennsylvania statute⁵⁰⁸ provides that

[t]he husband, wife, child, father and mother of every indigent person, whether a public charge or not, shall, if of financial ability, care for and maintain, or financially assist, such indigent person at such rate as the court of the county, where such indigent person resides shall order or direct.

According to the American Association of Retired Persons (AARP), filial support laws

raise provocative questions about who should be responsible for costly eldercare. Families? Societies at large? What about the individual's own role in planning for long-term care needs? The growing numbers of older people, their increased longevity and increasing care costs continue to make those questions that more pressing.⁵⁰⁹

Laws on filial obligations are seldom applied,⁵¹⁰ partly because of “deeply conflicting public attitudes toward filial responsibility”.⁵¹¹ Attempts to place focus on filial responsibility have been described as “not consistent with a historical perspective, or with long-term trends in public policy concerned with the welfare of the elderly”.⁵¹²



⁵⁰⁸ 62 P.S. 1973. The example of the Pennsylvania statute is used as an example of a filial responsibility statute that is actively enforced.

⁵⁰⁹ AARP Bulletin Today “Paying for Mom: Little-known laws for families to fund parents’ care” http://bulletin.aarp.org/yourworld/family/articles/paying_for_mom_little_known_laws_force_families_to_fund_parents_care.html (accessed 30/08/2009).

⁵¹⁰ When filial support laws are enforced, it is usually only done when an older person who is eligible for Medicaid is not receiving it and therefore cannot afford nursing home costs. See AARP Bulletin Today “Paying for Mom: Little-known laws for families to fund parents’ care” http://bulletin.aarp.org/yourworld/family/articles/paying_for_mom_little_known_laws_force_families_to_fund_parents_care.html (accessed 30/08/2009). According to Myers and Agree “The world ages, the family changes – a demographic perspective” (1994) 21 (1) *Aging International* 16, the weak enforcement of filial responsibility laws is linked to the global trend to more state responsibility toward older persons independent of children and other relatives.

⁵¹¹ Moody (2000) *Aging: Concepts and controversies* 68.

⁵¹² Bulcroft et al “Filial responsibility laws: issues and state statutes” (1989) 2 (3) *Research on aging* 391 as quoted by Myers and Agree “The world ages, the family changes – a demographic perspective” (1994) 21 (1) *Aging International* 17.

It is submitted that De Giacomo is correct in her view that, even where states face difficulties in enforcing filial responsibility laws or where there are no such laws, it is possible that adult children will still provide care for relatives out of a sense of moral obligation.⁵¹³ They may be even more inclined to do so if they receive benefits, protection and support from the state in return for family caregiving.⁵¹⁴

7.3.5.7.4 *Assistance to family caregivers*

Apart from Medicaid, the Older Americans Act⁵¹⁵ also makes provision for supportive services for older persons wishing to live at home. Federal grants are available for a number of support services including, but not limited to, services “designed to assist older individuals in avoiding institutionalization and to assist individuals in long-term care institutions who are able to return to their communities”.⁵¹⁶ Services for which grants can be made available also include assessment of an older individual in order to ensure that he or she receives the appropriate services.⁵¹⁷ Provision is made for “supportive activities to meet the special needs of caregivers, including caretakers who provide in-home services

⁵¹³ See also Moody (2000) *Aging: Concepts and controversies* 69 where the view is expressed that filial responsibility continues to be practiced in the USA “not as a matter of law but as a matter of ethics or custom”.

⁵¹⁴ De Giacomo (2008) “A comparative analysis of filial responsibility: Italy and United States” International Society of Family Law World Conference Vienna 13.

⁵¹⁵ 42 U.S.C. 3030d.

⁵¹⁶ 42 U.S.C. 3030d (a)(5).

⁵¹⁷ 42 U.S.C. 3030d (a)(5)(B).

to frail older individuals”. Grants are also available for home health services, homemaker services and assistance with shopping.⁵¹⁸

The abovementioned provisions of the Older Americans Act facilitating grant payments to states for supportive services mean that older persons in states where such supportive services are provided have the option to remain in their own homes. For this reason, the Older Americans Act is described as “the major vehicle for promoting the delivery of social services to the aging population”.⁵¹⁹

Family caregivers to older persons may also be in need of support, particularly in the form of respite care,⁵²⁰ allowing them to take occasional breaks from their caregiving duties. The Older Americans Act makes provision for grants for services “designed to support family members and other persons providing voluntary care to older individuals that need long-term care services”.⁵²¹ This is achieved through the National Family Caregiver Support Program in terms of which grants are made available to states based on their plans for the provision of respite care to temporarily relieve caregivers from their responsibilities.⁵²²

⁵¹⁸ 42 U.S.C. 3030d (a)(5)(C).

⁵¹⁹ O’Shaughnessy (2008) The basics: Older Americans Act of 1965 1.

⁵²⁰ Similar to respite care made available to carers in the UK. See fn 394 above.

⁵²¹ 42 U.S.C. 3030d (a)(19).

⁵²² 42 U.S.C. 3030s-1(b)(4).

7.3.5.7.5 Working caregivers

In the USA, caregivers (more often than not women) are often forced by circumstances to resign or cut back on work in order to give care to family members.⁵²³ To address this problem, the Family Medical Leave Act⁵²⁴ aims

- (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
- (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.

The Family Medical Leave Act entitles a family caregiver to 12 weeks per year leave with job security and the continuation of full social security benefits to care for a seriously ill parent.⁵²⁵ This provision is generous compared to the South African Basic Conditions of Employment Act⁵²⁶ which does not make any provision for leave for caregiving responsibilities and allows employees only three days paid family responsibility leave for limited events.⁵²⁷

⁵²³ See above at 5.6.2 for a discussion of the impact that caregiving responsibilities have on the caregiver's employment.

⁵²⁴ 29 U.S.C.2601.

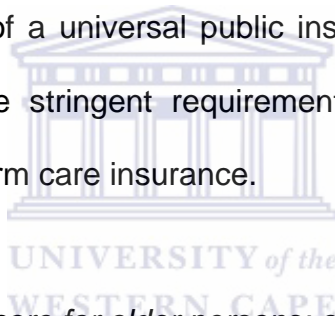
⁵²⁵ 29 U.S.C. 2612(a)(1)(C). The Act provides for the restoration of an employee to his or her position or equivalent position upon return from family medical leave (29 U.S.C. 2614).

⁵²⁶ Act 75 of 1997, s 27.

⁵²⁷ See above at 6.2.4.3.4.

7.3.5.7.6 Long-term care insurance

Finally, individuals can plan ahead and take out private long-term care insurance for long-term nursing home care. The costs of the long-term care insurance vary, depending on the coverage chosen and the age when the policy is first purchased, with the result that a policy purchased at an advanced age can be very expensive. Eligibility requirements also differ between policies and most insurance companies exclude persons with pre-existing health conditions.⁵²⁸ Nonetheless, the absence of a universal public insurance programme for long-term care coupled with the stringent requirements for Medicaid force many individuals to rely on long-term care insurance.



7.3.5.7.7 Long-term care for older persons: conclusion

The abovementioned provisions of the Social Security Act and the Older Americans Act show a significant legislative commitment to public provision of care and support to older persons. Filial support laws, based on the notion of families' care responsibility towards older relatives, are hardly ever enforced. Legislation enables older persons who can meet the strict requirements to access programmes such as Medicaid to pay for nursing home costs, should this

⁵²⁸ Moody (2000) Aging: Concepts and controversies 70 and 88-89.

be the best option for them. Where older persons wish to live independently at home, they can access services funded by grants to States.

7.3.5.8 Lessons from the USA

The Social Security scheme in the USA is an example of a national pension system run on the basis of intergenerational solidarity. A PAYG system of the magnitude of Social Security is vulnerable to demographic changes and economic fluctuation, as illustrated above. In South Africa, additional factors such as the high level of unemployment and the effects of HIV/AIDS negatively affect the tax base⁵²⁹ and compound the problems associated with a PAYG system. It is submitted that the reformed pension system will have to incorporate some funded components as protection against demographic shocks and financial problems similar to those that Social Security is currently experiencing. The added advantage of incorporating funded “pillars” in the system is that younger generations can also have a stake in the pension system.

The failed reform attempts in the USA illustrate how jealously Americans guard the solidarity aspect of their social security system, and it may become progressively more difficult to change.⁵³⁰ The commitment to intergenerational

⁵²⁹ See above at 4.3.1.5.

