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UNIVERSITY OF THE WITWATERSRAND

JOHANNESBURG

A research paper submitted to the Faculty of Commerce, Law and Management in partial fulfilment of the requirements for the degree of Master of Commerce in the field of Taxation

ARE LEVIES RAISED BY SOUTH AFRICAN ADMINISTRATIVE BODIES TAXES, WITH PARTICULAR REFERENCE TO THE TWO REGULATORY AUTHORITIES OF THE NEW TWIN PEAKS REGULATORY SYSTEM?

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Degree: Master of Commerce (Specialising in Taxation)

Date: April 2018

Declaration

I declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Commerce (Specialisation in Taxation) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination at any other university.

_____

Lutendo Ramuedzisi

_____day of_____, 2018

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I would like to thank Prof Robert Vivian for the guidance in writing this paper and simplifying the structure of a research paper as being simply a “V” – i.e. one must start broad and then ensure that the paper eventually narrows down while answering the research question with a clear context. I was good at working at the broad open sides of the “V”, but with his guidance I have learnt and will continue to practice to close the “V”.

Lastly, but not least, I would like to thank my wife Phuti, for cheering me on and the patience while on this journey.

Abstract

The South African Financial Sector Regulation Act 9 of 2017 (FSR Act 9 of 2017) establishes two new administrative bodies for the "Twin Peaks" regulatory system. To carry out their mandates, these authorities are vested with the power, in terms of sections 237-246 of the FSR Act 9 of 2017, to raise fees and impose levies. These fees and levies are payable by entities whom oversight and regulation is being provided to. When considering the Financial Sector Regulation Bill (FSRB), the Standing Committee on Finance asked whether or not these fees and levies constitute taxes. The National Treasury returned with a legal opinion indicating that these may indeed be taxes. The Standing Committee on Finance accepted this view with the consequence that the funding is dealt with in terms of a money bill. This research report attempts to answer the question posed by the Standing Committee, i.e., are levies raised by these administrative bodies taxes? The question will first be posed more broadly, i.e., are levies and fees imposed by administrative bodies taxes and then focus specifically on the two Twin Peaks authorities. Should the conclusion be reached that levies are taxes, the research will then examine the consequences, in particular, the need for a money bill as accepted by the Standing Committee but go further and examine if the taxes so collected need also to be appropriated by parliament.

Key words:

Appropriation Bill, Fees, Finance Sector Regulation Authority, Finance Sector Regulation Act, Levies, Money Bill, Prudential Authority, Quangos, South African Reserve Bank (SARB), Standing Committee, Taxation.

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Glossary

Acronym	Meaning
ADI	Authorised deposit-taking institution
APRA	Australian Prudential Regulatory Authority
APRA Act	Australian Prudential Regulatory Authority No. 50 of 1998
ASIC	Australian Securities and Investments Commission
ASIC Act	Australian Securities and Investments Commission Act 2001 No. 51 of 2001 as amended
CAMAC	Corporations and Markets Advisory Committee in Australia
CC	Constitutional Court of South Africa
DEA	Department of Environmental Affairs
FCA	Financial Conduct Authority
FSA	Financial Services Authority
FSB	Financial Services Board
FSCA	Financial Sector Conduct Authority
FSR Act	Financial Sector Regulation Act No. 9 of 2017
FSRB	Financial Sector Regulation Bill
IT	Information Technology
Quangos	Quasi-Autonomous Non-governmental Organisations
NHBC	National House Building Council
NHBRC	National Home Builders Registration Council
NOHC	Non-operating holding company
PRA	Prudential Regulatory Authority
RAF	Road Accident Fund
REDISA	Recycling and Economic Development Initiative of South Africa
RSA	Retirement Savings Account
SARB	South African Reserve Bank
SCA	Supreme Court of Appeal of South Africa
UK	United Kingdom
US	United States of America

Chapter 1. Introduction

Chapter 1.1. Introduction

The Republic of South Africa is a parliamentary democracy which operates within the Rule of Law framework and as recognised the separation of powers framework which separates the powers into legislative, executive and judicial. The legislative authority is vested in the Parliament of South Africa.[1] The executive authority is vested in the President of South Africa, who is the head of State, government, and his cabinet.[2] The judicial power is vested in an independent judiciary.[3]

To carry out the executive powers vested upon the president, the president further appoints ministers who are responsible for executing and delivering their mandates via various government departments. The execution of the underlying mandates is also achieved through focused administrative bodies which usually include ministers in some or other role and capacity.

The formation of administrative bodies is not new or unique to South Africa in general or specifically for regulatory purposes. Most developed countries have been establishing administrative bodies for some time led by the United States.[4] Various explanations have been given as to why these administrative bodies were formed, including the need to enhance efficiency in executing government

[1] Chapter 4 of The Constitution of the Republic of South Africa, 1996 outlines the structure and characteristics of parliament as follows: (1) Composition of parliament (2) Legislative authority of the Republic (3) National legislative authority (4) Joint rules and orders and committees. The structure and composition of the National Assembly and the National Council of Provinces.

[2] Chapter 5 of The Constitution of the Republic of South Africa, 1996 outlines the responsibilities and characteristics of the President and the National executive. The following key areas are covered: (1) The role of the President (2) Powers and functions of President (3) Executive authority of the Republic (4) Assumption of office by President (5) term of office of President (6) Removal of president (7) Acting President (8) Cabinet (9) Accountability and responsibilities (10) Deputy ministers (11) Continuation of cabinet after elections (12) Oath of affirmation (13) Conduct of cabinet members and deputy ministers (14) Transfer of functions (15) Temporary assignment of functions (20) Assignment of functions (21) National intervention in provincial intervention (22) Executive decisions (23) Motions of no confidence

[3] Chapter 8 of The Constitution of the Republic of South Africa, 1996 outlines the structure and characteristics of Courts and Administration of Justice as follows: (1) Judicial authority (2) Judicial system (3) Constitutional Court (4) Supreme Court of Appeal (5) High Court of South Africa (6) Other courts (7) Court procedures (8) Powers of courts in constitutional matters (9) Inherent power (of each of the courts) (10) Appointment of judicial officers (11) Appointment of acting judges (12) Terms of office and remuneration (13) Removal (14) Judicial Service Commission (15) Prosecuting authority (16) Other matters concerning administration of justice

[4] For example the Interstate Commerce Commission (1887); the Federal Trade Commission, (1914); Securities and Exchange Commission (1936)

mandates.[5] Chapter 2 discusses, among other things, the origin of administrative bodies focusing on their purpose and proliferation. Although they are intended to solve service delivery and related administrative challenges, administrative bodies tend to have operational and accountability problems, particularly in relation to funding. Chapter 2 also discusses earmarking of taxes as part of the discussion around dedicating taxes to a specific government or departmental mandates.

The National Treasury is an important department of government. It is subjected to the Minister of Finance who also oversees the financial sector which will be regulated in terms of the Twin Peaks system created by the Financial Sector Regulation Act No.9 of 2017 (FSR Act). Under the Twin Peaks system, two new administrative bodies will be responsible for regulation, a prudential regulator and a market conduct regulator. This follows the international trend of establishing administrative bodies which inter alia are given the power to charge fees and impose levies which are paid by the regulated entities in the financial sector. The Twin Peaks system discussion will conclude chapter 2.

The central research question to be answered is whether or not the fees charged and levies imposed by administrative bodies are taxes. Chapter 3 focuses on answering this research question through discussion of the purpose of charging fees and imposing levies by administrative bodies, followed by a review of the treatment of surpluses and deficits with the particular reference to the South African Twin Peaks authorities and comparison with the Australian and UK Twin Peaks authorities. Finally, chapter 3 will use case law to answer whether the levies are taxes or not.

If levies imposed by administrative bodies are found to be taxes, then chapter 4 will outline the constitutional and related legal procedural framework which administrative bodies, within the Twin Peaks system, will need to follow in order comply with the constitutional requirements. Chapter 4 will conclude the research and provide recommendations for future possible related research areas which the report could not explore.

[5] Cole, M., 1998, 'Quasi-Government in Britain: The Origins, Persistence and Implications of the term 'Quango' ', *Public policy and administration,* 13(1), 65 -78.

Chapter 1.2. The research problem

The proliferation of administrative bodies to execute government mandates, has led to many administrative bodies obtaining the power to impose levies and charge fees on those persons (natural and/or juristic) whom oversight is being provided to. The main question which follows is whether the fees charged and levies imposed by administrative bodies qualify as taxes. And if so, what are the consequences from a legislative and administrative perspective? The research will discuss whether the fees charged and levies imposed by administrative bodies are taxes with focus on the prudential and market conduct authorities to be established under the Financial Sector Regulation Act No.9 of 2017 or "Twin Peaks" model in South Africa.

The research problem is made up of the following sub-problems:

Sub-problem 1

How did administrative bodies come about? Purpose and proliferation.

Sub-problem 2

How are administrative bodies funded?

Sub-problem 3

If fees charged and levies imposed by administrative bodies are considered to be taxes, what are the necessary regulatory processes and procedures to be followed when imposing these levies?

Chapter 1.3. Research methodology and scope

The research will assess whether levies imposed by administrative bodies are taxes. The assessment is performed in relation to case law and measured for validity against relevant constitutional regulation. The focus of the research will be in the finance sector with particular reference to the Twin Peaks system.

The implementation of the Twin Peaks system is new to South Africa. Therefore, the measurement and assessment of the treatment of the underlying levies will also be benchmarked against those countries that have implemented the system. The research will attempt where possible to propose aspects which may be applicable to the South African context.

Chapter 1.4. Scope Limitations

The Twin Peaks system is in its infancy in South Africa, therefore new regulation in relation to the system is yet to be explored as Bills prior to being enacted as Acts of parliament. Some countries who have introduced the Twin peaks system will be analysed and discussed at a high level, however the analyses will focus more on the design and architecture of the system as opposed to whether or not the system has been successfully implementation.

Although the research is in relation to the Twin Peaks authorities, the main focus of the research is on determining whether fees charged and levies imposed by administrative bodies are taxes. Therefore, not all characteristics inherent in the Twin Peaks systems will be covered in this research.

Chapter 2. Administrative bodies and quangos

Chapter 2.1. Origin and objectives – When – what for – why?

To carry out the executive powers vested upon the president, ministers often establish administrative bodies. These administrative bodies are often referred to as quangos (Quasi-autonomous non-governmental organisations). The history of the formation of administrative bodies dates back to 18th century in countries such as Sweden.[6] Administrative bodies are a result of the evolution of governments' functionalities.[7] There has also been a growth of quangos noted at the local government level as opposed to only the national government level.[8] Administrative bodies are generally established through the passing of an Act of parliament. Although they generally serve objective and societal requirements, they are politically linked institutions that may survive different political administrations.[9] In the UK there was a proliferation of quangos. The government listed some 742 but the Taxpayer's Alliance claimed 1 162 existed which in 2010 it was estimated cost the taxpayer between £34 billion - £64 billion and decided to axe 192 of these.[10]

One of the key reasons why administrative bodies are established is to assist the government in delivering services required by citizens in more efficient and effective ways.[11] Whether this has always been achieved has been debated over time and requires scrutiny with appropriate benchmarks. The usage of administrative bodies came with some resistance as some thought this was duplicating government departments' mandates.[12]

Acceptance of newly formed administrative bodies is not always simple and straightforward. Sometimes stakeholders who stand to benefit from the proposed new focused servicing from administrative bodies vehemently resist the introduction. In the UK, the introduction of the National House Building Council (NHBC) took around 30 years before the NHBC being fully accepted by the banks and the building society as a necessary regulator in the construction industry.

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[6] Boukcaert, G. & Peter, B., 2004, 'What is available and what is missing in the study of quangos?' in C Pollit and C Talbot (eds.), *Unbundled government – A critical analysis of global trend to agencies, quangos and contractualisation,* pp. 22 – 50, Routledge and Taylor & Francis Group, London and New York.

[7] Kamensky, J., 1996, 'Role of the "reinventing government" movement in federal management reform', *Public Administration Review,* 56(3), 246-255.

[8] Davis, H., 1996, 'Quangos and local government: A changing world.' *Journal of local government studies,* 22(2), 1-7.