⁵³⁰ In 1999 Burtless predicted that “if Social Security enjoys broad political support today, when comparatively few voters draw benefits, it is hard to believe the popularity of the program will disappear when a sharply higher percentage of voters reaches retirement age, beginning around 2010”. Burtless “Private accounts: putting retirement at risk” in Moody (2000) *Aging: Concepts and controversies* 243.

solidarity in the face of problems with the PAYG scheme and the failure of attempts to steer it in a 'neo-liberal' direction serve as a warning that a solidarity-based system is not a short-term undertaking that can be easily amended.

It is suggested that research should be done to determine the viability of introducing programmes similar to the grants and non-financial assistance provided to family caregivers of older persons in the USA in South Africa.

South Africa has no national health insurance programme in general or a health insurance system catering specifically for older persons such as Medicare. The need for post-retirement medical cover in South Africa was recognised by the Department of Social Development in its 2007 discussion document⁵³¹ where it is concluded that

[t]o best eliminate the social security gaps that have arisen in relation to medical scheme cover, it is recommended that a system that integrates a number of social security entities be implemented. The purpose of this integration would be to establish a mechanism allowing individuals to create an entitlement to subsidised post-retirement contributions, based on their years of contributing to a medical scheme.

It recommends that a portion of the contributions made by and on behalf of each member of a medical scheme be paid to the proposed national pension fund.⁵³²

It therefore envisages a relationship between post-retirement benefits and the mandatory pillar of the reformed national pension system similar to the relationship between Medicare and Social Security in the USA.

⁵³¹ DSD discussion document (2007) 96.

⁵³² DSD discussion document (2007) 97.

7.3.6 Sweden

7.3.6.1 Introduction

Sweden was one of the first countries to introduce individual accounts into public and occupational pension schemes.⁵³³ In 1998, pension reforms took place “in order to meet the demands of an aging society”⁵³⁴ and the consequent pressure placed on the previous pension system.

Current social insurance benefits in terms of the Social Insurance Act⁵³⁵ can either be social insurance available to all residents, such as the “guarantee pension” and allowances,⁵³⁶ or occupation-based benefits intended to compensate workers for loss of income.⁵³⁷ The Social Insurance Act sets down the qualifying requirements for social insurance.

In the context of the question of the locus of the responsibility to provide care and support to older persons, the current Swedish model is worth examining as it is a

⁵³³ Sundén (2004) *How do individual accounts work in the Swedish pension system?* 1. The current system has been in operation from 2001. For transitional arrangements see Sundén (2000) *How will Sweden's new pension system work?* 11-12; Försäkringskassan (2008) *Income pension and supplementary pension* 1 and 3; Ministry of Health and Social Affairs (2000) *Old age pensions in Sweden* 1.

⁵³⁴ Sundén (2004) *How do individual accounts work in the Swedish pension system?* 1. In 2007, persons older than 65 constituted over 17% of the Swedish population and are considered to be the fastest growing part of the population (Ministry of Health and Social Affairs (2007) *Facts about elderly in Sweden* 1).

⁵³⁵ Act 1999:799.

⁵³⁶ See below at 7.3.6.2.3.

⁵³⁷ Ministry of Health and Social Affairs (2007) *Social insurance in Sweden* 1.

prime example of a system where it mainly falls on the state to care for and support older persons.⁵³⁸

The following is an overview of the Swedish pension system and provision for care and support for older persons.

7.3.6.2 The Swedish pension system

The Swedish state pension is made up of three parts or “pillars”: a PAYG defined contribution system with notional accounts (the “income pension”), a system based on individual accounts (the “premium pension”), and a “guarantee pension”.⁵³⁹ The two former systems are earnings-related and based on an overall contribution of 18,5% of an employee’s gross earnings shared by the employee and his or her employer.⁵⁴⁰ In addition, the state benefits discussed below are supplemented by contractual pensions, occupational pensions and personal savings.⁵⁴¹ Most occupational pension plans were established as a

⁵³⁸ See below at 7.3.6.4 for an overview of Swedish legislation on the provision of care to older persons.

⁵³⁹ The terminology in the translated versions of Swedish legislation is used in this chapter.

⁵⁴⁰ Ministry of Health and Social Affairs (2007) *Social insurance in Sweden 2*; Sundén (2004) *How do individual accounts work in the Swedish pension system?* 1. The National Social Insurance Board and the Premium Pension Authority are tasked with overseeing the state pension system i.t.o. Ch1, s 3 of the Social Insurance Act 1999:799.

⁵⁴¹ Ministry of Health and Social Affairs (2000) *Old age pensions in Sweden 1*; Ministry of Health and Social Affairs (2007) *Social insurance in Sweden 2*.

result of collective bargaining between employee and employer representatives.⁵⁴²

7.3.6.2.1 *The income pension*

The income pension is a defined contribution PAYG system with notional accounts based on a contribution of 16% of earnings.⁵⁴³ The benefit is calculated on 'lifetime income'.⁵⁴⁴ Employees build up pension entitlements based on their contributions.⁵⁴⁵ The amount of pension entitlements an individual has earned is recorded in his or her pension account.⁵⁴⁶ The total value of the individual's pensions entitlements, plus interest earned on the account over the years, constitute a person's 'pension balance'.⁵⁴⁷ Pension rights are indexed by linking them to economic growth in Sweden.⁵⁴⁸ Upon retirement, the pension balance is converted into an annuity by dividing the pension balance by a life expectancy denominator. The life expectancy denominator differs for every cohort and "mainly reflects the statistically expected remaining length of life when starting to draw pension".⁵⁴⁹ Hence, the dangers of demographic changes for the PAYG system are addressed by shifting the consequences of being in a cohort where

⁵⁴² For a description of the various types of occupational plans, see ISSA (2008) "Pension plans (voluntary): Plan profile" <http://www.issa.int/aiss/Observatory/Country-Profiles/Regions/Europe/Sweden> (accessed 01/07/2009).

⁵⁴³ Ministry of Health and Social Affairs (2007) *Social insurance in Sweden 2*

⁵⁴⁴ The income earned throughout the employee's career. Ministry of Health and Social Affairs (2000) *Old age pensions in Sweden 2*.

⁵⁴⁵ Although pension entitlements can be built up in other ways, e.g. caregiving and studying – see below at 7.3.6.4 for measures to assist caregivers.

⁵⁴⁶ Försäkringskassan (2008) *Income pension and supplementary pension 1*.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ministry of Health and Social Affairs (2000) *Old age pensions in Sweden 1*.

⁵⁴⁹ Försäkringskassan (2008) *Income pension and supplementary pension 2*.

people live longer, and consequently cost the pension system more, to individual members. Effectively the annual pension received by members of a longer living cohort will be a relatively reduced amount paid over more years compared to that received by members of a cohort with a shorter living expectancy.

The term 'notional accounts' is used in connection with the income pension as an individual's retirement income depends on his or her pension entitlements and not on the amount in the 'account'.⁵⁵⁰ In any given year, the amount in the employees' 'accounts' is actually being spent on a PAYG basis on current retirees.⁵⁵¹

7.3.6.2.2 *The premium pension*



The premium pension is a mandatory funded system with privately managed individual accounts. Contributions of 2.5% of earnings are credited to this system.⁵⁵² The body tasked with administering, regulating and acting as a clearing house for individual accounts is the Premium Pension Agency (PPM),⁵⁵³ hence the name "premium pension system".

⁵⁵⁰ The "notional accounts" correspond with the "cash balance" plans in the USA (see above at 7.3.5.3)

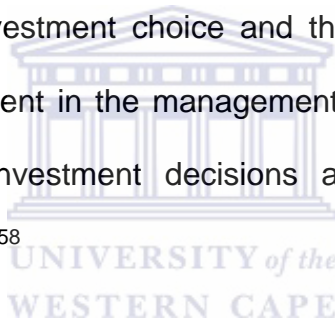
⁵⁵¹ See above at 2.7 for an explanation of PAYG systems.

⁵⁵² Sundén (2004) How do individual accounts work in the Swedish pension system? 1.

⁵⁵³ Premiépensionsmyndigheten (PPM).

By having a central agency in control of the system, administration costs can be kept down by “drawing on economies of scale in administration”.⁵⁵⁴ Participants are free to choose their own investment funds.⁵⁵⁵ Investment elections are held where investment funds are chosen. Only funds that have concluded agreements with the PPM stipulating the reporting requirements and the fee structure may participate in the system.⁵⁵⁶

In addition to private accounts, the government has established two additional funds: the one serving as a default fund for participants who do not wish to make or are unsure about an investment choice and the other for participants who prefer government involvement in the management of the fund.⁵⁵⁷ Participants are not bound by their investment decisions and can change their fund allocations on a daily basis.⁵⁵⁸



Pension credits are provided for raising small children, but it is not required that the parent has to stop working due to child-rearing in order to get the credits.⁵⁵⁹ Credits are also provided for serving in the military and studying.⁵⁶⁰

⁵⁵⁴ Sundén (2004) How do individual accounts work in the Swedish pension system? 2.

⁵⁵⁵ Similar to personal pension plans in the UK. See below at 7.3.4.2.

⁵⁵⁶ As the PPM itself handles the administration of the accounts, it ensures that fees charged by investment funds are kept down (Sundén (2004) *How do individual accounts work in the Swedish pension system?* 2).

⁵⁵⁷ Sundén (2004) How do individual accounts work in the Swedish pension system? 2-3.

⁵⁵⁸ Sundén (2004) 3.

⁵⁵⁹ Ståhlberg, Birman, Kruse and Sundén (2008) *Retirement income security for men and women* 16.

⁵⁶⁰ Ch 3, s 14 Social Insurance Act 1999:799.

7.3.6.2.3 The “guarantee pension”

The third pillar is made up of the guarantee pension paid from general tax revenues, which provides basic income security for people with low or no pension income.⁵⁶¹ The guarantee pension is pension-tested⁵⁶² and pays 40% of an average industrial worker’s wage.⁵⁶³ The pensionable age for men and women is 65.⁵⁶⁴ Only persons who have been resident in Sweden for at least 40 years are entitled to the guarantee pension.⁵⁶⁵

7.3.6.3 Additional benefits



A housing supplement is provided to older persons with low or no income who are in receipt of a guarantee pension.⁵⁶⁶

Older persons who receive little or no pension may apply for social assistance in the form of maintenance support.⁵⁶⁷ In terms of the Maintenance Support for the

⁵⁶¹ Ministry of Health and Social Affairs (2000) *Old age pensions in Sweden 2*.

⁵⁶² Income from other pensions may reduce the amount payable, as opposed to means tested benefits where all income is taken into account.

⁵⁶³ Ståhlberg, Birman, Kruse and Sundén (2008) *Retirement income security for men and women* 11.

⁵⁶⁴ Ministry of Health and Social Affairs (2000) *Old age pensions in Sweden 2*.

⁵⁶⁵ Ministry of Health and Social Affairs (2000) *Old age pensions in Sweden 2*. See below at 7.3.6.3 for the support provided to older persons who cannot meet the 40 year residence requirement.

⁵⁶⁶ The housing supplement pays over 90% of the older person’s housing costs (up to a maximum amount) (s 9 Housing Supplements for Pensioners Act 2001:761).

⁵⁶⁷ Äldreförsörjningsstöd.

Elderly Act⁵⁶⁸ persons who are 65 years or older and cannot meet the condition of 40 years' residence in Sweden are entitled to maintenance support.⁵⁶⁹ The aim of maintenance support is to guarantee a "reasonable standard of living" to all older persons living in Sweden.⁵⁷⁰ Maintenance Support is the Swedish equivalent of Supplemental Security Income in the USA⁵⁷¹ and the South African older person's grant.⁵⁷²

In terms of the Social Services Act 2001, "[p]ersons unable to provide for their needs or to obtain provision for them in any other way are entitled to assistance from the social welfare committee towards their livelihood (livelihood support) and for their living in general".⁵⁷³ Livelihood support covers "reasonable expenditure" on items required to enable the person to live independently.⁵⁷⁴ A person in receipt of maintenance support can therefore receive additional livelihood support to pay for the listed items.

⁵⁶⁸ SFS 2001:85.

⁵⁶⁹ S 2 Maintenance Support for the Elderly Act 2001:85; Ministry of Health and Social Affairs, Sweden *Host country report* EU Peer Review of "Freedom of choice and dignity for the elderly" 8.

⁵⁷⁰ Försäkringskassen Social Insurance in 10 minutes" http://www.forsakringskassan.se/irj/go/km/docs/fk_publishing/Dokument/Publikationer/Faktablad/Andra%20spr%C3%A5k/Engelska/socfors_10min_eng.pdf (accessed 15/06/2009).

⁵⁷¹ See 7.3.5.6 above.

⁵⁷² Discussed at 3.3.1.1 above.

⁵⁷³ Ch 4, s 1. The functions of the social welfare committees are described below at 7.3.6.4.

⁵⁷⁴ Ch 4, s 3 read with ch 4, s 1. The items covered by livelihood support include: "food, clothing and footwear, play and leisure, disposable articles, health and hygiene, a daily newspaper, a telephone and a television license fee, housing, domestic electricity supply, ... household insurance" as well as a number of other items aimed at working age rather than older persons. "Reasonable expenditure" for the purpose of this section is based on a national norm set by the government.

Older persons receiving care from family members may apply for a family carer grant to pay the family member for care.⁵⁷⁵ This is similar to the attendance allowance paid in the UK and the South African grant-in-aid⁵⁷⁶ but the level of the Swedish grant far exceeds the South African grant.

7.3.6.4 Care and support for older persons

In addition to the benefits paid by the advanced pension system, Swedish older persons' care needs are covered by a comprehensive social services system. The basis of the Swedish social services system is "democracy and solidarity" and its objectives are to improve people's socio-economic circumstances, promote "equality of living conditions" and allow people to actively participate in community life.⁵⁷⁷ In addition, the national policy with regard to older persons aims to ensure that older persons retain their independence and are treated with respect.⁵⁷⁸ Steps to achieve the objectives of social services must be taken "with due consideration for the responsibility of the individual for his own social situation *and that of others*".⁵⁷⁹ Hence, solidarity with older persons needing care and support is entrenched by legislation as a core value in the provision of social services.

⁵⁷⁵ Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 4. See below at 7.3.6.4 for other services linked to family members providing care and support to older persons.

⁵⁷⁶ See above at 3.3.1.2.

⁵⁷⁷ Ch 1, s 1 Social Services Act 2001:453.

⁵⁷⁸ Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 1.

⁵⁷⁹ Ch 1, s 1 Social Services Act 2001:453 (my emphasis).

Although much of the actual care of older persons in Sweden is provided by family members, overall responsibility for care of older persons rests with the state and, therefore, care for older persons is financed mainly from tax revenue.⁵⁸⁰ The delivery of good quality social services to older persons by suitably trained and experienced staff is guaranteed by the state.⁵⁸¹

The Social Services Act⁵⁸² and the Health and Medical Services Act⁵⁸³ form the legislative framework for social and nursing care services to older persons in Sweden. Social services are run by the municipalities,⁵⁸⁴ whereas health care is run on a regional level by county councils.⁵⁸⁵ Each municipality has a social welfare committee which is inter alia responsible for “the provision of care and service, information, counselling, support and care, financial assistance and other assistance for families and individuals in need of the same”.⁵⁸⁶ Each social welfare committee is free to organise services and to levy taxes according to its own priorities, provided its functions conform to national legislation.⁵⁸⁷ The

⁵⁸⁰ Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 1.

⁵⁸¹ Ch 3, s 3 of the Social Services Act 2001:453

⁵⁸² SFS 2001: 453.

⁵⁸³ SFS 1982:763. The Act has the provision of a high standard of health care to all members of society on equal terms as its main objective. I.t.o. the Act, health care must be financed on the basis of solidarity. Apart from the instances where nursing care is combined with social care, the Swedish health care system falls outside the scope of this thesis. See Ministry of Health and Social Affairs (2007) *Health and medical care in Sweden* for an overview of the Swedish health care system.

⁵⁸⁴ Ch 2, ss 1 and 2 Social Services Act 2001:453.

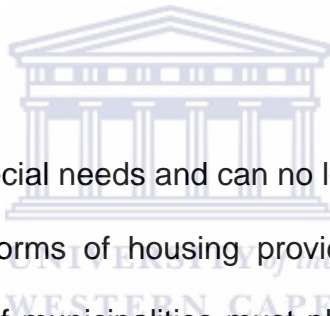
⁵⁸⁵ Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 1. In Sweden, county councils are the regional governments and municipalities the local governments.

⁵⁸⁶ Ch 3, s 1 Social Services Act 2001:453.