[9] Park, S., 2013, 'What Causes the Death of Public Sector Organizations? Understanding Structural Changes and Continuities in Korean Quangos', *International Public Management Journal*, 16(3), 413-437.

[10] British Broadcasting Corporation, 14 October 2010, *UK Politics,* viewed 28 April 2018, from http://www.bbc.com/news/uk-politics-11405840.

[11] Van Thiel, S., 2001, Quangos, trends, causes and consequences, Routledge, New York.

[12] Gash, T. & Rutter, J., 2011, 'The Quango Conundrum', *The political quarterly,* 82 (1), 95-101.

Chapter 2.2. Accountability

One of the key objectives of setting up administrative bodies was to ensure that greater accountability is achieved. However, this seems to have had varying outcomes based on the type of administrative body. On his assessment of accountability of government-sponsored enterprises and quangos, Andre indicates that there has been less accountability from the officials running the quangos,[13] this could be attributed to the passive participation by citizens in political events such as elections.[14]

The one perspective adopted is that of principal-agent relationship which is normally seen in the private sector, where the government is the principal and the officials running the quangos are the agents.[15] It is, however, difficult to compare the effectiveness of accountability in the private sector versus public sector on an equal footing, as accountability in the private sector focuses on profitability whereas in the public sector focus is on compliance to processes and general policy implementation.[16]

Chapter 2.3. Problems with administrative bodies

Administrative bodies are not immune from problems which may be encountered at the government department levels. Accountability has been found to be one of the problems that sometimes filter through to the administrative bodies. This problem tends to filter through to the administrative bodies due to political influence of the minister's in charge of the administrative body.[17] Some of the problems are created through ministers recruiting their political allies who do not possess the requisite competencies and skills to occupy key positions within the administrative bodies. This eventually leads, among others, to lack of accountability and poor service delivery.[18]

Consequently, there have been situations where government through ministers and politicians creates a vacuum for activities and mandates that need to be performed by specialized institutions,

[13] Andre, R., 2010, 'Assessing the accountability of government-sponsored enterprises and quangos', *Journal of Business Ethics,* 97(2), 271-289.
[14] Wilson, D., 1995, 'Quangos in the skeletal state', *Parliamentary Affairs,* 48(2), 181-191.
[15] Van Thiel, S. & van der Wal, Z., 2010, 'Birds of a Feather? The effect of organizational value congruence on the relationship between ministries and quangos', *Public Organization Review,* 10(4), 377-397.
[16] Mulgan, R., 2002, 'Comparing accountability in the public and private sectors', *Australian Journal of Public Administration,* 59(1), 87-97.
[17] Bertelli, A., 2006, 'The role of political ideology in the structural design of new governance agencies', *Public Administration Review,* 6(4), 583-595.
[18] Dommet, K., Flinders, M., Skelcher, C. & Tonkiss, K., 2014, 'Did they 'read before burning'? The coalition and quangos', *The political quarterly,* 85(2), 133-142.

this would then be followed by the establishment of mandated administrative bodies. It would appear that the purposes of these institutions were not adequately outlined resulting in their effectiveness being insignificant while their numbers are increasing. The arbitrary creation of these institutions further creates an environment of government spending with no objectives, particularly as these institutions are given the power to make their own decisions with minimal accountability to parliament.[19]

Chapter 2.4. Earmarking of Taxes

The dedication of funds through taxes to a specific field or purpose is common and can be achieved either through receipts from a single tax base or proportion of a wider pool of a revenue base.[20] Various administrative bodies are funded through earmarked taxes. The Road Accident Fund (RAF) in South Africa receives funds dedicated to its cause through part of the Fuel Levy.[21]

The RAF's mandate is to compensate all persons injured within the Republic of South Africa through motor vehicle accidents as well as provide indemnity cover to the wrongdoers.[22] The National Treasury collects the Fuel Levy mandated through the Customs and Excise duty Act 91 of 1964. The National Treasury accepts annual submissions from the RAF of what the levy should be. However the National Treasury often does not grant the full RAF proposed levy and has adopted a "pay-as-you-go" method – i.e., each litre of fuel purchased has a certain percentage of Fuel Levy allocation.[23]

The Fuel Levy appears to be a road user's fee.[24] However, it may be argued that not all parties who purchase fuel are road users and may need to be granted some form of relief in relation to fuel related levies.[25] A National Treasury discussion paper on "Reducing greenhouse gas emissions: The carbon tax option" released in December 2010, supported the notion that earmarking of taxes may lead to misallocation of for specific government expenditures and as such is not good practice. The

[19] Moore, C. & Booth, S., 1987, 'Hunting the quarc: An institution without a role?', *Public Administration,* 65(4), 455-466.
[20] Rushton, M., 2004, 'Earmarked Taxes for the Arts: US experience and policy implications', *International Journal of Arts Management,* 6(3), 38-48.
[21] Fin24, 2018, *Petrol price breakdown*, viewed 1 May 2018, from https://www.fin24.com/Economy/petrol-price-breakdown-20180410.
[22] Refer to RAF website - https://www.raf.co.za/About-Us/Pages/profile.aspx
[23] Refer to RAF website - https://www.raf.co.za/About-Us/Pages/Fuel-Levy.aspx
[24] Rushton, M. 2004
[25] A National Treasury discussion paper for public comment: Review of the diesel fuel tax refund system in February 2017 covered aspects for non-road users being granted relief from the fuel levy as a mechanism to assist South African enterprises being more competitive against international counterparts.

inclination was towards taxes being contributed to general revenue fund and then appropriately redistributed.[26]

The adoption of an earmarking system is not always supported by budgeting officials as it does not allow them the discretion of where and how funds will be spent,[27] while another perspective is that it encourages the payment of taxes as the taxpayers can easily see the benefit to be derived from their contributions and thereby ensuring promises made by government to voters are kept.[28]

Chapter 2.5. South African administrative bodies

The number of administrative bodies that have been established in South Africa has been growing since 1994. There are different types of administrative bodies, some of which provide regulatory oversight following the American[29] practice are referred to as commissions, etc. or those that facilitate a certain government program such as agencies, bureaus, etc.. Increasingly these commissions are empowered to charge fees and impose levies to fund themselves.

In South Africa, some administrative bodies tend to receive more publicity than others. Consequently, some appear to be more accountable to parliament than others. The Financial Services Board (FSB) and Road Accident Fund (RAF)[30] are examples of administrative bodies that have high levels of publicity relative to other ones such the Recycling and Economic Development Initiative of South Africa (REDISA).

REDISA is an example of how administrative bodies can be abused. In a Standing Committee on Environmental Affairs held on 12 October 2017 the following non-compliant findings were noted from the reviews performed by the Department of Environmental Affairs (DEA) on REDISA: (1) Poor Governance Controls (2) Poor performance management – targets not being achieved (3) Deviations from the DEA approved plan (4) Misuse of Public Funds (5) Non-alignment of the REDISA Plan to the new regulatory framework. The Standing Committee also noted that REDISA management also did not see the need to be accountable to the minister and parliament.[31]

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[26] The discussion paper on "Greenhouse Gas Emissions: The carbon tax option" made reference to the following article presentation: "European Parliament: Directorate-General for Internal Policies, Policy Department A; Economic and Scientific Policy. "Financial Transaction Tax: Small is Beautiful", PE 429.989, January 2010, p.11."

[27] Rushton, M. 2004

[28] Hsiung, B., 2001, 'A note on earmarked taxes', *Public Finance Review,* 29(3), 223–232.

[29] In the United States of America , the Administrative Procedure Act of 1946 governs the manner in which administrative agencies of the federal government may propose and establish regulations

[30] The Road Accident Fund, Unemployment Insurance Fund (UIF) and Worker's Compensation (WCA) are state insurance funds which do not have active administrative roles. They function similar to private sector insurance companies

[31] Parliamentary monitoring Group, 12 October 2017, *REDISA liquidation; Waste Tyre Plan; Waste Bureau: briefing with Minister*, viewed 15 April 2018 from https://pmg.org.za/committee-meeting/25224/.

South Africa generally follows the international trends when it comes to governance and oversight, some of the examples are the National Home Builders Registration Council (NHBRC) which plays the same role of supervision on homebuilders as that for the National House Building Council (NHBC) in the UK of ensuring that houses constructed by those regulated entities meet the minimum construction quality standards. Another example is that of the Financial Services Board (FSB) converting to become the Financial Sector Conduct Authority (FSCA) as from 1 April 2018 in line with the Twin Peaks model adopted in the UK.

Chapter 2.6. "Twin Peaks" regulatory model

The Twin Peaks model is primarily responding to changes in the global economy and the trend of consolidation of regulated entities within the finance sector.[32] The model mainly comprises of two regulators, the prudential authority and the market conduct authority. The prudential authority will focus on financial stability and the market conduct authority will concentrate on market conduct concerning the consumers. In South Africa, the "Twin Peaks" model is introduced through the new Financial Sector Regulation Act No. 9 of 2017 (FSR Act) to be supplemented by further legislation. South Africa followed the UK's model by variation which exist elsewhere including Australia. Whether this has been successfully implemented and achieving the desired results in these countries is subject to debate and does not form part of this paper's scope. Although the objectives of the Twin Peaks system is the same across different countries, the architecture and design of legislation along with the related bodies seem to vary across different countries.

The paper will look at the architecture and design of the Australian, UK and the infant setup of the South African Twin Peaks model.

The Australian "Twin Peaks" system

The Twin Peaks model was introduced in Australia in 1998. Two authorities oversee the model, namely, The Australian Securities and Investment Commission (ASIC) and the Australian Prudential Regulatory Authority (APRA).

The ASIC oversees various bodies and it is therefore obliged to administer multiple relevant legislations (or relevant parts of it), some of which are also supervised by other authorities, as outlined below:

- *Australian Securities and Investments Commission Act 2001*

[32] At the Standing Committee on Finance held on 30 November 2016 as part of the rationale for the bill, some of the key reasons for adopting the Twin Peaks system in South Africa was attributed to the changing global financial services environment and the shortcomings of the current financial legislation.

- *Corporations Act 2001*
- *Business Names Registration Act 2011*
- *Business Names Registration (Transitional and Consequential Provisions) Act 2011*
- *Insurance Contracts Act 1984*
- *Superannuation (Resolution of Complaints) Act 1993*
- *Superannuation Industry (Supervision) Act 1993*
- *Retirement Savings Accounts Act 1997*
- *Life Insurance Act 1995*
- *National Consumer Credit Protection Act 2009*, and
- *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.

The ASIC Act of 2001 governs the ASIC. As per section 1(1) of the ASIC Act:

'The objects of the Act' are:[33]

- To provide:
    - The Australian Securities and Investments Commission whose responsibility, among others, will be to administer such laws applicable to the Commonwealth, a State or a Territory as confer functions and powers under those laws on ASIC;
    - For the ASIC's powers, functions and business;
- To establish:
    - A Corporations and Markets Advisory Committee which will provide expert advice to the Minister on the content, operation and administration of the corporations' legislation (other than the excluded provisions), about corporations, financial products and financial markets;
    - A Takeovers Panel, a Company's Auditors and Liquidators Disciplinary Board, a Financial Reporting Council, an Australian Accounting Standards Board, an Auditing and Assurance Standards Board, a Financial Reporting Panel and a Parliamentary Joint Committee on Corporations and Financial Services.

[33] Section 1(1) of the ASIC Act 2001

Section 1(2) of the ASIC Act further indicates the ASIC must strive to:

- Enhance commercial certainty, efficiency and development of the Australian economy through maintenance, facilitation and improvement of the performance of the financial system including entities with the system;
- Ensure that investors and consumers are informed and confident to participate in the financial system;
- Effectively administer the laws that fall within the ASIC's ambit;
- Ensure efficient and quick receipt, storage and processing of information given to the ASIC and falls within the scope of the ASIC's mandate;
- Ensure the public has easy access to information as soon as possible; and
- Enforce the laws of the Commonwealth that fall within the ASIC's scope, by taking action within the parameters of the laws.[34]

The APRA is established through section 7 of the APRA Act 1998 which entails compliance with the Australian Public Governance, Performance and Accountability Act 2013. In terms of section 7(2) of the APRA Act:

'…

(a) APRA is a listed entity; and
(b) the Chair is the accountable authority of APRA; and
(c) the following persons are officials of APRA:

(i) the Chair;

(ii) the other APRA members;

(iii) the APRA staff members; and

(d) the purposes of APRA include:

(i) the purposes of APRA referred to in section 8[35]; and

(ii) the functions of APRA referred to in section 9.'