⁵⁸⁷ Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 1

system aims to provide each older person with social services tailor-made for his or her care needs and based on a needs assessment.⁵⁸⁸

As in South Africa, the UK and the USA, enabling older persons to continue living independently in their own homes for as long as possible is a priority function of the social welfare committees.⁵⁸⁹ Social welfare committees are therefore required to provide support and assistance to older persons still living at home.⁵⁹⁰ Home-care services providing assistance with day-to-day tasks are the most important services provided to older persons living at home and who are unable to cope on their own.⁵⁹¹



Older persons who have special needs and can no longer live in their own homes are entitled to alternative forms of housing provided by the municipalities.⁵⁹² Social welfare committees of municipalities must place older persons who need care and accommodation in either their own family home or a care home and ensure that they are properly cared for where they are placed.⁵⁹³

⁵⁸⁸ Ibid.

⁵⁸⁹ Ch 5, s 4 of the Social Services Act 2001:453; Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 1 and 3.

⁵⁹⁰ Ch 5, s 5.

⁵⁹¹ Home care services include help with shopping, cleaning, washing, cooking and personal care and can be combined with other more specialised services such as meals services and adult day care (Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 3). The number of older persons receiving home care services has increased in recent years relative to the number of older persons placed in special housing (Ministry of Health and Social Affairs (2007) *Facts about elderly in Sweden* 2). Home care services are similar to the support services for older persons living at home in the UK (see 7.3.4.4.3) and the home care services covered by Medicaid in the USA (see 7.3.5.7.2).

⁵⁹² Ch 5, s 5.

⁵⁹³ Ch 6, s 1. Ensuring the availability of alternative accommodation for older persons is also the responsibility of the social welfare committees (ch 6, s 2).

The private sector may also provide care and support services, particularly residential care, to older persons provided the permission of the relevant county administration board of the county where the care is to be provided is obtained.⁵⁹⁴ The required permission will only be granted to service providers that meet quality and safety standards.⁵⁹⁵ The social welfare committee remains responsible to ensure that services provided by the private sector are of a high standard.⁵⁹⁶

In terms of the Social Services Act, social welfare committees are obliged to develop support and relief services to assist family caregivers of older persons.⁵⁹⁷

The various assistance options available include

- financial compensation paid directly to the caregiving family member;⁵⁹⁸
- employment of the family caregiver by the municipality to care for the older person; and
- a family carer grant which is awarded to the older person to pay family members for caregiving.⁵⁹⁹

⁵⁹⁴ Ch 7, s 1. The county administration boards are the regional bodies responsible to supervise services provided by the municipalities in the county (Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 2).

⁵⁹⁵ Ch 7, s 2.

⁵⁹⁶ Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 5.

⁵⁹⁷ Ch 5, s 10.

⁵⁹⁸ Similar to the conditional cash transfer paid by the Chile Solidario programme (see above at 7.3.3.5) and the carer's allowance in the UK (see above at 7.3.4.4.4).

⁵⁹⁹ Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 4. The family carer grant corresponds with the attendance allowance paid in the UK (see above at 7.3.4.3) and the South African grant-in-aid (see above at 3.3.1.2).

Municipalities may charge reasonable fees for services.⁶⁰⁰ The basis for charges for home-help services, daytime activities and residence in special types of accommodation is indicated in the Social Services Act.⁶⁰¹ The charges must leave the older person with “sufficient money ... to cover his or her personal needs and other living expenses (reserve sum)”.⁶⁰² As long as the charges levied are within the framework of the rules set in the Act to protect the individual against high charges, a municipality may decide how much to charge for services.⁶⁰³

7.3.6.5 Lessons for South Africa

Many of the measures to provide for older persons in place in Sweden are not financially viable in South Africa.⁶⁰⁴ For instance, most of the items provided for as livelihood support⁶⁰⁵ would be regarded as unaffordable in the South African context, where financial support and basic care services are clearly a priority. The extensive financial resources that would be required to provide for older persons' care needs on the same scale as Sweden are also not available. The significance of the Swedish system from a comparative point of view does not lie in the detailed provisions of the Social Services Act itself but in the core principle

⁶⁰⁰ Except for “measures of support and assistance of a therapeutic nature” (ch 8, ss 1 and 2).

⁶⁰¹ Ch 8, s 5.

⁶⁰² Ch 8, s 6. See ch 8, s 7 for the basis of calculating an individual's “reserve sum”.

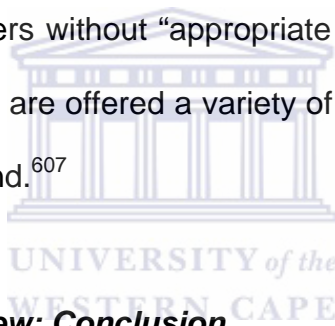
⁶⁰³ Ministry of Health and Social Affairs (2007) *Care of the elderly in Sweden* 1. An older person has the right to appeal to an administrative court against high charges for services (ch 16, s 13).

⁶⁰⁴ This is also true for the measures in place in the UK and the USA, but more so for the Swedish system.

⁶⁰⁵ See above at 7.3.6.3.

of the Act: solidarity with older persons and the resultant obligation on the state to provide for their care needs. At the very least, the range of measures to assist families caring for older relatives in Sweden serves to illustrate that various options for state assistance to families exist.

Although the Swedish pension system is definitely innovative, it is also quite complicated and, particularly where the notional accounts in the income pension are concerned, “most individuals are only vaguely aware of the monetary equivalent of their acquired rights”.⁶⁰⁶ Experience in Sweden and in South Africa has shown that fund members without “appropriate expertise” tend to err on the conservative side when they are offered a variety of investment choices that they do not necessarily understand.⁶⁰⁷



7.3.7 Comparative overview: Conclusion

As far as provision of care and support to older persons is concerned, an important question posed by this thesis is to what extent the state should provide these systems, and families are responsible for caring for older relatives. All four countries discussed above have state-sponsored measures to provide care and support for older persons, but the measures themselves have different

⁶⁰⁶ Schwarz and Demirguc-Kunt (1999) *Taking stock of pension reforms around the world* 13. See also the testimony by James B Lockhart III, Deputy Commissioner, SSA, Hearing before Senate Committee on Aging, “Strengthening Social Security: ‘Can we learn from other nations?’” 18 May 2004 http://www.ssa.gov/legislation/testimony_051804.html (accessed 19/05/2009).

⁶⁰⁷ National Treasury discussion paper (2004) 64. See also Sundén (2004) *How do individual accounts work in the Swedish pension system?* 3-6 for an analysis of the preference of participants in the Swedish premium pension system for the default fund.

conceptual and constitutional bases. The result is a whole gamut of combinations, ranging from legislation creating mainly state-provided benefits at the one end of the spectrum to laws and policies highlighting family responsibility for care and support of older persons at the other end. The fiscal resources at a country's disposal also play an important role, as "family care" will of necessity increase in importance in a country where the state cannot afford to provide for older persons directly.

In Sweden, older persons are entitled by law to state assistance in securing accommodation, long-term care and financial assistance. Swedish legislation attempts to balance service-orientated plans with cash-based solutions for older persons' care needs. The Swedish Social Services Act is based on social solidarity with older persons. Where families do provide care and support to older persons, they have access to financial assistance in doing so. At the other end of the spectrum, the Chilean constitution regards families as the basic core of society and hence as the main source of support for older persons. Through the *Chile Solidario* programme families can gain access to a state assistance programme and thereby access to a temporary cash subsidy if they are caring for older family members.

In the UK, there are no filial support laws compelling families to support older persons. However, the support offered by local authorities to families who do provide care and support for older relatives is more advanced and

comprehensive compared to the other systems in this study, barring Sweden. Pension legislation also credits family caregivers for time spent caring for older persons. In addition, pension legislation and legislation dealing with support services for older persons provide for a vast range of benefits and services to older persons who cannot rely on family support. The system therefore operates on the principle of shared responsibility between families (although there is no express statutory caregiving obligation for families) and the state. It is submitted that the holistic approach to legislation regarding older persons evidenced by the links between legislation providing for pensions and for care and support services is one of the main success factors in the UK system.

The US care and support system also operates on the basis of the shared responsibility between families and the state to provide care and support to older persons. Indigent older persons in the USA can rely on the state for long-term care and for support services should they prefer to live at home. Although filial support legislation exists in some states, these laws are not often enforced and the system rather relies on support to family caregivers to encourage increased family care and support to older persons.

The four countries in this comparative study have one important aspect of care and support legislation in common: where the need for increased family care and support of older persons is identified, legislation does not shift the burden to families without making additional resources available to assist families. This is a

valuable lesson in the context of the South African policy preference for family care of older persons.