Section 8 of the APRA Act 1998 outlines the Purpose for establishing APRA as follows:

[34] Section 1(2) of the ASIC Act 2001
[35] Section 8 of the APRA Act 1998, No.50 of 1998 Compilation No.35

'(1) The main purposes for which APRA exists are as follows:

(a) regulating bodies in the financial sector in accordance with other laws of the Commonwealth that provide for prudential regulation or for retirement income standards;

(b) administering the financial claims schemes provided for in the *Banking Act 1959* and the *Insurance Act 1973*;

(c) developing the administrative practices and procedures to be applied in performing that regulatory role and administration.

(2) In performing and exercising its functions and powers, APRA is to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality and, in balancing these objectives, is to promote financial system stability in Australia.'

The Prudential Regulation Framework Law is a framework comprising of various Acts in the Australian context and comprises the following Australian legislation:[36]

- The *Australian Prudential Regulation Act 1998*;
- The *Banking Act 1959*;
- The *Financial Institutions Supervisory Levies Collection Act 1998*;
- The *Financial Sector (Collection of Data) Act 2001*;
- The *Financial Sector (Shareholdings) Act 1998*;
- The *Financial Sector (Business Transfer and Group Restructure) Act 1999*;
- The *Insurance Act 1973*;
- The *Insurance Acquisitions and Takeovers Act 1991*;
- The *Life Insurance Act 1995*;
- The *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*;
- The *Private Health Insurance (Prudential Supervision) Act 2015* or the risk equalisation levy legislation (within the meaning of that Act);
- The *Retirement Savings Accounts Act 1997*;
- The *Superannuation Industry (Supervision) Act 1993*;
- The *Superannuation (Self Managed Superannuation Funds) Taxation Act 1987*;
- Any Act imposing a levy to which the *Financial Institutions Supervisory Levies Collection Act 1998* applies, or to which the *Superannuation (Self Managed Superannuation Funds) Taxation Act 1987* applies;

[36] This is part of the definitions covered in the APRA Act 1998. Section 3 – Definitions, APRA Act 1998. No. 50 of 1998.

Bodies regulated by the APRA

Section 3(2) of the APRA Act gives a list of bodies regulated by the APRA. The list may be changed through additions, omissions or change in descriptions of the bodies or entities in terms of section 3(3) of the APRA Act. The list of entities in terms of section 3(2) is as follows:

> '…
>
> (a) An ADI[37], within the meaning of the *Banking Act 1959*;
> (b) An authorised NOHC[38], within the meaning of the *Banking Act 1959*;
> (c) A general insurer, authorised NOHC or subsidiary of a general insurer or authorised NOHC, within the meaning of the *Insurance Act 1973*;
> (d) Lloyd's, or a Lloyd's underwriter, as defined in section 3 of the *Insurance Act 1973*;
> (e) A life company that is registered under section 21 of the *Life Insurance Act 1995* or a registered NOHC within the meaning of that Act;
>
> (ea) A private health insurer, within the meaning of the *Private Health Insurance (Prudential Supervision) Act 2015*;
>
> (f) The trustee of a superannuation entity, within the meaning of the *Superannuation Industry (Supervision) Act 1993*;
>
> (g) An RSA[39] provider, within the meaning of the *Retirement Savings Accounts Act 1997*.'

Section 3(3) of the APRA Act allows for the additions, omissions or change is descriptions of the above items.

The United Kingdom "Twin Peaks" system

Michael Taylor proposed twin peaks for the UK, but his recommendation was ignored as the UK adopted a single peak regulatory system after the collapse of Barings Bank and faced the so-called pensions misspelling saga.[40] The regulation of the banks, to the extent that it can be said banks were regulated,[41] was removed from the Bank of England to the then newly created Financial Services Authority (FSA). The single peak system proved to be a failure by the 2008 Global Financial Crisis. On 1 April 2013, the single peak regulatory system was abandoned in favour of the Twin Peaks system. South Africa seems to be merely aping the UK.

[37] Per APRA Act 1998, ADI is short for authorized deposit-taking institution.
[38] Per APRA act 1998, NOHC is short for non-operating holding company.
[39] Per APRA Act 1998, RSA is short for retirement savings account
[40] Taylor, M & Fleming, A., 1999, 'Integrated financial supervision: Lessons of Scandinavian experience', *Finance and Development,* 36(4),
[41] Until the passing of the Financial Services Act of 1986 the UK financial market was considered to be a self-regulated market.

The UK Twin Peaks structure comprises the Financial Conduct Authority and Prudential Regulatory Authority. These authorities were established through the Financial Services Act 2012. Although the high-level structure of the Twin Peaks authorities in the UK appears simplistic, the underlying regulations of the Financial Services Act 2012 have interlinks between the old financial sector regulations. Amendments to specific sections were made through issuing new Acts rather than repealing old Acts in their entirety – for example certain sections within the Financial Services Market Act of 2000 are repealed through issuing the Financial Services Act of 2012 and the Bank of England and Financial Services Act of 2016.[42]

The Financial Conduct Authority (FCA) was established on 1 April 2013 and was previously the Financial Services Authority (FSA).[43] As per Chapter 1 of Part 1A of the Financial Services Act 2012, the following entail the general duties of the FCA:

- Section 1(B) indicates that 'in discharging its general functions the FCA must, so far as is reasonably possible, act in a way which — (a) is compatible with its strategic objective, and (b) advances one or more of its operational objectives.'
- The strategic objective is ensuring that the relevant markets function well
- The operational objectives entail (i) consumer protection objective (ii) the integrity objective (iii) the competition objective.
- The consumer protection objective entails securing an appropriate degree of protection for consumers[44].

The Prudential Regulatory authority was initially a wholly-owned subsidiary of the Bank of England and began operating from 1 April 2013, however as from 1 March 2017 all the assets and liabilities of the prudential regulatory authority were transferred and housed within the Bank of England.[45]

[42] The Prudential Regulatory Authority Annual Report for the period 1 March 2016 – 1 March 2017 were presented to Parliament pursuant to paragraphs 19(4) and 23(3) of Schedule 1ZB of the Financial Services and Markets Act 2000 as amended by the Financial Services Act 2012 and the Bank of England and Financial Services Act 2016.

[43] Refer to Financial Services Act 2012, Part 1A Chapter 1 (1) – The body corporate previously known as the Financial Services Authority is renamed as the Financial Conduct Authority.

[44] Refer to section 1C, Part 1A Chapter 1 of Financial Services Act 2012

[45] Per note 32 b of the 2016-17 of the Bank of England Annual Report and Accounts from 1 March 2016 to 28 February 2017, "The PRA is a wholly-owned subsidiary of the Bank. The company was established on 21 November 2011 and began to operate when the new regulatory framework for the United Kingdom's financial sector came into effect on 1 April 2013. Following enactment of the Bank of England and Financial Services Act

Section 2B, Part 1A Chapter 1 of the Financial Services Act 2012 outlines the objective of the PRA as follows:

> '…
>
> (1) In discharging its general functions the PRA must, so far as is reasonably possible, act in a way which advances its general objective.
>
> (2) The PRA's general objective is: promoting the safety and soundness of PRA-authorised persons.
>
> (3) That objective is to be advanced primarily by—
>
> (a) seeking to ensure that the business of PRA-authorised persons is carried on in a way which avoids any adverse effect on the stability of the UK financial system, and
>
> (b) seeking to minimise the adverse effect that the failure of a PRA authorised person could be expected to have on the stability of the UK financial system.
>
> (4) The adverse effects mentioned in subsection (3) may, in particular, result from the disruption of the continuity of financial services.'

Section 3D of Part 1A Chapter 1 of the Financial Services Act 2012 outlines the relationship between the FCA and PRA. Section 3D (1) in particular states as follows:

> '…

(1) The regulators must co-ordinate the exercise of their respective functions conferred by or under this Act with a view to ensuring—

(a) that each regulator consults the other regulator (where not otherwise required to do so) in connection with any proposed exercise of a function in a way that may have a material adverse effect on the advancement by the other regulator of any of its objectives;

(b) that where appropriate each regulator obtains information and advice from the other regulator in connection with the exercise of its functions in relation to matters of common regulatory interest in cases where the other regulator may be expected to have relevant information or relevant expertise;

(c) that where either regulator exercises functions in relation to matters of common regulatory interest, both regulators comply with their respective duties under section 1B(5)(a) or 2H(1)(a), [46] so far as relating to the regulatory principles in section 3B(1)(a) and (b).'[47]

<u>The FSR Act and South African prospects</u>

2016 on 1 March 2017 the regulatory activity, along with the assets and liabilities, of the PRA transferred to the Bank."

[46] Section 1B(5)(a) and section 2H(1)(a) of the Financial Services Act 2012 essentially state that In discharging its general functions the FCA must have regard to the regulatory principles in section 3B.

[47] Section 3B (1) (a) outlines regulatory principles to be applied by both the FCA and PRA

The FSR Act brings about two regulatory authorities, namely a Prudential Authority and a Financial Sector Conduct Authority.

The *preamble/objectives* of the FSR Act is as follows:

> 'To establish a system of financial regulation by establishing the Prudential Authority and the Financial Sector Conduct Authority, and conferring powers on these entities; to preserve and enhance financial stability in the Republic by conferring powers on the Reserve Bank; to establish the Financial Stability Oversight Committee; to regulate and supervise financial product providers and financial services providers; to improve market conduct in order to protect financial customers; to provide for co-ordination, co-operation, collaboration and consultation among the Reserve Bank, the Prudential Authority, the Financial Sector Conduct Authority, the National Credit Regulator, the Financial Intelligence Centre and other organs of state in relation to financial stability and the functions of these entities; to establish the Financial System Council of Regulators and the Financial Sector Inter-Ministerial Council; to provide for making regulatory instruments, including prudential standards, conduct standards and joint standards; to make provision for the licensing of financial institutions; to make comprehensive provision for powers to gather information and to conduct supervisory on-site inspections and investigations; to make provision in relation to significant owners of financial institutions and the supervision of financial conglomerates in relation to eligible financial institutions that are part of financial conglomerates; to provide for powers to enforce financial sector laws, including by the imposition of administrative penalties; to provide for the protection and promotion of rights in the financial sector as set out in the Constitution; to establish the Ombud Council and confer powers on it in relation to ombud schemes; to provide for coverage of financial product and financial service providers by appropriate ombud schemes; to establish the Financial Services Tribunal as an independent tribunal and to confer on it powers to reconsider decisions by financial sector regulators, the Ombud Council and certain market infrastructures; to establish the Financial Sector Information Register and make provision for its operation; to provide for information sharing arrangements; to create offences; to provide for regulation-making powers of the Minister; to amend and repeal certain financial sector laws; to make transitional and savings provisions; and to provide for matters connected there with.'

There is a very close resemblance between the South African FSR Act and the Financial Sector Act 2012 of the UK. Both make reference to both the prudential and market conduct authorities, and consequently they both relate to similar supplementary legislation.

The full establishment of the Twin Peaks model in South Africa, will be rolled out over a number of years as from 1 April 2018. The National Treasury needs to source the necessary infrastructure and resources, as well as appropriately co-ordinate with the relevant stakeholders. The current Financial Services Board (FSB) will morph into Financial Sector Conduct Authority (FSCA). The FSCA became operational from 1 April 2018, however the transitional period will be underway for some time after this date.

As is the practice, the legislation that was applicable at the date of the transaction will remain applicable post 31 March 2018, until the matter has been fully resolved. Apart from the transitional matters the FSB has also been in the spotlight with the perception of being ineffective in enforcing the regulatory and oversight laws against those entities in the financial sector who have grossly

contravened some of the significant laws.[48] The same employees of the FSB will still be part of the FSCA but 57 have been transferred to the PRA. Understanding and implementation of the new FSR Act will take some time, this implies a requirement for extensive training. This also implies that enforcement will not be fully effective during the 2018-19 period.

A media release on 17 April 2018 from the South African Reserve Bank (SARB), as the prudential regulator, indicated that the SARB and the Bank of England (BoE) are in the process of agreeing a programme of engagement in relation to bringing the SARB as the anticipated prudential regulator up to speed by mid-2019. The projects highlighted as some of the projects are as follows:[49]

'…..

- Training initiatives in the "Twin Peaks" approach to financial regulation;
- Enhancing macro prudential surveillance and policy frameworks;
- Developing tools to better measure systematic risk and vulnerabilities in the financial sector; and
- Closer cooperation on Fintech.'

The FSR Act's intention appears to be robust, as the underlying regulations seem to have a comprehensive outlook on the entire financial sector by bringing entities which provide different financial services into one basket of regulatory oversight. If fully enforced, the FSR Act may achieve the intended objectives. The FSCA will gradually adopt the FSR Act regulation over time while other related regulated institutions are being established. The biggest challenge at these stage will be the ability to recruit the appropriate human resources to ensure successful enforcement of all the necessary regulation.

[48] Maake, M., 2018, 'Is the FSB a toothless regulator?', *Financial Mail*, 5 April 2018, p. 20-25.
[49]South African Reserve Bank, 17 April 2018, *South African Resrve Bank and Bank of England agree to cooperate,* viewed 18 April 2018,from https://www.resbank.co.za/publications/detail-item-view/pages/publications.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblist=21b5222e-7125-4e55-bb65-56fd3333371e&sarbitem=8405.

Chapter 3. Fees charged and levies imposed by administrative bodies

Chapter 3.1. Purpose of charging fees and imposing levies

The trading of goods and/or services is a significant component of any economic system which is governed by fundamental principles. Due to diversity of resources that can be exchanged via trading arrangements these transactions are expressed in monetary terms and transfer using money as the common denominator for transacting commodities. Indeed in this role two of the three ancient functions of money can be clearly seen, the function of assigning value to the transaction and the use of money as a medium exchange. Therefore, businesses, and government, charge fees to customers for goods and services that have been provided to customers.[50]

Similarly, a government also has a range of goods and services which it provides to individual citizens and society as a whole. The goods provided by the government are usually referred to as public goods. Since a government is a government under law these goods and services are almost certainly to be governed by legislation and in a constitutional democracy form part of the bill of rights. In South Africa these may include health care services, education, safety and security, etc.[51] The government thus needs to fund the provision of these goods and services. This can be achieved through charging its citizens fees/levies from general taxes.[52]

The economic well-being of a country will determine the country's ability to fund the services provided by a country.[53] All things being equal, a country which has high levels of exportable natural resources will be better placed to provide the services required through funds which are ultimately generated from exporting its resources.[54] Some countries fund the provision of domestic service requirements through colonial taxes obtained from their colonies.[55] However, such sources of funding are not common in most countries.[56] Therefore, a government will levy taxes upon various natural and juristic persons who generate taxable income.[57] It has however been long understood that in the end all taxes ultimately are on individual natural persons. At this juncture it is important to draw a

[50] Menger, C., 1976, *Principles of Economics,* Ludwig von Mises Institute - Auburn, Alabama.
[51] Chapter 2 of the Constitution of Republic South Africa, 1996, outlines the Bill of Rights and related limitations to the rights from section 7 to section 39.
[52] Peacock A.T., 2004 , 'The Growth of Public Expenditure', in Rowley C.K., Schneider F. (eds) *The Encyclopedia of Public Choice*, pp 594-597, Springer, Boston, MA

[53] Alfaro, L; Kalemli-Ozcan S and Volosovych V., 2008, Why doesn't capital flow from rich to poor countries? An empirical investigation. *The Review of Economics and Statistics.* Vol. 2. No. 2 May 2008.
[54] Menger, C., 1976, *Principles of Economics,* Ludwig von Mises Institute - Auburn, Alabama.
[55] Frankema, E., 2010, 'Raising revenue in the British empire, 1870 – 1940: how 'extractive' were colonial taxes?', *Journal of Global History,* 5(3), 447-477.
[56] Grier, M., 1999, 'Colonial legacies and Economic Growth', *Public Choice*, 98(3-4), 317-335.
[57] Wagner, R., 2011, *Charging for Government: User charges and earmarked taxes in principle and practice*, Routledge Revivals, Oxon.

distinction between fees and levies. A fee is an amount charged for a specific service whereas a levy is raised to cover general none specific expenses.[58] The tax concern is about levies not fees. It is accepted for the purpose of this research that fees may not be taxes requiring the consent of parliament. This however is a matter which deserves separate consideration.

Since the signing of the Magna Carta (1215) it has been accepted that there can be no taxes without the consent of parliament and no revenue raised through taxes can be spend unless appropriated by parliament.[59]

In South Africa, the National Treasury is responsible for the allocation of funding to the various departments through the Division of Revenue Bill,[60] which aims to achieve equality across the three spheres of government. Through the funds allocated to them, the departments are in positions to provide the services which they are mandated to execute.

A more recent development has been the setting up of administrative bodies to provide goods and services.[61] Some of these administrative bodies may be given the power to charge fees and impose levies which they deem necessary to deliver the underlying services. The two regulatory bodies set up in terms of the Twin Peaks system are examples of this.

It has been stated that the South African Twin Peaks system has been influenced by the Australian model and hence the funding of that model is now examined. In Australia, not all the bodies under the Twin Peaks system are obliged to pay taxes. Section 133 of the ASIC Act details how the ASIC will source its funds and section 139 further indicates that the funds received by ASIC are exempt from tax.

The ASIC receives its funding from government through section 133 (1) of the ASIC Act which states that 'There is to be paid to ASIC such money as is appropriated by the Parliament for ASIC.' Section 133(2) further provides the Minister the power to determine when the money envisaged under section 133(1) is paid to the ASIC.[62]

The ASIC Act outlines the activities on which the ASIC may use the money which it has received from government as follows:[63]

[58] Taylor, M., 2012, 'Is it a levy, or is it a tax, or both?', *Revenue Law Journal,* 22(1), 188-200.
[59] Vincent, N., 2012, *Magna Carta* A Very Short Introduction 321, Oxford University Press.
[60] Division of Revenue Bill – As introduced in the National Assembly (proposed section 76 of the Constitution). section 214(1) of the Constitution of the Republic of South Africa, 1996,requires an Act of Parliament to provide for— *(a)* the equitable division of revenue raised nationally among the national, provincial and local spheres of government; *(b)* the determination of each province's equitable share of the provincial share of that revenue; and *(c)* any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made;
[61] Van Thiel, 2001.
[62] Section 133 of the ASIC Act 51 of 2001.
[63] Section 135 of the ASIC Act 51 of 2001.

- To pay or discharge expenses, charges, obligations or liabilities that the (1) ASIC, (2) the Panel, (3) the Disciplinary Board, or (4) the AASB incur or undertake to execute their mandated duties;
- To pay remuneration or any allowances that are payable within the scope of the ASIC Act, except for remuneration or allowances payable to members of Corporations and Markets Advisory Committee in Australia;
- To pay allowances and other benefits as determined by the Minister in writing;
- To reimburse a member for any loss or expenditure by a member while performing his mandated duties; and
- To make contributions on behalf of a member who is not a full-time member and not an employee of the ASIC, to a retirement or superannuation scheme.[64]

The ASIC does not charge fees or impose levies to any of the regulated entities, therefore in terms of section 139 of the ASIC is not liable for taxation, unless if there is a specific law which deems the income generated by ASIC to be taxable.

Section 51 of the APRA Act allows the APRA to impose a charge which need to be paid by a person for:

- Services and facilities the person enjoyed as provided by the APRA; or
- For applications or requests that made to APRA which are within the ambit any law of the Commonwealth.[65]

Section 52 of the APRA Act establishes the Special Account with the main purpose for compliance with the Australian Public Governance, Performance and Accountability Act of 2013. While section 53 of the APRA Act deals with credits made to the APRA Special Account. The purposes of the amounts credited into the account are dealt with by Section 54 (2) as follows:

> (a) in payment or discharge of the costs, expenses and other obligations incurred by APRA in the performance of its functions or the exercise of its powers;
>
> (b) in payment of any remuneration or allowances payable to persons appointed or engaged under this Act;
>
> (c) in making any other payments which APRA is authorised or required to make under this Act or any other law of the Commonwealth.[66]

The APRA Act also provides for the creation of different Special Accounts as follows:

- Financial Claims Scheme Special Account

[64] Section 135 of the ASIC Act 51 of 2001.
[65] Section 51 of the APRA Act 50 of 1998.
[66] Section 54 of the APRA Act 50 of 1998.

- Private Health Insurance Collapsed Insurer Special Account

Section 55 of the APRA Act exempts the APRA to taxation.

In South Africa the FSB morphed into the Financial Services Conduct Authority (FSCA) with effect from 1 April 2018. The prudential responsibilities of the FSB was transferred to the other newly formed Prudential Regulatory Authority (PRA) which is housed within the South African Reserve Bank. The FSCA has a broader market conduct oversight coverage which will also place customers' interest at the core. The focus of this assessment will be in relation to the newly established FSCA and where applicable the other related financial sector bodies. The FSCA is one of the two key authorities under the Twin Peaks model. The FSCA, in collaboration with other financial sector bodies, will be given the power and discretion to determine the fees and levies which entities regulated by the finance sector need to pay to operate through the FSR Act. The other financial sector bodies under the "Twin Peaks" system will also require additional funding to support their establishment and compliance with the necessary regulation. This funding will be sourced from additional levies which cannot exceed 15% of the going standard levies.

Section 237(1) *(a)* and *(b)* of the FSR Act empowers a financial sector body to charge fees to fund the performance of specific functions of the FSR Act and also to impose levies to fund the operations of the financial sector body. These fees and levies appear as membership or user fees (Rushton, 2004), but are they?

Chapter 3.2. Treatment of surpluses and deficits

The FSB itself was an innovation established in terms of an Act of Parliament after the collapse of the AA Mutual Insurance Company in the mid-1980s. The establishment flowed from the Melamet Commission which investigated the collapse. Prior to this, the cost of regulation was funded from the General Revenue Account as appropriated by Parliament. Dr Burton, the then Registrar of Insurance, testified before the Melamet Commission of difficulties of securing adequate financing. The Commission suggested (but did not recommend) additional funding (excluding salaries) could be sourced from the private sector.[67] This suggestion was subsequently investigated by the Van Der Horst committee which recommended the formation of the Financial Services Board which came into force with the passing of the Financial Services Act.[68] In the meanwhile in the UK developments were also taking place. South Africa historically has closely followed the UK regulatory path.

[67] De Villiers, J.U. & Vivian, R.W., 1991, 'Insurance by large corporations: The Melamet Commission', *South African Journal of Economics,* 59(4), 425-441.
[68] Worker, T., 2013, 'Property-syndication investment *v* property scam: who decides? A critical examination of the regulation of public-property syndication schemes in South Africa', *Obiter*, 34(2), 233-251.

In terms of an amendment to the Financial Services Act, FSB became funded by the private sector out of fees and levies contrary to the original views of the Melamet Commission.

The FSCA will require R661 million establishment funding from National Treasury. However most of the funding is expected to be carried over from the FSB operations. Through analysis of the 2016-17 FSB annual report, it was noted that the FSB does not transfer fees charged and levies imposed to the National Treasury. Consequently, if there is a surplus, the FSB carries it forward to the following financial year. This substantially portrays the FSB as an autonomously fund entity which determines how it runs its affairs with minimal involvement by parliament, although it is comprised of stakeholders from various high public interest constituencies.[69]

Section 247 (1) (b) of the FSR Act indicates that funds accruing or that may have accrued to a particular financial sector body form part of the money of that same financial sector body. Section 239(2) of the FSR Act allows the annual budgeting to provide for surpluses to be kept year on year[70]. When it comes to a deficit, it is not clear what would happen. It is not anticipated that the FSCA will run at a deficit. Should it do so, no doubt it would be recovered by increasing the levy in the subsequent period. The costs of this transitioning have already been presented to the Standing Committee on Finance and approved accordingly. National Treasury will need to fund this over and above the fees and levies that the FSCA will charge.[71]

Chapter 3.3. Are levies a tax?