In the context of retirement income legislation, the research question is whether South African legislation should continue on the path of regulating voluntary retirement savings provided exclusively by the private market or introduce a system underpinned by intergenerational solidarity.

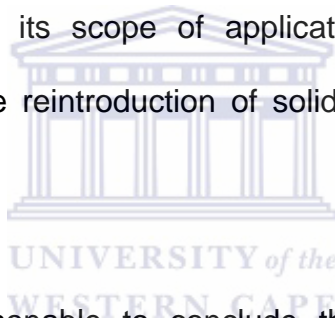
In Sweden, the USA and the UK, legislation provides for mandatory contributions to a national pension system which is mainly PAYG in nature. In all three countries varying degrees of steps have also been taken to improve access by those whose employment income is modest or irregular to cost-effective retirement savings mechanisms. Although Sweden and the UK have introduced funded elements to their national pension systems in order to encourage savings, it can be said that the national pension systems in all three countries are based on intergenerational solidarity.

The advantage of pooled social security funds, managed on a pay-as-you-go basis as in Sweden, the UK and the USA, is that it can finance benefits for those whose lifetime contributions are inadequate, subject to the extent of cross-subsidisation that the system can handle before discontent sets in.⁶⁰⁸ The relative disadvantages of pay-as-you-go financing of a national pension scheme

⁶⁰⁸ National Treasury (2004) Discussion paper 6.

are the inherent fiscal and financial risks and the need to occasionally raise social security taxes.⁶⁰⁹

The enduring popularity of the Social Security system in the USA and the steps taken in Sweden and UK to address imbalances show that a system based on intergenerational solidarity can work, particularly in a multi-pillared system with other pillars that provide privately managed funded savings. As far as the initially lauded Chilean experiment with a privatised system is concerned, the privatised system perpetuated the high levels of inequality in Chile and excluded many vulnerable individuals from its scope of application. The problems of the privatised system led to the reintroduction of solidarity aspects to the Chilean system.



It would therefore be reasonable to conclude that in jurisdictions such as Sweden, the USA, the UK, and even Chile, there is ample evidence of the advantages of intergenerational solidarity in the national pension system and illustrations of how it can operate in practice.

Unfortunately, no easy solution for uniquely South African problems can be found in a comparison with other countries,⁶¹⁰ particularly because of the different socio-economic circumstances prevailing in South Africa as compared with more

⁶⁰⁹ Ibid.

⁶¹⁰ Mouton Committee Report (1992) par 2.2.

industrialised countries.⁶¹¹ It is therefore imperative that a model and legal framework for the provision of retirement income, as well as care and support to older persons, be developed that is responsive to South Africa's unique needs. The development of such a legal framework for the provision of financial and non-cash support to older persons is addressed in the final chapter.



⁶¹¹ Patel (1992) Restructuring Social Welfare 81.

CHAPTER 8

CONCLUSION

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8.1 THE RESEARCH QUESTION

Intergenerational solidarity is based on the “mutual dependencies and responsibilities between the different age groups of which society is comprised”.¹ The central research question addressed by this thesis is whether intergenerational solidarity should form the basis of South African legislation on the provision of income during retirement, and if so, whether it in fact does. If the answer to the latter part of the question is in the negative, a further question is whether the current process to reform the retirement income system can be utilised to strengthen intergenerational solidarity in South Africa.

For many older persons whose retirement income is inadequate to provide the necessary living standards, the issue is not so much where their retirement income comes from but the standard of living it affords them. Issues such as accommodation and care for older persons are of as much importance as retirement income. Hence, an additional theme of this research has been the extent to which the duty to provide non-cash support and care to older persons rests with the state, with the older person’s family or with the community.

¹ Ben-Israel and Ben-Israel (2002) “Senior citizens: Social dignity, status and the rights to representative freedom of organization” 141 3) *International Labour Review* 3. See 2.3 for a more detailed description of intergenerational solidarity.

8.2 THE POINT OF DEPARTURE

The hypothesis of this thesis was that intergenerational solidarity is the most appropriate basis for legislation relating to older persons and retirement but that it is not necessarily present in current South African legislation. To determine whether this view is correct, the concept of intergenerational solidarity and opposing concepts such as 'neo-liberalism' (in terms of which, in the context of provision for retirement, each individual is responsible for his or her own retirement income) and 'intergenerational equity' (which questions whether 'disproportionate' public spending on older persons is fair to younger generations) were examined.² An overview followed of the current law on retirement income and care and support for older persons.³ Attention was then given to those aspects of South African legislation and policy on social security for older persons that may affect intergenerational solidarity directly or indirectly, such as the availability of resources to fund social assistance,⁴ fraud and maladministration of state grants⁵, the voluntary nature of occupational retirement fund membership⁶ and the recognition of the role of older persons in society.⁷ The role of families and communities in providing care and support to

² See above at 2.3.

³ Chapter 3 above.

⁴ See above at 4.3.1.

⁵ See 4.3.3 above.

⁶ See above at 5.5.

⁷ See above at 6.4.1.

older persons was also discussed.⁸ To determine whether the importance attributed to intergenerational solidarity as an inherent value in social security legislation is in fact warranted, international standards relevant to older persons and their rights were examined to determine the extent to which intergenerational solidarity plays a role in international law.⁹ Finally, a comparative overview of legislation on benefits and support for older persons was undertaken to determine whether it is in fact possible to incorporate and entrench intergenerational solidarity in legislation.¹⁰

8.3 INTERGENERATIONAL SOLIDARITY AND CURRENT SOUTH AFRICAN LAW



Currently, three main measures are available to provide for the needs of older persons:

Firstly, a non-contributory means-tested older person's grant is paid as a social assistance measure.¹¹ Older persons in need of regular attendance by another person are entitled to grants-in-aid in addition to older person's grants.¹²

Secondly, occupational retirement funds pay benefits to members on retirement. Membership of these funds is voluntary and limited to individuals in formal

⁸ See above at 6.2 and 6.3.

⁹ See above at 7.2.

¹⁰ See above at 7.3.

¹¹ The older person's grant and its legislative framework is discussed above at 3.3.1.1.

¹² See above at 3.3.1.2.

employment. The state only regulates and monitors the management of these funds.¹³ The South African retirement fund system differs from the systems found in most developed countries as South Africa does not have a national retirement insurance scheme. In addition to the benefits paid by occupational retirement funds, employees who wish to supplement their retirement savings and self-employed persons have to make use of private retirement savings vehicles.¹⁴

Finally, the state makes financial awards available to non-governmental and community organisations that provide care and support services to older persons. It was argued that non-cash support to older persons in the form of care and support services form part of social security.¹⁵ However, the legislative framework for care and support services to older persons¹⁶ operates in isolation from that of retirement income provision. The state itself provides little direct care and support¹⁷ and most care services to older persons are provided by the community¹⁸ and older persons' families. Current government policy treats the

¹³ The occupational retirement fund system is described above at 3.3.2.

¹⁴ See 3.3.3 for a brief overview of private retirement savings vehicles.

¹⁵ See above at 2.2 for a description of the concept of social security and for arguments for viewing care and support services to older persons as social security measures. See also 7.2 for examples of international standards that include care and support services under social security.

¹⁶ The provisions of the Older Persons Act 13 of 2006 are discussed above at 3.3.4.5.

¹⁷ See 3.3.4 where the lack of state-run residential facilities for older persons is discussed.

¹⁸ 'Community' support is provided by a number of institutions including private profit-making organisations, the welfare sector (NGOs, charities, religious organisations) and informal networks such as neighbours and friends.

family as the core support structure for older persons and regards the state's role as merely residual.¹⁹

It was also argued above²⁰ that state measures to provide retirement income or support services to older persons in South Africa have to be evaluated against the backdrop of older persons' constitutional rights. Hence, the question of the need for intergenerational solidarity in social security measures cannot be addressed in isolation from older persons' basic rights.

Older persons have the right of access to social security including, if they are unable to support themselves and their dependants, appropriate social assistance.²¹ In addition to social security rights, older persons also have the right to dignity²² and to equality.²³ The state is required to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of access to social security.²⁴ The interpretation of phrases such as "reasonable measures" and "within available resources" is important in evaluating whether the state complies with its duty to realise social security rights.²⁵

¹⁹ Government policy on older persons and the responsibility to care for them is discussed above at 4.2.

²⁰ At 3.2.