The central question to be answered by this research is, are fees charged and levies imposed by administrative bodies taxes? As indicated above the question focuses on the levies not the fees. To determine whether an impost levied by a state organ constitutes a tax, the case of *South African Reserve Bank and Another v Shuttleworth and Another* 2015(5) SA 146 (CC) (Shuttleworth case) provides a useful framework. The case progressed through the three courts, namely, the High Court, the Supreme Court of Appeal and the Constitutional Court.

[69] Financial Services Board, n.d., Annual Report 2016-17, viewed 1 April 2018, from https://www.fsb.co.za/Departments/communications/Documents/FSB%20Annual%20Report%202017.pdf.
[70] Section 239 (3) of the FSR Act allows for the budgeting of one or more reserves for the following year, but the total accumulated reserves with the proposed expenditure may not be greater than 15% of total expenditure less the reserves.
[71] Report of the standing committee on Finance on the Financial Sector Regulation Bill [B34 – 2015], dated 30 November 2016.

Facts of the case

The Shuttleworth case was initiated by Mark Shuttleworth, a South African entrepreneur, who emigrated from South Africa to the Isle of Man, a British Crown dependency and a tax efficient jurisdiction, in 2001. He subsequently applied to the South African Reserve Bank (SARB) for his assets to be transferred to the Isle of Man. This resulted in the SARB imposing a 10% percent exit levy on the value of the assets being transferred out of South Africa.[72]

Shuttleworth obtained the funds to be transferred through the sale of his IT company, Thwate Consulting, for $575 million in 1999. As a result of this sale, Shuttleworth made investments in various local business and social initiatives. In 2001 Shuttleworth emigrated from South Africa to the Isle of Man with the intention to free up funds to invest outside South Africa. Shuttleworth's emigration triggered Section 9 of the Currency and Exchanges Act 9 of 1933 which had the effect of blocking the transfer of his assets from South Africa. These assets were valued at R4 276 757 134 and were classified to be in a blocked loan account and could not be transferred outside South Africa without permission from the SARB. The SARB gave Shuttleworth the right to freely remit interest on the blocked loan accounts from South Africa at prime plus 2%.[73]

On 5 March 2008, Shuttleworth applied to the SARB for permission to transfer a gross amount of R1 500 000 000 from the blocked loan account out of South Africa. The SARB required the application to be facilitated by an authorised dealer bank and Shuttleworth chose Standard Bank of Southern Africa Limited (Standard Bank). The SARB indicated that the amount would be subject to a 10% levy and this was imposed in line with regulation 10(1)(c) of the Currency Exchange Control Regulations of 1961. The net transferrable amount was thus R1 485 000 000. After the transfer of R1 485 000 000, Shuttleworth made donations from the blocked account to entities within South Africa which led to a balance of R2 504 748 935 in his blocked account by 26 June 2009.[74]

In June 2009 Shuttleworth made an application to the SARB to transfer the remaining R2 504 748 935 out of South Africa. He also sought legal advice in relation to the 10% exit levy which would amount to R250 474 893.50. The outcome of the advice was that the imposition of the 10% exit levy was not lawful. In his application of the final transfer, he included an addendum indicating the possibility of him contesting the imposition of the 10% exit levy. He instructed Standard Bank to process the application with the addendum. However, Standard Bank did not submit his addendum to the SARB and upon approval of the application by the SARB, Standard Bank had tendered the 10% exit levy over to the SARB. Shuttleworth then instructed Standard Bank to request the SARB to reconsider its decision to impose the 10% exit levy. At the same time Shuttleworth allowed Standard Bank to pay

[72] Paragraph 2 of the *Shuttleworth v South African Reserve Bank (864/2013)* [2014] ZASCA 157 (1 October 2014)
[73] Paragraph 2 – 6 of the *Shuttleworth v South African Reserve Bank (864/2013)* [2014] ZASCA 157 (1 October 2014)
[74] Paragraph 7 – 8 of the *Shuttleworth v South African Reserve Bank (864/2013)* [2014] ZASCA 157 (1 October 2014)

the levy to the SARB so that he could commence clearing the blocked account while waiting for the outcome of reconsideration by the SARB.[75]

The blocked account was then cleared as follows:[76]

- The 10% exit levy which was paid under protest and was paid on 11 November 2009;
- R650 000 000 and R1 036 128 303 of the blocked assets were transferred out of South Africa on 18 November 2009;
- R300 000 000 was transferred out of South Africa on 2 December 2009; and
- The remaining R268 145 738 was transferred out of South Africa on 21 December 2009.

The SARB did not reconsider its decision to impose the 10% exit levy indicating that it was bound by Exchange Control Regulations with particular reference and reliance on Exchange Control Circular No. D375 of 26 February 2003[77] and Circular D380[78] of Exchange Control Rulings. Shuttleworth then argued that the 10% exit levy was imposed on a generalised basis and that it was a revenue raising mechanism making it to be a tax.[79]

The legal issues to the High Court

As a result of the SARB's refusal to reconsider its decision, Shuttleworth approached the North Gauteng High Court for relief against the unlawful imposition of the exit levy. The relief which he sought included some provisions of the South African exchange control system was brought against

[75] Paragraph 9 – 10 of the *Shuttleworth v South African Reserve Bank (864/2013)* [2014] ZASCA 157 (1 October 2014)

[76] Paragraph 11 of the *Shuttleworth v South African Reserve Bank (864/2013)* [2014] ZASCA 157 (1 October 2014)

[77] The extract of the circular reads as follows: "Emigrant blocked assets are to be unwound. Amounts up to R750 000 (inclusive of amounts already exited) will be eligible for exiting without charge. Holders of blocked assets wishing to exit more than R750 000 (inclusive of amounts already exited) must apply to the Exchange Control Department of the South Africa Reserve Bank to do so. Approval will be subject to an exiting schedule and an exit charge of 10 per cent of the amount."

[78] Section B 5(E)(iii)(e) of the Exchange Control Rulings as reflected in Circular No D380 : "Any other assets belonging to the emigrants at the time of their departure or accruing to them thereafter will require to be brought under the control of an Authorised Dealer. The Exchange Control Department of the South African Reserve Bank will, on application, consider requests for the unblocking of the emigrant's remaining assets. Any approval will be subject to an exiting schedule, at the discretion of the Exchange Control Department of the South African Reserve Bank, and an exit charge of 10%."

[79] Paragraph 12 of the *Shuttleworth v South African Reserve Bank (864/2013)* [2014] ZASCA 157 (1 October 2014)

the SARB as the first respondent, the Minister of Finance as the second respondent and the President of the Republic of South Africa as third respondent.

As a starting point, Shuttleworth requested the High court to review and set aside the decisions by the SARB 'to impose a 10% levy payment' payable by Shuttleworth into the SARB's Blocked Rand levy account prior to Shuttleworth transferring his blocked assets that remained in South Africa. These remaining blocked assets would be transferred out of South Africa unconditionally – i.e. Shuttleworth would not be obliged to any further restrictive terms barring him from transferring his blocked assets out of the country. Shuttleworth also requested that the High court instruct either the SARB or the Minister of Finance to repay him the levy amount of R250 474 893.50 with interest which he had unwillingly paid to the SARB.[80]

The main areas of contestation by Shuttleworth was the constitutional invalidity of the provisions of the Exchange Control Circulars and Currency and Exchange Act 9 of 1933 which led to the imposition of the 10% levy against him. He further requested the High court to consider to declare the following as being inconsistent with the Constitution and invalid:

- The words "and an exit charge of 10% of the amount" in: (1) Exchange Control Circular No D375 of 26 February 2003 (2) Exchange Control Circular No D380 of 26 February 2003, and (3) Section B [5](E)(iii)(e) of the Exchange Control Rulings.;
- Section 9 of the Currency and Exchange Act 9 of 1933 ("the Act");
- Section 9(2)(a), (c) and (f) of the Act;
- Section 9(3) of the Act;
- Section 9(5) of the Act;
- The Exchange Control Regulations;
- Paragraphs (a) to (c) of Regulation 3(1) of the Exchange Control Regulations;
- Regulation 3(3) of the Exchange Control Regulations;
- The words "(3) or" in Regulation 3(5) of the Exchange Control Regulations;
- Regulation 10(1)(b) of the Exchange Control Regulations;
- Regulation 18 of the Exchange Control Regulations;
- Regulation 19(1) of the Exchange Control Regulations;

[80] Refer to paragraph 14 of the *Shuttleowrth v South African Reserve Bank (864/2013)* [2014] ZASCA 157 (1 October 2014)

- The words “unless he proves that he did not know, and could not by the exercise of a reasonable degree of care have ascertained that the statement was incorrect” in Regulation 22 of the Exchange Control Regulations and the omission in that regulation of the words “intentionally or negligently” immediately after the words “every person who”;
- The Orders and Rules under the Exchange Control Regulations;
- Order and Rule 10(a) of the Orders and Rules under the Exchange Control Regulations; and
- The policy of the first respondent of refusing to deal directly with members of the public in relation to the exercise of its delegated powers under the Exchange Control Regulations and insisting that members of the public communicate with it through the intermediation of authorised dealer banks.

The logic of the North Gauteng High Court judgement

In passing judgement, the North Gauteng High Court’s approach to the case was by assessing the overall context of origination and purpose of the Exchange Control regulations under contestation, as opposed to only consider whether the imposition of the 10% exit levy by the first respondent met all the technical and constitutional validity requirements. The High Court’s approach appears to have been: (1) to weigh the impact, on public interest, of imposing the exit levy by the first respondent against (2) the impact on the public interest of not complying with the technical and constitutional requirements in parts of the Exchange Control regulations.

The High Court also took note that although the overall context of the regulations remains applicable, there may be additional procedures that the respondents may have been required to put in place to meet the requirements of the modern economic climate. The additional procedures, in the form of rulings and circulars, may have been set to enhance the application of the exchange control regulations. Based on this approach, the overall judgement held by the High Court was that the main objective of the regulations was still intact and relevant in the Shuttleworth case, and thus the judgement was in favour of the respondents although the invalidity of some of the applicant’s issues were acknowledged.

On reaching its decision, the High court concluded on three aspects:

> ‘(a) the 10% levy did not amount to a revenue raising mechanism but was intended to act as a disincentive to the export of capital; (b) that there was legislative underpinning for its imposition, namely, regulation 10(1)(c) and (c) that it was not unconstitutional.’

A brief analysis of each aspect follows:

(a) The 10% levy did not amount to a revenue raising mechanism but was intended to act as a disincentive to the export of capital

This view taken by the High court focused on the economic well-being of the country. Therefore the view emphasised that if the levy or another form of deterrent was not in place, there would be a high capital flight out the country resulting in a severe economic crisis.

(b) There was legislative underpinning for the 10% levy's imposition in terms of regulation 10(1)(c)

In this part the High court failed to provide thorough historical and broader context of the regulation, i.e. that it was intended to serve a broader purpose although it

(c) The 10% levy was not unconstitutional

Shuttleworth raised the issue that there were various sections of the Constitution which the levy contravened and this resulted in it being restrictive and rigid. The sections of the Constitution under question were section 22, 25 and 36, which Shuttleworth indicated that the imposition of the levy was contravening these sections.[81] Although the High court held the view that the imposition of the 10% levy was not in contravention with Constitution, its admission that there are elements of constitutional invalidity somewhat did not provide a satisfactory judgement.

Legal issues in relation to SCA[82]

Shuttleworth's case brought through to the North Gauteng High Court was that the exit levy constituted a tax and it required a statute to be passed in parliament for it to be constitutionally valid. As result of his failure at the high court, Shuttleworth appealed to the Supreme Court of Appeal (SCA) on the same basis. The SCA upheld Shuttleworth's appeal and as a result the SARB, the respondent, brought through the following defenses:

'[23]...

[81] Section 22 of the Constitution The Republic of South Africa, 1996, deals with Freedom of trade, occupation and profession. Section 25 deals with property and ownership thereof. Section 36 deals Limitation of Rights in terms of Bill of Rights.

[82] The case to the Supreme Court of Appeal was heard on 28 August 2014 and judgement delivered on 1 October 2014. The appellant was Mark Richard Shuttleworth, the first respondent was the South African Reserve Bank, the second respondent was the Minister of Finance, the third respondent was The President of the Republic of South Africa.

47. The exit charge that the applicant complains of is imposed in terms of Regulation 3(1) read with Regulation 10(1)(c).
48. Regulation 3(1)(a) read with Regulation 10(1)(c) *inter alia* prohibits any person from taking currency or capital out of the Republic without the prior permission of the Treasury or a person authorised by the Treasury. Should such permission have attendant conditions of export, these must be complied with by all parties, including the authorised dealer who may be facilitating the transaction.
The determination of 10%
49. The 10% charge is a condition that was decided upon by Treasury in accordance with Regulation 10(1)(c). It is imposed as a flat rate in the interests of consistency, certainty, constancy and evenness in its application. In practice it is implemented by the first respondent and its designated officials. The above provisions of the Act and regulations thus form the basis of the legal framework within which the 10% charge was located whilst it was still in force.

'[25]Section 9(1) of the Act empowers the President to make 'regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges'Section 9(5)(a) of the Act provides that: '[a]ny regulations made under this section may provide for the empowering of such persons as may be specified therein to make orders and rules for any of the purposes for which the [President] is by this section authorized to make regulations' In terms of the regulations, the control over South Africa's foreign currency is vested in the Treasury. The Treasury is defined in regulation 1 as the Minister of Finance or an officer of the Department of Finance who, by virtue of the division of work in that Department, deals with the matter on the authority of the Minister.'
'[27] Acting in terms of regulation 10(1)(c), so we are told, the Minister granted permission generally for the export of capital from the Republic. The grant of that general permission though was subject to a condition, namely payment of a ten per cent levy. The effect therefore was the grant of a general permission subject to a blanket condition. The consequence, as Treasury understood the situation, was that its discretion was rigidly fettered because it was obliged to apply the policy of the Minister instead of assessing the peculiar facts of the application before it. The Reserve Bank's officials were therefore responsible only for mechanically applying the policy decision of the Minister.'

The logic of the Supreme Court of Appeal

The High Court judgement left room for Shuttleworth to pursue through an appeal on those parts of the exchange control regulations which were considered to be invalid and unconstitutional. Therefore, based on Shuttleworth's appeal to the Supreme Court of Appeal ("SCA"), the SCA focused on addressing the detail of the relevant affected sections. In passing its judgement, the SCA placed more weight on the assessment of complete constitutional validity of imposing the levies in light of the exchange control regulations as opposed to the assessment of the broader context and intention of the origination and application of those exchange control regulations (i.e. to serve as a disincentive to capital outflows from South Africa.).

As a result of the approach followed by the SCA, the SCA passed a judgement in favour of Shuttleworth, effectively reversing the judgement passed by the High Court.

The judgement considered that the purpose and objective of regulation 10(1)(c) was legitimate, however, all relevant aspects need to be taken into account.

> '[26] The respondents now rely exclusively on regulation 10(1)(c) as the ostensible enabling power for the imposition of the exit levy. In broad terms regulation 10(1)(c) prohibits the export of capital or any right to capital from the Republic. It provides that: "No person shall, except with permission granted by the Treasury and in accordance with such conditions as Treasury may impose enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic".
>
> Considering the history of Exchange Control and prior concerns about the outflow of capital on a scale that would be detrimental to South Africa's economy, this regulation clearly served a legitimate purpose.…Even now the external balance of payments must be a continuing concern for Treasury. However, notwithstanding that the regulation was intent on ensuring that the outflow was regulated and that conditions could be attached in relation to the outflow of funds, it does not follow that the regulation was intended to or could be utilised as a revenue-raising mechanism. On the contrary, as will become evident, for the collection of revenue, taxes or levies, prescribed procedures have to be followed.'

> '[28] The ten per cent levy on the export of capital was a levy of general application that, whilst in force, was imposed on every export of capital in excess of R750 000. It can thus hardly be in dispute that the levy was a revenue-raising mechanism for the State. The levy could therefore only have been intra vires regulation 10(1)(c) if that provision legitimately authorised the raising of revenue for the State. Section 9(4) of the Act, however, prescribes how a regulation calculated to raise revenue has to be promulgated…
> [29] It is undisputed that reg 10(1)(c) had not followed the procedure for taxation prescribed by s 9(4) of the Act. Thus, even if the regulation can be construed as authorising the raising of revenue, the problem is that it has not been approved in terms of s 9(4) of the Act. Section 9(4), it would seem, is animated by the 'no taxation without representation principle'. A founding principle of Parliamentary democracy is that there should be no taxation without representation and that the executive branch of government should not itself be entitled to raise revenue but should rather be dependent on the taxing power of Parliament, which is democratically accountable to the country's tax-paying citizenry.
> [30] Our Constitution is careful to ensure that the power of taxation is tightly controlled. Section 77(1) of the Constitution defines a 'money bill' as follows:
> "77. Money Bills –
> (1) A Bill is a money Bill if it-
> (a) Appropriates money;
> (b) Imposes national taxes, levies, duties or surcharges…."
> Section 77(2) provides:
> '77(2) A money bill may not deal with any other matter except –
> (a) a subordinate matter incidental to the appropriation of money
> (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges.'

Section 73(2) states that only the Minister of Finance may introduce a money bill in the House of Assembly. According to sections 55(1)(b) and 68(1)(b) of the Constitution, the ordinary power of the National Assembly and the National Council of Provinces to initiate and prepare legislation does not extend to the initiation or preparation of money bills. And, s 73(3) prevents the introduction of money bills in the National Council of Provinces. All of these constitutional provisions thus render it unconstitutional for taxes or levies to be raised by delegated legislation which is not specifically authorised in a money bill enacted in accordance with the money bill provisions of the Constitution.

[31] The levy raised revenue for the State. It brought ten per cent of the value of any capital in excess of R750 000 exported out of the country, into the National Revenue Fund. Whilst in force, it raised approximately R2.9 billion. The levy thus fell within the category of 'taxes, levies or duties' contemplated by sections 75 and 77 of the Constitution. The reference in regulation 10(1)(c) to the power of Treasury to impose conditions on the export of capital from the Republic cannot be construed to include the power to impose a tax or levy on such export of capital. It must follow that the imposition of the ten per cent levy was inconsistent with sections 75 and 77 of the Constitution and invalid and ultra vires regulation 10(1)(c).

[32] It appears to be clear from the history of the matter, including the correspondence exchanged between the Reserve Bank and Shuttleworth that the former relied principally and enduringly on the speech delivered by the Minister in Parliament for the imposition of the ten per cent levy. The more recent reliance on regulation 10(1)(c) is, in our view, contrived and an ex post facto attempt to contextualise the levy within an enabling regulatory framework.

[33] It is now necessary to consider whether the ten per cent levy unlawfully imposed by the Reserve Bank has to be repaid to Shuttleworth. It is common cause that the levy was paid by Shuttleworth under protest to the Corporation of Public Accounts as the representative of Treasury. He therefore pursues the repayment claim against the Minister.'

In bringing his case to the SCA, Shuttleworth asserted that the levy raised revenue and therefore was a tax. However, it had not been validly and constitutionally legislated and as a result it was not a valid and unconsititutional. The SCA agreed with Shuttleworth and as a result he won the case. In passing judgement, the SCA quoted a number of cases to arrive at the orders. The judge acknowledged that Shuttleworth had paid the 10% levy in protest which was similar to The *Union Government (Minister of Finance) v Gowar* 1915 AD 426 at 433-4 case justifies for Shuttleworth to be repaid the 10% levy, although Shuttleworth would need to, as he did, show that the money was indeed paid in protest. Another reference was made to a case of *Commissioner for Inland Revenue v First National Industrial Bank Ltd 1990 (3)* SA 641 (A) at 647 which a payment was made in mistake, although not forced to pay, the view was that the payment was made under pressure and protest and thus had to be repaid. Shuttleworth was thus entitled to a repayment equivalent to the 10% levy with interest as Shuttleworth unduly lost out on the income.[83]

[83] Refer to paragraph 32-35 of the *Shuttleworth v South African Reserve Bank (864/2013)* [2014] ZASCA 157 (1 October 2014)

Facts of the case to the Constitutional Court

After the SCA judgement in favour of Mr Shuttleworth, the SARB as the first applicant, and the Minister of Finance, second applicant, appealed to the Constitutional Court with Mr Shuttleworth being the first respondent and the President of the Republic of South Africa being the second respondent. The case commenced on the 3rd of March 2015 and the judgment held on the 18th of June 2015 with Moseneke DCJ (in the majority) and Froneman J (with dissenting).

The legal issues in relation to the Constitutional Court

As a result of the judgement of the SCA being in favour of Mr Shuttleworth, the following occurred:

- The SARB and the Minister of Finance applied to the Constitutional Court for leave to appeal and appeal.
- Mr Shuttleworth applied for leave to cross-appeal in the event leave to appeal was granted to the two applicants, and to cross-appeal against those portions of the SCA judgment adverse to them.
- The Constitutional Court, by a majority (Froneman J dissenting) , identified the core issue in the main appeal as whether this exit charge constituted a regulatory charge, or whether it was a tax, a revenue-raising mechanism for the government. If it were the latter, the regulation that authorised the exit charge would be invalid because it had not been enacted in accordance with the prescribed strictures of sections 75 and 77 of the Constitution (and section 9(4) of the Act).
- The constitutional court granted leave to appeal, and leave to cross-appeal only on the narrow issue of the constitutional validity of s 9(1) of the Act read with regulation 10 (1)(c) held as follows:

Main appeal

On making a ruling on the application for leave to appeal by the SARB and the Minister of Finance, the Constitutional Court by stated that the constitution overrides the provisions of section 9(4) of the Currency and Exchanges Act. The Constitutional Court further clarified that a Bill that generates revenue through imposition of a tax needs to comply with the money Bill requirements as per the constitution. While there would be no need for compliance with section 9(4) of the Currency and Exchanges Act if the exit levy was not calculated to generate revenue.

The key question was how to differentiate between a regulatory charge which would classified as a fee and a tax that needed to comply with the requirements of a money Bill. The Constitutional Court also noted that all charges considered to be regulatory generate revenue, conversely every tax at some degree is regulatory. As a result of this, the Constitutional Court used a method of determining what the main, dominant or primary purpose of the regulation imposing the charge, fee or tax is. Two

aspects would be looked into – i.e. whether the purpose was to achieve certain public behaviour or conduct through regulation or main aim was to fund public operations through the revenue. If the main purpose was to regulate then the charge would be a fee and if to generate revenue was the main purpose then the charge would be a tax.

The next step was to consider the purpose of the exchange-control legislation – which was to regulate with the intention to lessen the flight of investments or capital from South Africa. The main purpose of the legislation was thus to achieve certain behaviour and not to fund public operations in South Africa. The Constitutional court also noted that the exit levy was part of the process of simplifying the exchange controls. The exit levy was also imposed on those who were exporting more than R750 000 out of the South Africa.

On ruling on the appeal, it was noted that the exit levy generated incidental revenue of around R2,9 billion for the National Treasury. This revenue was considered to be a by-product of the exit levy's main purpose. The decision held on the appeal was that the exit levy did not meet the criteria of a money Bill. It was noted that the interpretation of the SCA was incorrect and, as a result of this, the appeal by the SARB and the minister of Finance was granted by the Constitutional Court.

Cross appeal

The Constitutional Court rejected the cross appeal based on the fact that the minister of Finance had the power to ensure that the exchange control regulation were flexible and continuously adaptive to the changing economic environment:

> 'Not all wide legislative discretion was inconsistent with the constitutional norm and invalid. The broad discretionary power of the Minister under the impugned provisions was justified in that South Africa's exchange control system required a flexible, speedy and expert approach to ensure that proper financial governance prevailed. Circumstances could change at any time, requiring an adaptation of the rules in place, so that it would be impossible to lay down rules or set out factors in advance. The cross-appeal must therefore fail.'