²¹ Section 27(1)(c) of the Constitution, 1996.

²² Section 10 of the Constitution.

²³ Section 9.

²⁴ Section 27(2) of the Constitution.

²⁵ See above at 3.2.2 for an overview of the interpretation of s 27 of the Constitution, particularly in *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC). The conclusions reached regarding the reasonableness of current social

The protection of the right of access to social security furthermore depends on the existence of an efficient social security administration that does not impede access of applicants and beneficiaries to benefits and is therefore linked to the right to just administrative action.²⁶

Proposals for reform of the current retirement income system also have to be evaluated against older persons' constitutional rights. Various policy statements and discussion documents have circulated over the last few years. Although they differ on some technical points, all policy and discussion documents point to the future introduction of a multi-pillar retirement income scheme including a national pension scheme.²⁷ The conclusions drawn in this chapter relate not only to the current social security system, but to the proposed reformed system as well.²⁸

8.3.1 The older person's grant as an expression of solidarity

Older persons are entitled to access social security, including social assistance if they are unable to support themselves and their dependants.²⁹ The existing

security measures is best discussed in the context of the relevant measures and are incorporated in the following paragraphs.

²⁶ See above at 4.3.4 for the administrative problems encountered by applicants for and beneficiaries of the older person's grant.

²⁷ See above at 5.2 for the main reform proposals and 7.3.2 for a description of the World Bank's multipillar model that the reforms proposals are based on.

²⁸ Unless stated otherwise.

²⁹ Section 27(1)(c) of the Constitution.

social security measure intended to give effect to older persons' right of access to social assistance is the means tested non-contributory older person's grant.³⁰

The grant is well targeted and provides groups that face the gravest poverty, such as older women in the rural areas, with access to retirement income. The grant is often used to support other household members. The older person's grant therefore plays an important role as a solidarity measure, redistributing income from taxpayers to older persons living in poverty as well as their families.³¹

In the context of intergenerational solidarity, the means test that is currently imposed to determine eligibility for the older person's grant is problematic. In terms of intergenerational solidarity, benefits to older persons form part of the flow of resources from the working-age generation to older persons in return for older persons having contributed to the working-age group's well-being when they were children. The imposition of the means test excludes relatively better-off older persons from receiving their due in terms of intergenerational solidarity. It is therefore recommended that the means test be abolished.³²

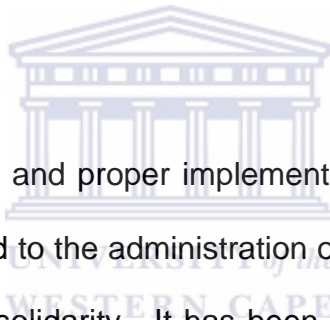
The older person's grant is funded through taxes on a PAYG basis and is therefore dependant on a healthy tax base and a strong working-age generation.

³⁰ Payable i.t.o. the Social Assistance Act 13 of 2004 and its regulations.

³¹ See above at 4.4.

³² See 4.3.2 above for other arguments against the imposition of a means test such as the high costs involved in administering the test. The means test also creates a "poverty trap" by discouraging lower earning workers from saving for their retirement as the current means test takes all income, including retirement benefits, into account.

Factors such as HIV/AIDS-related deaths and the consequences of the current economic recession, such as retrenchments, reduce the economically active population and therefore the tax base, thus leaving the other generations, particularly older persons, more vulnerable. As the state's responsibilities in terms of social assistance payments are limited to its "available resources", a decline in available resources may lead to difficult trade-offs in the relationship between different generations. For this reason it is submitted that intergenerational solidarity must be entrenched in legislation to protect the interests of older persons from being outweighed by other short-term spending priorities.³³



In addition, the enforcement and proper implementation of the provisions of the Social Assistance Act related to the administration of grants is required to ensure continued intergenerational solidarity. It has been argued that intergenerational solidarity with beneficiaries of the older person's grant presupposes measures to ensure that persons other than the intended beneficiaries do not unlawfully benefit from the system.³⁴ It is hoped that the Social Security Agency (SASSA)³⁵ will continue to improve the management of the grants system.

It may be concluded that, with sufficient budgetary support, the older person's grant can go a long way in alleviating poverty among older persons and their

³³ See 4.3.1 above for an analysis of the impact of high grant costs on intergenerational solidarity.

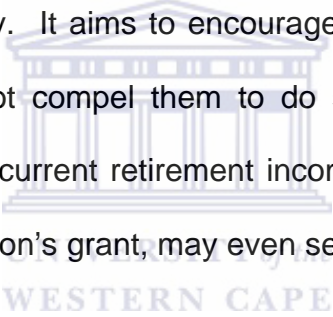
³⁴ See 4.3.3 and 4.3.4 above for a detailed description of measures that have been implemented to address these problems in the grants system.

³⁵ I.t.o. the South African Social Security Agency Act 9 of 2004.

communities. However, the older person's grant is the only redistributive element in the current retirement income system. It therefore is crucial that the redistributive elements of the reformed retirement system are not limited to the social assistance pillar and that a mandatory contributory public pension scheme operated on a PAYG basis be created as part of a multi-pillar system.³⁶

8.3.2 *Toward a national retirement fund*

The current occupational retirement funds system³⁷ in South Africa is not based on risk-pooling and solidarity. It aims to encourage individuals to save for their own retirement but does not compel them to do so. In effect, the voluntary nature of this aspect of the current retirement income system, coupled with the means test for the older person's grant, may even serve to discourage individuals from saving for retirement.³⁸



As far as the constitutionality of the occupational retirement fund system is concerned, the state may delegate its obligations to realise social security rights to other parties as long as the measures put in place meet the test of "reasonableness" among others.³⁹ The question in the case of occupational retirement funds is whether the current occupational retirement fund system can

³⁶ See below at 8.3.2 for an example of the possible combination of 'pillars' that could constitute a multi-pillar system in South Africa.

³⁷ The legal framework for the occupational retirement funds system is discussed above at 3.3.2.

³⁸ See above at 4.3.2.

³⁹ I.t.o. s 27 of the Constitution.

be regarded as “reasonable” in terms of section 27(2) of the Constitution. On the basis of the test for the “reasonableness” of a programme developed in *Government of the Republic of South Africa and Others v Grootboom and Others*,⁴⁰ the occupational fund system may have the institutional capacity required by the test⁴¹ but fails in terms of the other factors to be considered in the evaluation of a measure’s reasonableness. The flexibility of the system can be questioned in the light of the lack of portability of benefits between funds.⁴² Only employees in the formal economy can participate as occupational funds are accessed through participating employers. The result is that workers in the informal economy and self-employed individuals are excluded and consequently have to rely on the older person’s grant or, if they can afford to, private savings vehicles. The excluded groups constitute a significant section of society.⁴³ The voluntary nature of participation in the occupational retirement funds means that many cash-strapped employees may choose not to join a retirement fund. The lack of compulsion therefore leads to a situation where the occupational fund system may not be providing benefits to the most vulnerable workers.⁴⁴ The current occupational fund system, therefore, does not meet the other important

⁴⁰ 2000 (11) BCLR 1169 (CC) para 43. The *Grootboom* case and the interpretation therein of clauses in s 27(2) of the Constitution such as “reasonable measures” and “within available resources” were discussed above at 3.2.2.2.

⁴¹ See National Treasury (2007) 2nd discussion paper 2.

⁴² See 5.4 above for a discussion of leakage from the current retirement funding system due to low withdrawal benefits, the lack of compulsory preservation of funds and the issue of the pension rights of employees of a business that is transferred to a new employer as a going concern.

⁴³ See above at 5.6 for a discussion of the current exclusion of workers in the informal economy, the unemployed and family caregivers from the benefits of occupational fund membership.

⁴⁴ See 5.5 above for the problems created by the voluntary nature of the occupational fund system and for proposals on how to encourage (or compel) more employees to save for their retirement.

criterion in *Grootboom* as it does not make provision for the most vulnerable groups of workers.

It is therefore clear that reform of the pension system and the corresponding legislative framework to incorporate a public contributory scheme in addition to the current voluntary schemes is vital from both a constitutional and an intergenerational solidarity point of view.⁴⁵ International standards such as ILO Conventions 102 and 128 place the general responsibility for the provision, implementation and administration of retirement benefits on the state;⁴⁶ providing yet another reason for reform of the current retirement funding system.