The Logic of the Constitutional Court

The approach of the Constitutional Court was to take into account all the aspects addressed in the preceding courts, and then only address those aspects which were relevant for consideration at the constitutional court level. Certain key cases were also cited in reaching judgement. The outcome of the above process was for the Constitutional Court to focus on the constitutional validity of section 9(1) of the Currency and Exchanges Act read with regulation 10(1)(c) as part of the majority judgement with a dissenting judgement from one judge, Froneman. As a result of the dissenting judgement, it was thus necessary for the merits of each judgement to be taken into account. The majority judgement

commenced by providing the historical context in which the Currency and Exchanges Act was passed by parliament in 1933 and then proceeded to passing judgement on the constitutional validity of the exit charge in line with the main appeal:

> '[29] The resolution of the main appeal hinges on three questions. First, was the imposition of the exit charge a decision of the Minister or the Reserve Bank? Second, was the exit charge a national tax, levy, duty or surcharge under ss 75 and 77(1)*(b)* of the Constitution? And third, was the exit charge 'calculated to raise revenue' as envisaged in reg 10(1)*(c)*[38]
> and s 9(4)[39] of the Act?'

1. <u>Was the exit charge a decision of the Minister or the Reserve Bank?</u>

The view held by the SARB and the Minister was that the exit charge was imposed by the Minister through the budget speech held on 26 February 2003 and this was in compliance with section 9(1) of the Currency and Exchanges Control Act and regulation 10(1)(c) of the Exchange Regulations. Subsequent to the budget speech, the decision to impose the exit levy was tabled in parliament and sent for consideration and approval to the relevant Portfolio Committee. It was noted and agreed that since its announcement in 2003, the SARB did not exercise any discretion in imposing the levy (i.e. what percentage to be levied) on any applicant whom the SARB dealt with and that the SARB mechanically implemented the minister's decision in 2009. Consequently, the SARB and Minister argued that the SCA incorrectly held that the SARB imposed the exit levy on Mr Shuttleworth's blocked assets whereas the SARB was only mechanically applying what the Minister had implemented. It was also Mr Shuttleworth's assumption that the SARB made the decision to impose the exit levy and this view managed to convince the SCA's judgement in favour of Mr Shuttleworth. The SARB and the Minister also took note that Mr Shuttleworth had not challenged the Minister's decision at the SCA but had incorrectly concluded that the SARB made the decision to impose the levy on him, and therefore challenged the SARB's implementation as if it was its decisions.[84]

Although the judgement held that Mr Shuttleworth challenged the wrong person, i.e. the SARB instead of the Minister, there could be a possibility of probing further technicalities from a legal point of view. It is highly likely that the SARB makes significant contributions and recommendations to the Minister on various operational and financial matters, with the possibility that, in this case, the SARB may have proposed the imposition of the exit levy, which the minister may have approved without significant opposition. The exit levy would have thus originated from the SARB and went through to the minister as a formality.[85]

[84] Refer to paragraph 30-33 of the *South African Reserve Bank and Another v Shuttleworth and Another 2015 (5) SA 146 (CC)*

[85] Similar method followed by the RAF on proposing their future fuel levy allocation – although the RAF is more of a state insurer as opposed to be being a regulator such as the SARB.

2. <u>Was the exit charge a "money Bill"?</u>

In reaching the decision whether the exit charge constitutes a money bill, the Constitutional Court progressed through the decision processes of the High court and the SCA to ensure all is covered. While the final judgement held by the Constitutional Court would be the same as that by the High court, there were significant procedural differences in the approaches taken. Conversely while the final judgement held by the Constitutional Court was different there were some similarities in approach however vast differences in interpretation of statues.

To start of the judgement, the Constitutional Court defined a money bill in line with the definition provided by section 77 of the Constitution. Essentially, the Constitutional Court held that all the subsections of section 77 of the Constitution need to be taken into account to ensure full comprehension and interpretation of the definition of what constitutes a money bill.[86]

In its decision making process, the High court did not consider to delve into the detail of considering the money Bill provisions and as part of assessing the constitutional requirements. This created the loophole which Mr Shuttleworth used to appeal to the SCA.

Similar to the SCA, the Constitutional Court agreed that 'A Bill before National Assembly is a money Bill if it imposes 'national taxes, levies, duties or surcharges'.' However, the SCA did not consider section 77(1)(a) which deals with the appropriation of money which the Constitutional court dealt with extensively. The SCA focused on the revenue raised by the exit charge which also made it a tax in the SCA's view – which was flawed in not complying with the necessary constitutional requirements.

The Constitutional Court held that true taxes are imposed through a systematic approach which entails the usage of the executive and legislature as especially in democratic setups. However, as it was noted in *Minister of Finance and Another v Paper Manufacturers of South Africa* 2008 the SCA held that a money Bill cannot be deemed to be inconsistent with the Constitution and invalid if parliament had not adopted the procedure to appropriately amend the money Bill. The Constitutional Court also acknowledged that any legislation other than a money Bill gives the executive arm of

[86] Refer to the discussion of on the logic of the Supreme Court of Appeal above for part of the definition of a Money Bill.

government, the power to regulate through imposing levies or any other charges, provided that this is in ambit of carrying out legitimate government mandates.[87]

This led to the view around the term 'appropriates money', which the Constitutional Court held that it is not incidental but can rather be seen as the allocation of revenue raised as a tax and not as a regulatory charge. Several cases were referred to in relation to assist in differentiating between a regulatory charge and a tax. The general outcome from the various courts was that the true intention of the regulation needed to be taken into account when deciding whether a statute comprises of imposition of a regulatory charge or tax, and not merely focus on the words that have been used.[88]

In an attempt to simplify the identification of a tax or a fee, the Constitutional Court resorted to a test of the dominant or primary purpose of the statute, whether the statute is to raise revenue or to regulate. The Constitutional Court noted that the clear distinction of whether a statute's main or dominant purpose is to raise revenue and to regulate has been a difficult one to pin down, and since 1950's there hasn't been significant number of court cases that have come through to express a view. Although some have identified characteristics which can assist in the decision making process, in *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W), Ramsbottom J listed the characteristics that could assist in identifying a tax: '(i) when the money is paid into general revenue fund for general purposes; and (ii) when no specific service is given in return for payment.'[89]

The Constitutional Court sought to provide the context of the origination of the exit charge which is through the exchange control legislation which came into effect in 1933 during the 1929 Great Depression. The Constitutional Court further highlighted that the exchange control system which the exit charge originates from is there to regulate capital outflows from the country. The Constitutional Court therefore correctly held that the exit charge was not directed at raising revenue and therefore not subjected to the requirements of the section 75 of the Constitution.

3. <u>Was the exit charge 'calculated to raise revenue'?</u>

[87] Refer to paragraph 43-45 of the *South African Reserve Bank and Another v Shuttleworth and Another 2015 (5) SA 146 (CC)*
[88] Refer to paragraph 46-47 of the *South African Reserve Bank and Another v Shuttleworth and Another 2015 (5) SA 146 (CC)*
[89] Refer to paragraph 48-49 of the *South African Reserve Bank and Another v Shuttleworth and Another 2015 (5) SA 146 (CC)*

With reference to section 9(4) of the Currency and Exchanges Act, Mr Shuttleworth argued that the exit charge was calculated to raise revenue, but the manner in which it has been imposed is invalid, which the SARB and the minister disputed both. Mr Shuttleworth's view was that the word 'calculated' was the intent to raise revenue. In their defence, the SARB and the minister indicated that the word 'calculated' was part of the mechanism to regulate and that they would not have known how many people would have wanted to take their capital out of the country – for them to know how much revenue would be raised. The Constitutional Court held the same view as the SARB and the minister that the exit charge was to curb and discourage export of capital from South Africa. The Constitutional Court further acknowledged that the exit charge generated R2,9 billion revenue. However, as per the Constitutional Court, the R2,9 billion was 'incidental to the dominant object of regulating and discouraging capital flight.' As a result of this view the Constitutional Court indicated that the minister was only required to comply with regulation 10(1)(c) and not follow the procedure set out in section 9(4) of the Currency and Exchanges Control Act. Further since the section 9(4) of the Currency and Exchanges Control Act was promulgated before the Constitution of 1996, if the exit charge was a revenue, it would need to comply with sections 75 and 77 of the Constitution.[90]

The timing of enacting the Currency and Exchanges Act No. 9 of 1933 (Act) appears to have been the main determining factor of direction of the judgement held by Constitutional Court. One key factor that needs to be taken into account in drafting legislation is to attempt to avoid ambiguity were possible. A revision to the Currency and Exchanges Act would seem necessary to ensure future ambiguities are avoid. The *Shuttleworth case* does, however, serve as a precedent for similar cases.

Application of the framework to the charging of fees and imposition of levies by the Twin Peaks authorities

Part 1 of Chapter 16 in the FSR Act covers fees, levies and finances of the financial sector bodies implicated by the Twin Peaks model. Section 237 covers fees and levies as follows:

> '237 (1) (a) – Fees may be charged by a financial sector body in accordance with this Part to fund the performance of specific functions under this Act and the relevant financial sector laws.'

[90] Refer to paragraph 58-62 of the *South African Reserve Bank and Another v Shuttleworth and Another 2015 (5) SA 146 (CC)*

This section reflects the fees being charged by a financial sector body in order to render a specific service and also appearing as member fees[91] and not going through to the national revenue fund.

> '237 (1) (b) – Levies may be imposed by a financial sector body in accordance with this Part, read with legislation that empowers the imposition of levies, to fund the operations of the financial sector body.'

Section 237(1)(b) emphasises that "legislation that empowers the imposition of levies" needs to be taken into account prior to the levies being imposed in order for this section to be valid. A test of whether the primary or dominant purpose of the legislation that empowers the imposition of levies may need to performed. The test will examine whether the purposes is to raise revenue or to regulate conduct. However, as indicated in the Shuttleworth case, it is generally a blur to pin down the primary purpose.

> '237 (2) – A financial sector body must publish fees that have been determined and levies that have been imposed in the Register and on its website.'

As the financial sector is a high public interest sector, and the fees and levies are approved by the Minister (section 239(5) of FSR Act) it follows that the charging or imposition thereof must be as transparent and clear as possible.

Section 237 (3) of the FSR Act indicates that financial body has the power to specify the times at which fees and levies due to the financial sector body can must paid to the financial sector body. The section also allows for the financial sector body and the person (natural or juristic) to agree on the time at which the fees and levies may be paid. The authority given to the financial sector body has to be authorised by the Minister and as such the discretion that the financial sector body would exercise would be within the parameters authorised by the minister although there could be room some degree of flexibility.

> '237 (4) – Different fees may be determined and different levies may be imposed for different types or categories of persons or supervised entities.'

The criteria for determination would need to be approved by the Minister in line with section 239(5) of the FSR Act.

Budgets, fees and levies proposal

[91] Rushton, 2004

Section 239 of the FSR Act further indicates that although the financial sector bodies are given some form of autonomy to operate by themselves, the Minister still has the overall power to approve the key administrative aspects. In this case it applies to the budget, fees and levies:

> '239 (1) (b) - For each financial year, each financial sector body must prepare and adopt a proposal for the fees that will be charged and levies that will be imposed by the financial sector body.'

These fees and levies will be approved by the minister as per section 239(7) of the FSR Act, and the financial sector bodies may not divert from the approved fees and levies.

> '239 (2) – A proposal for levies may include a proposal for one or more special levies, and in that case, the estimate of expenditure must include an estimate for the special expenditure in relation to a special levy proposal.'

The Standing Committee on Finance meeting held on 30 November 2016 saw that the implementation of the Twin Peaks system will cost approximately R1.113 billion. The costs were further broken down into the different financial sector bodies as follows:[92]

a. The Prudential Authority – R341 million
b. Financial Sector Conduct Authority – R661 million
c. Financial Services Tribunal – R22 million
d. Ombud Council – R14 miilion
e. Office of the Pension Fund Adjudicator – R44 million
f. Office of the Ombud for Financial Services Providers – R37 million
g. Financial Stability department in the SARB – R44 million

The transitional period for introducing the new bodies and implementing the new system is expected to last for two years. The implementation costs of the new system will need to be funded through a special levy which the Standing Committee came to hear that it will be an additional 15% of the levy. The Special Levy would be introduced through a money Bill in parliament.

[92] Report of the standing committee on Finance on the Financial Sector Regulation Bill [B34 – 2015], dated 30 November 2016.

Section 239 of the FSR Act further outlines the administrative aspects in relation to submission of the proposed budget, fees and levies for approval by the minister. The minister is further required to approve the proposed fees and levies for all the financial bodies in the first financial year after the FSR Act comes into effect, however annually for the Tribunal.[93]

Section 246 (1)[94] of the FSR Act allows for the collection of fees by a financial sector body and those fees to be deposited into that financial sector body's bank account. However, section 246 (2)[95] of the FSR Act states that levies will be collected by the FSCA and then per section 246 (3)[96] the FSCA will allocate the levies to the relevant financial sector body with consultation with the FSCA. The National Treasury will need to approve the bank account which the FSCA transfers the funds to.[97]

The above analysis indicates that the levies to be imposed by the financial sector bodies in the Twin Peaks system are raised with the purpose of raising revenue to be used to fund the operation of the administrative body. They are not being raised for a specific function which is catered for by the raising of fees. The levies are thus taxes within the ambit of the Shuttelworth judgement. Levies are taxes is also the finding within a broader context, of Taylor, 'a levy is a temporary tax collected by federal, state or local governments and used for a stated public purpose'. 'Federal, state and local level governments can impose both taxes and levies by enacting appropriate legislation'. It then follows, that in relation to the Twin Peaks authorities, a similar approach is applied. Therefore, the relevant constitutional requirements with regard to taxes need to be met in order for the levies to be legally valid and enforceable. Chapter 4 will look at the relevant legal procedures and requirements.[98]

[93] Section 239 of the FSR Act 2017

[94] Section 246 (1) of the FSR Act 2017 indicates that the financial sector body must collect fees and interest which has been imposed by the financial sector body. The fees and interest must be deposited into an account under the name and controlled by that financial sector body. The account must be for the purpose of collecting fees and interest.

[95] Section 246 (2) of the FSR Act 2017 indicates that Financial Sector Conduct Authority must collect levies and interest which has been imposed by a financial sector body. The levies and interest must be deposited into an account under the name and controlled by the Financial Sector Conduct Authority. The account must be for the purpose of collecting levies and interest.

[96] Section 246 (3) of the FSR Act 2017 indicates that the Financial Sector Conduct Authority must transfer the allocation of each financial sector body's chosen account and the transfer will be in line with an agreed upon payment schedule.

[97] Section 246 (4) states that The designated bank accounts referred to in subsections (1) to (3) must be approved by the National Treasury.

[98] Taylor, M., 2012, Is it a levy, or is it a tax, or both? *Revenue Law Journal,* 22(1), 188-200.

Chapter 4. If levies imposed by administrative bodies are taxes, then what?

When the requirement for a tax has been met, the appropriate legal procedures need to be followed in order to ensure that the fees and levies are legally valid taxes. Constitutional validity is the basis for ensuring that all legal aspects are covered. The section below will apply the relevant constitutional requirements in relation to the fees and levies to be legally binding taxes, which include the following:

- Money Bills
- Appropriation of taxes

Chapter 4.1. Constitution of the Republic of South Africa and the Money Bill

The Standing Committee, National Treasury and ultimately Parliament accepted that the levies are taxes and required a Money Bill. This has subsequently been drafted. The question of appropriation was not considered and hence no steps have at this point of time been taken for parliament to appropriate the expenditure raised in terms of the levy.

In order for a levy or a tax to qualify as constitutionally valid tax, it needs to comply with section 77 read with section 75 of the Republic of South Africa constitution.

No	Criteria	Application
1	***'Section 77 of the Constitution of RSA.***	
	(1) A Bill is a money Bill if it—	
	a) appropriates money;'	No appropriation of funds taking place through charging of funds.
	b) 'imposes national taxes, levies, duties or surcharges;'	The Twin Peaks authorities will be imposing levies.
	c) 'abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or'	No abolishment or reduction of funds taking place.
	d) 'authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214[99] authorising direct charges.'	No direct charges against the National Revenue Fund are being made by the imposition of levies.
	'(2) A money Bill may not deal with any other matter except'—	
	a) the imposition, abolition or reduction of national taxes, levies, duties or surcharges	Addressed by subsection 1 above

[99] Section 214 of the constitution falls under Chapter 13 of the Constitution which focuses on the General Financial Matters. Section 214 specifically focuses on the equitable share and allocations or revenue among the three spheres of government – i.e. National, provincial and local. Section 214 further gives rise to the Division of Revenue Bill, which provides a detailed breakdown of how the funds are allocated to each sphere of government and the different programmes that will be covered.

	b) the granting of exemption from national taxes, levies, duties or surcharges; or	Addressed by subsection 1 above
	c) the authorisation of direct charges against the National Revenue Fund.	Addressed by subsection 1 above
	'(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.'	A test for section 75 of the constitution follows. Subsequent to this, a valid money Bill need to be put in place in order for the levies to be imposed to be considered a valid constitutional tax.
	Section 75 of the Constitution of RSA.	
	'(1) When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74[100] or 76[101] applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:'	
	(a) 'The Council must— i) pass the Bill; ii) pass the Bill subject to amendments proposed by it; or iii) reject the Bill.'	This may mean inclusion in the Customs and Excise Duties Act. Without the passing the test of the council the Money Bill referred to above may be invalid if not correctly passed through the National Council of Provinces.
	(b) 'If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.'	The relevant signatures will be required for valid approval.
	Money Bill	
	Parliamentary committees for consideration of money Bills	
	Section '4 (2) A committee on finance has the powers and functions conferred to it by the Constitution, legislation, the standing rules or a resolution of a House, including considering and reporting on:'	The committee is formed in compliance with section 75 of the Constitution, in order to propose the relevant money Bill.
	(b) 'amendments to the fiscal framework, revised fiscal framework and revenue proposals and Bills;'	The committee on finance will need to report the new levies to the National Assembly and National Council of Provinces.

[100] Section 74 of the Constitution refers to Bills amending the Constitution, stating the minimum requirements for the amendments.
[101] Section 76 of the Constitution deals with Ordinary Bills affecting provinces.

	Section '4(4) A committee on appropriations has the powers and functions conferred to it by the Constitution, legislation, the standing rules or a resolution of a House, including considering and reporting on—'	
	'(a) spending issues;'	The committee on appropriations will need the financial sector bodies to report on how the levies collected have been spent accordingly.
	'(d)reports on actual expenditure published by the National Treasury; and'	The actual expenditure of the FSCA, as an institution that falls under the National Treasury, will need to be reported on to parliament.
	Passing other Money Bills	
	Section '13(2) The standing rules must provide that a Committee on Appropriations considering a money Bill in terms of this section, must—'	
	a) conduct public hearings on the Bill; and	Sufficient feedback must be obtained prior to the passing the bill on charging fees and imposing levies.
	b) report on the Bill to the relevant House.	Subsequent to the public hearings a report to the NCOP must be performed.
	Section '13(3) If a Committee on Appropriations propose amendments to a money Bill referred to in this section, the Minister must be given at least 14 days to respond to such proposed amendments before the committee reports to the House.'	The FSCA may not proceed with imposition without the valid response by the minister. The minister will also need to follow the appropriate processes in order for approval to be valid, prior to the recommendation to the president.

Chapter 4.2. Appropriation of taxes

It is not sufficient that a tax be raised in terms of a Money Bill, the expenditure must also be appropriated by parliament.

Appropriation Bill

The next step to be followed is the appropriation of the taxes through the Appropriation Bill. This is an annual activity as the appropriation Bill is updated on annual basis. The objectives of the Appropriation Bill are as follows:

> 'To appropriate money from the National Revenue Fund for the requirements of the State for the 2017/18 financial year;
> To prescribe conditions for the spending of funds withdrawn for the 2018/19 financial year before the commencement of the Appropriation Act for the 2018/19 financial year; and
> To provide for matters incidental thereto.'

No.	Criteria	Application
	Appropriation Bill: Appropriation of money for requirements of State	
	Section '2(3) The spending of funds withdrawn from the National Revenue Fund before this Act takes effect, as envisaged in section 29(1) of the Public Finance Management Act, is subject to section 7 of the Appropriation Act, 2016 (Act No. 6 of 2016).'	The National Treasury will need to report to parliament on the total of fees and levies collected and how they have been spent or allocated to other purposes of government.
	Use of unspent funds	
	Section '5(1) Despite section 3 of this Act and section 43 of the Public Finance Management Act, the Minister may, for purposes of service delivery, approve that unspent funds in an amount appropriated in the Schedule to this Act for—'	
	a) 'compensation of employees, be used within the same vote for transfers and subsidies for the payment of severance or exit packages;'	If the fees and levies have not been used for their intended purposes, they may be

		reallocated upon approval by the minister.
	b) 'transfers and subsidies to other institutions, be used elsewhere within the same main division; or'	As above.
	c) 'payments for capital assets, be used elsewhere within the same vote.'	As above.
	Section '5(2) The Minister may not approve the use of unspent funds in terms of subsection (1)(b) or (c) for compensation of employees.'	As above.
	Section '5(3) The approval of the use of unspent funds in terms of subsection (1) must be disclosed in the National Treasury's next quarterly report to the relevant Parliamentary Committees.'	Frequent reporting and oversight over expenditure very important.

In Australia, the ASIC does not charge fees or impose levies, however in South Africa, the FSCA is will continue in the same path as the FSB and continue to charge fees and impose levies. Therefore the FSCA will need to comply with the constitutional requirements.

The Australian PRA appropriates a certain portion of the fees and levies to the government. Part 5 of the Australian Prudential Regulation Authority Act 1998 deals with Financial and taxation matters. Section 50 of APRA Act 1998 gives the Minister the discretion to determine the portion of the levies collected in a particular financial year that will be allocated to various aspects, i.e. to cover Commonwealth Costs in relation to administering the APRA and credited to the APRA Special Appropriation account. The Special Appropriation Account is mainly to cover the levies payable to the APRA for its operations. The Special Appropriation Account is allocated to the financial bodies overseeing the following entities: 1. Superannuation funds 2. Authorised deposit-taking institutions 3. Life insurers and friendly societies 4. General insurers 5. Private Health Insurers.[102]

[102] Note 6.1 to the Notes to the Financial Statements for the year ended 30 June 2017 of the APRA provides a detailed breakdown of the Special Appropriation Account. The following key items are covered: 1. Summary of APRA levy funding 2. Net current year levies and penalties by levy type 3. Amounts retained in the Consolidated Revenue Fund by levy type or returned to industry 4. Amounts of levy payable to APRA under the APRA Special Appropriation by levy type.

The South African Prudential Regulatory Authority will be housed under the SARB, it is not clear whether funds will be allocated to a special account within the SARB or the Prudential Regulatory Authority will have its own independence, nonetheless the minister should have access to all the accounts of the Prudential Authority and through the parliamentary structures in terms of the Appropriation Bill have the authority in terms of how the funds will be appropriated.

Chapter 5. Conclusion

The Constitution of the Republic of South Africa is considered to be one of the best in the world. The number and reach of administrative bodies have increased in recent years which has not received adequate consideration from taxation position. This research is start in this direction. It is not claimed that this has been exhaustively expounded. Indeed it is suggested that it is merely the beginning of what can prove to be an interesting and useful area of research. South African administrative bodies enjoy the power to comply with a constitution that allows for fair representation of all who reside in the Republic.[103] The power to constitutionally determine fees that can be charged and levies that can be imposed shows that these administrative bodies have significant authority over performance of the executive powers delegated to them. The proposals for these fees and levies are seldom fully rejected, as justifications as to what they will be funding are legally requested. However, it is important that this perceived autonomy does not compromise accountability to parliament.

In relation to the newly established Twin Peaks regulatory authorities, the view of the Standing Committee that levies constitute taxes appears to be correct. The two new administrative bodies make it clear that proper treatment of levies raised by administrative bodies and control of the expenditure is essential for proper accountability of public funds. South Africa is currently facing unprecedented allegations of state capture – the miss appropriation of public funds. South Africa can ill-afford repeat amongst the ever increasing administrative bodies which are being formed.

Possible future research area

An assessment of the economic impact of taxes imposed by administrative bodies on different LSM's in South Africa.

The contribution of earmarked taxes in relation to service delivery performance in South African Metropolitan Municipalities.

[103] With reference to the preamble of The Constitution of The Republic of South Africa, 1996.

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