The extent to which the proposed national retirement fund would impact on intergenerational solidarity is uncertain at this stage and would depend on the design of the system and the legislative framework.⁴⁷ However, the comparative overview in Chapter 7 above of the retirement funding systems in Sweden, the UK and the USA indicates that their PAYG schemes succeed in paying the promised retirement benefits⁴⁸ and that the notion of intergenerational solidarity underpinning their pension systems is popular.⁴⁹

⁴⁵ According to Diamond (1993) *Privatization of social security: lessons from Chile* 1, “the role of government in the provision of retirement income is important for the well-being of its people”.

⁴⁶ See 7.2.4 above for a discussion of the relevant ILO standards.

⁴⁷ See e.g. 5.3.2 above where it is argued that the proposed national retirement fund must be a pension fund, as the lump sums paid by provident funds amount to the abdication of the responsibility that the working-age generation has toward older persons once the lump sum is paid. It is, of course, imperative that the proposed national retirement fund be run on a PAYG basis to ensure intergenerational solidarity and redistribution.

⁴⁸ Admittedly from a much higher employment and/or income base than is currently possible in South Africa. Therefore, the recent pension reforms in Chile (a country with comparable socio-economic indicators) that reintroduced a public solidarity-based minimum pension into the

The idea behind a contributory retirement income scheme is that an individual should attempt to secure income for his or her retirement during his or her working years by participating in a solidarity-based scheme offering risk-pooling and economies of cost. It is submitted that the state's responsibility to retirees does not only entail the provision of a retirement income system but also extends to ensuring that an individual who has saved for his or her retirement can be assured that the promised benefits will in fact be paid upon retirement. The state therefore has an important role in the regulation of fund governance to ensure confidence in the long-term continuity of the national retirement scheme.⁵⁰

In the context of a retirement funding system, the mere presence of 'neo-liberal' aspects such as a voluntary fully funded pillar will not of necessity detract from the goal of social solidarity, but it is imperative that a careful balance is struck between the 'neo-liberal' and solidarity aspects. For example, the combination of a mandatory PAYG national pension fund with a fully funded retirement savings

previously privately managed pension system are also illustrative of the importance of a national pension scheme as part of a multi-pillar system. See above at 7.3.3 for an overview of the Chilean pension system.

⁴⁹ Each of these countries have experienced some problems with the PAYG nature of their retirement systems and have introduced (or are planning to introduce) reforms in their national pension schemes. However, these reforms were intended to strengthen intergenerational solidarity, not to replace the PAYG system with a funded scheme. The national pension schemes in these countries have thus retained their PAYG nature despite the reforms. See above at 7.3.6 (Sweden), 7.3.4 (UK) and 7.3.5 (USA) for an overview of the pension systems and reforms in these countries.

⁵⁰ See above at 5.7.

"pillar" may strike the required balance, depending on the provisions of the legislation creating the retirement funding system..⁵¹

In South Africa, the balance and flexibility of a state programme are factors to be taken into account in determining whether the state is taking reasonable measures to achieve the realisation of social security rights. Hence, it was argued that the answer lies in a multi-pillar system that balances a PAYG national pension pillar with funded retirement savings pillars. It is suggested that the proposed national social security system should comprise the following pillars:⁵²

- A tax-financed older person's grant, without a means test, providing a minimum income to all older persons;
- A contributory defined-benefit national pension fund financed on a PAYG basis with compulsory membership for all employees and self-employed individuals, including measures such as wage subsidies to assist lower paid employees;⁵³

⁵¹ The aforementioned balance is of vital importance, as is illustrated by the system in the USA where the solidarity-based Social Security system has overshadowed the other pillars of retirement income with negative consequences for the long-term solvency of Social Security. The projected long-term financial difficulties of Social Security and the attempts at Social Security reforms were outlined above at 7.3.5.5.

⁵² The multi-pillar system proposed above is based on and adapted from the World Bank "multi-pillar model" (see above at 7.3.2) and the models proposed by the Taylor Committee Report (2002), the DSD discussion document (2007) and the National Treasury discussion papers (2004 and 2007). The multi-pillar system envisaged in the various discussion documents is summarised above at 5.2..

⁵³ See above at 5.5.3 where it is submitted that the increase of participants in a national retirement scheme as a result of the proposed wage subsidy for lower earning employees would have a positive effect on intergenerational solidarity, as an increase in fund members would subsequently increase the interest in maintaining the system until their retirement.

- Compulsory membership of defined contribution fully-funded occupational retirement funds or a national retirement saving fund for employees to supplement the retirement benefits from the solidarity-based national pension fund;⁵⁴
- Voluntary additional retirement saving e.g. retirement annuities or membership of occupational retirement funds;
- The provision of care and support services to older persons.⁵⁵

It is submitted that the objective of adequate retirement income for all will require an improved interface between social assistance for older persons on the one hand and, on the other, benefits paid by retirement funds and private retirement savings vehicles. The incorporation of social assistance measures for older persons and a national contributory pension scheme in a single coherent system through the proposed reforms would be indicative of a holistic approach to retirement funding that is currently lacking.⁵⁶

8.3.3 The provision of care and support services to older persons

An additional aim of this thesis is to determine the boundary between the family's obligation to care for older family members and the state's obligation to take reasonable measures to provide appropriate care to older persons.

⁵⁴ See e.g. the discussion of the introduction in the UK of a system of defined contribution personal accounts, and of auto-enrolment of jobholders into these accounts, at 7.3.4.2 above.

⁵⁵ The inclusion of care and support services to older persons as a "pillar" of the proposed national social security system is explained below in 8.3.3.

⁵⁶ See 4.4 and 5.8 above.

In terms of African customary law, the extended family has a legal duty to support family members and therefore older relatives. Similarly, a Roman-Dutch common law filial duty to support indigent parents exists. The difficulties posed by both the customary law and common law duties are discussed above⁵⁷ and it is suggested that legislation be considered determining the filial obligation to support elderly parents in order to clearly outline the responsible parties and when an adult child is absolved from the duty to support. The breakdown of the traditional system of support of older persons⁵⁸ necessitates statutory intervention to ensure that older persons are supported by those family members who are able to do so. It is submitted that the proposed legislation on family obligations will have to strike a balance between compensating for the breakdown of traditional family structures whilst still acknowledging and strengthening family support where it still exists. The central aim of such legislation should not be to create a “stick” whereby adult children (or other family members) are compelled to support their elderly parents, as this would be difficult to enforce, but rather to determine the boundaries between the family’s obligation to support older persons and the state’s responsibilities to provide support to those older persons.⁵⁹ It is submitted that the objective of the proposed

⁵⁷ See 6.2.1 above for an overview of the customary law duty to support older relatives and the common law filial support obligation.

⁵⁸ See 6.2.2 above.

⁵⁹ See above at 7.3.5.7 for a discussion of the filial obligation legislation in a number of states in the USA. Although these laws have not often been enforced in the past, they are increasingly being used by care homes to compel the adult children of older persons who cannot pay for their care and who do not qualify for Medicaid benefits, to comply with their filial obligation by either paying for the older persons’ care or ensuring that they get access to Medicaid.

legislation would therefore be to determine the point where the family's obligations to older persons end and the state's liability begins.

The aforementioned intersection between the family's duty to support elderly family members and the state's constitutional obligations to provide older persons with access to social security gains importance in the light of the stated government policy that families are the main support structure for older persons.⁶⁰ Based on the breakdown of traditional support of older persons, government policy may be based on assumptions that no longer hold true. The policy is in line with the provisions of the African Charter which also regards care and support of older persons as primarily the duty of the family as a group and of individual family members. In terms of the African Charter the state has the duty to assist the family.⁶¹ However the African Charter should not be interpreted to undermine international standards that take a different stance on the respective roles of the state and the family in providing care and support for older persons. Whereas the ICESCR also regards the family as the fundamental group of society, the provisions of the ICESCR on social security rights have been interpreted as requiring the state to provide social services to older persons with no other resources. Where family members are providing care and support to older persons, they should be entitled to state support.⁶²

⁶⁰ White Paper for Social Welfare GN 1108 in GG1816 of August 1997 8.82.

⁶¹ See above at 7.2.5.1.2.

⁶² See above at 7.2.2.2 for a discussion of the relevant provisions of the ICESCR and the interpretations thereof in the General Comments of the UNCESCR.

The United Nations' view on family versus state responsibility for older persons as expressed in the "Political declaration" of the Second World Assembly on Ageing is that the provision of care and support services is primarily that of the state.⁶³

What all the divergent points of view of international and regional instruments and declarations have in common is the view that where families provide care and support to older relatives they should be entitled to state support and assistance where needed. It is submitted that the state should not shift the burden of taking care of older persons to families and communities without making additional funds and services available to family and community caregivers.⁶⁴ A policy shift is required in South Africa from one that views families and communities as primary caregivers to one that reflects the *shared* responsibility for the care and support of older persons.

An analogy can be drawn with the situation of family obligations towards children. In terms of section 28 of the Constitution, children have the right to family or parental care in the first place and the state is required to provide appropriate alternative care when the family cannot do so. However, the state

⁶³ See above at 7.2.3.3. The ILO Workers with Family Responsibilities Convention 156 of 1981 and Recommendation 165 of 1981 also require Member states to implement measures to address the needs of workers with family responsibilities such as caring for elderly parents (see 7.2.4.2 above).

⁶⁴ See at 7.3.3.5 for the example of the Chile Solidario programme whereby families receive cash and other assistance from the state, including a cash transfer to families with elderly members. The provision of care and support services to older persons by the community is discussed above at 6.3.3.

makes grants available to families to assist them in raising children.⁶⁵ An argument can be made that similar assistance to families taking care of older persons should be considered.⁶⁶

Another avenue of support could be cash payments to older persons in need of care.⁶⁷ Currently only the grant-in-aid, an additional grant paid to recipients of the older person's grant who need regular attendance by another person, is paid,⁶⁸ but the level of the grant is negligible compared to the cost of care. Similar grants, albeit at a much higher level, are paid in the form of attendance allowances in the UK⁶⁹ and the family carer grant in Sweden.⁷⁰

The Older Persons Act⁷¹ makes provision for assistance to family caregivers in the form of respite care allowing the caregiver some time off from his or her caregiving duties.⁷² It is submitted that the statutory support for respite care is another example of the state assistance to family caregivers that is required as the burden of care and support of older persons is shifted to families. However, it is suggested that state assistance to families providing care and support to older

⁶⁵ The Social Assistance Act 13 of 2004 provides for the payment of means-tested child support grants to primary caregivers of children, care dependency grants to parents, foster parents or guardians of severely disable children in need of constant care, and foster child grants to foster parents.

⁶⁶ Cash benefits are made available to family caregivers by law in Sweden – see 7.3.6.4 above.

⁶⁷ Such as the “direct payment” option in the UK – see 7.3.4.4 above.

⁶⁸ See above at 3.3.1.2 and 6.2.4.3.

⁶⁹ See above at 7.3.4.3.

⁷⁰ See above at 7.3.6.3.

⁷¹ Act 13 of 2006.

⁷² Provision for respite care is also made in the UK (see 7.3.4.4.4 above) and the USA (see 7.3.5.7.4 above).

persons should be expanded to reflect the state and families' shared responsibility for care and support of older persons.

It is therefore suggested that legislation giving effect to the shared responsibility of the state and older persons' families and communities be enacted to determine the circumstance under which families and communities providing care and support to older persons would be entitled to support.⁷³

8.4 THE NEED FOR INTERSECTORAL COLLABORATION

The resurgent ideologies of individualism, family and filial responsibility and free market competition, as manifested in the call for self-help and the return to the 'autonomous family', have been employed to justify the retreat of the state from intergenerational responsibility.⁷⁴

The link between intergenerational solidarity and state support to family caregivers as argued for in this thesis and the quote above may have been unclear initially. The prominence given to the provision of state support to families in this thesis may also have been questioned at first. However, it is submitted that there is a link between these issues, but the fact that they are covered by completely different legislative frameworks and systems means that they are not generally regarded as related issues and that the link between them is obscured.

⁷³ The financial and non-cash support to family members caring for older persons being the "carrot" as opposed to the "stick" of filial support legislation without any benefit for the family of the older person.

⁷⁴ Binney and Estes "The retreat of the state and its transfer of responsibility: the intergenerational war" (1988) 18 (1) *Intergenerational Journal of Health Services* 85.

It is submitted that linkages between the legislation and programmes on retirement income and on care and support services for older persons respectively are needed to give greater effect to intergenerational solidarity and the current government policy that families are the main support structures of older persons. Links between programmes providing retirement funding, and those providing care and support to older persons and their caregivers may provide the necessary incentive to family caregiving in cases where support of older relatives is currently absent.

Support for the notion that state assistance in the form of cash benefits is not sufficient to address the plight of vulnerable older persons and that an intersectoral approach is required, can be found in the following statement of the World Bank:

Addressing the needs of the elderly poor thus requires more than pensions... Different forms of direct and indirect support are needed for today's elderly. Programs can provide assistance to families that care for live-in elderly... And social assistance or social pensions should cover the poorest and very old (categories that often overlap) and those without family support.⁷⁵

The comparative overview of statutory provisions for older persons in the UK⁷⁶ revealed a system where programmes related to retirement, and older persons and their caregivers, are interlinked. Provision is made for credits for family carers in the national pension scheme, thereby making their retirement income more secure. In addition, the fact that the retirement income and care and

⁷⁵ World Bank (2001) World Development Report 2000/2001 154.

⁷⁶ See above at 7.3.4.

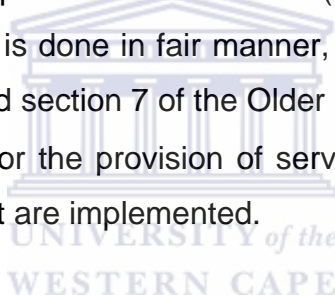
support systems are linked enables local authorities to assess older persons' financial situations to allocate the best care, as public benefits can also be used to pay for care.

The state currently regulates non-cash support to older persons in South Africa only through the Older Persons Act, but does not coordinate the available services. A right of access to services is worth little if the older person is not advised of the available care options and which option is most suitable for his or her needs, and then assisted in obtaining the appropriate services. The lack of state coordination of care and support for older persons may lead to situations where an older person may be indirectly denied the right to “live in an environment catering for his or her changing capacities” and “access opportunities that promote his or her optimal level of social, physical, mental and emotional well being”.⁷⁷ The UK model of state-supported care and support services is an example worth taking note of, particularly the state's statutory obligations to carry out needs and financial assessments of older persons to determine which services are most appropriate taking into account their particular needs and the affordability of the services. It is suggested that in the South African context, even if the actual provision of services may still be left to community organisations, the state should assume responsibility to ensure that the older person has access to the services best suited to his or her needs.

⁷⁷ Section 7(e) and (f) Older Persons Act 13 of 2006.

It is submitted that that the introduction in South Africa of legislation requiring the state to conduct assessments of older persons to facilitate access to care and support services is not likely to create a significant additional financial burden for the state. In point of fact, it will ensure fairness in access to services and complement the provisions of the Older Persons Act⁷⁸ requiring the state to set priorities for services to older persons and to link the payment of financial awards to the set priorities. Needs and financial assessments by the state before the allocation of services will ensure that

- older persons have access to the appropriate services for their circumstances in compliance with section 27(1)(c) of the Constitution;
- allocation of services is done in fair manner, in compliance with section 9 of the Constitution and section 7 of the Older Persons Act; and
- the state's priorities for the provision of services in terms of section 8 of the Older Persons Act are implemented.



It is recommended that additional research be done regarding the feasibility of

- adapting the UK model of state assessments of older persons in order to allocate appropriate care and support services to South African circumstances; and
- the adoption of legislation requiring the state to undertake such assessments and allocate appropriate care and support services to older persons.

⁷⁸ Section 8.

8.5 CONCLUSION

The aim of this thesis was to determine whether the hypothesis that intergenerational solidarity is the best basis for legislation on the provision of financial and non-cash support to older persons, as well as the extent to which intergenerational solidarity is present in South African social security legislation. Although the older person's grant system is solidarity-based, the same cannot presently be said for the retirement funding system and the provision of care and support services to older persons. The current reforms of the retirement funding system offer the ideal opportunity to incorporate and entrench intergenerational solidarity in South African legislation and to create an integrated multi-pillar system providing for older persons' financial and non-cash needs. It is submitted that this perspective provides the most appropriate answer to the challenge posed in the following quotation.

Older persons are the custodians of our traditions, heritage and culture and they have made an invaluable contribution to the struggle for democracy and equality. The challenge now is to develop solidarity between young and old generations, so as to ensure alignment between our history, our roots and our ultimate vision for Africa in the 21st century.⁷⁹

⁷⁹ National Report on the Status of Older Persons (2002) 57.

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