

https://dspace.org/

Should South Africa regulate the private funding of political parties?

Feltham, Luke

2016-03-01
http://hdl.handle.net/10539/19857

Downloaded from a DSpace repository. https://dspace.org/

Should South Africa regulate the private funding of political parties?

Luke Feltham
476996
27 March 2015

A research report submitted to the School of Social Sciences, Faculty of Humanities of the University of the Witwatersrand in partial fulfilment of the requirements for the degree of Master of Arts in Political Studies

Research Supervisor: Dr. Julian Brown

Abstract

"South Africa's democracy is faced with a clear and immediate threat". In a nutshell this is the narrative developed and adopted by countless activists and political commentators who believe that to move forward as a nation legislation regulating private funding of political parties must be introduced. The key objective is transparency – without it the fear is that donors will essentially be able to buy influence within the government. The constant insinuations and reports of adverse donor influences have not done anything to allay these fears. This research paper will examine the legitimacy of these claims. Is it indeed imperative that we regulate private funding? If we are to determine whether there is a need to adjust South African law to safeguard the democratic values that the nation has held dear for over 20 years, then we must answer a set of subsidiary questions, such as what alternatives do we have? Is transparency really a goal that should be fought to achieve? To what extent to South Africa's political parties rely on funding from private sources? To answer these questions this research paper will develop a thorough understanding of the financial and the political climate political parties find themselves in and ultimately determine whether the country's democracy is faced with a legitimate threat and if so what can be done to avert it.

Declaration

A thesis submitted in partial fulfilment of the requirements for the degree of Master of Arts at the University of the Witwatersrand, Department of Political Studies, I declare that this is my own unaided work. It is being submitted for the requirements of the Degree of Master of Arts in Political Studies, at the University of the Witwatersrand, Johannesburg. It has not been submitted for any degree or examination at any other university.

.....

Luke Feltham

Student Number: 476996

Johannesburg, 27 March 2015

Acknowledgements

First I would like to thank my supervisor, Dr. Julian Brown. Your guidance and dedication were invaluable while your patience in the face of my tendency to flirt with deadlines was remarkably unwavering.

I would not be here if it wasn't for my mother, father and step-father – Deirdre Berkovic, Graeme Feltham and Vjeko Berkovic. Thank you all for not only investing heavily in me financially but also providing an ever-present rock-solid pillar of support. And rest assured the many hours spent proofreading my work over the years has not gone unappreciated.

I have been extremely fortunate to have had Reneiloe Sekese accompany me along most of my university journey. Thank you for always being at my side when I needed it most and for giving me the courage to persevere.

Much thanks to Jeremy Afrika, your constant encouragement has been invaluable to me and your willingness to help in any way you can has been much appreciated.

Lastly, thank you to all my friends and university colleagues who have been there along the way and who never shy away from sparking a stimulating debate.

Contents

Introduction 5

1. Chapter One 9

1.1. Literature Review 9

1.1.1. Scholarly Literature on Party Funding in South Africa and Comparatively 9

1.1.2. Popular media discussions of Party Funding in South Africa 15

1.2. Research Methods 17

1.2.1. Secondary source analysis: 17

1.2.2. Popular media analysis: 17

1.2.3. Legal Judgments analysis: 18

2. Chapter Two 19

2.1. Public Funding 19

2.2. Private Funding 25

2.3. History 26

3. Chapter Three 32

4. Chapter Four 39

4.1. Brett Kebble 41

4.2. Sol Kerzner 44

4.3. Schabir Shaik and the arms deal 47

4.4. Chancellor House 50

5. Conclusion 55

6. Bibliography: 63

6.1. Court References: 66

6.2. Legislation 66

6.3. Reports 66

Introduction

On 16 July, 2014, the My Vote Counts organisation launched an application in the Constitutional Court demanding that Parliament establish legislation requiring political parties to disclose their private funders.[1] While this individual case may not succeed, it is symptomatic of a growing concern in South Africa. Party funding is an area in which many unanswered questions lie, such as how much do political parties receive from private sources? What do these donors expect in return? And, does this have a negative effect on our democracy? It is these questions, and others, that this research hopes to answer.

Undoubtedly, this is an issue not to be taken lightly. The evidence that will be presented in this paper suggests millions are spent by business on political parties each year but we do not know what incentive they have to do so. Theoretically, a corporation can buy favourable policies and the electorate would be none the wiser. Currently, no one can confidently explain the exact implications of the lack of legislation forcing parties to reveal their donors. The objective of this paper is to discover what these implications are. This will be done by examining the literature on the matter – both academic and from the media – and looking into cases of suspected donor influence.

The issues raised in these examples highlight what is a vital distinction to make – the different characteristics and values between public and private funding in South African politics. There are two types of party funding: the proportional amount received by all parties who have at least one seat in Parliament, otherwise known as public funding, and the funds parties may receive from private entities – both individuals and organisations. This

[1] O. Mooki, "Judgment reserved in party funding case", *http://www.iol.co.za/news/crime-courts/judgment-reserved-in-party-funding-case-1.1816554*, (2015), Accessed on February 14, 2015.

research is concerned with the latter. South Africa does not possess a stringent set of laws and regulations intended to restrict, regulate and prohibit funding from private entities. In addition, a 2005 court ruling found that political parties are private, not public, bodies and, therefore, are under no obligation to disclose their funders.[2] This has contributed to a political status quo in which party funding is essentially unregulated.

The issue of the private funding of political parties has been the source of controversy in many other countries. In the United Kingdom, for instance, in the past 15 years, there has been much debate over the issue. Currently, the country's legislation states that donations over £5 000 must be declared. Similarly, In the United States of America (US), over a similar time period, there has also been much political tension regarding the issue. The legislation of the US has had constant amendments through this time. At this moment, donors are restricted by how much they can give to any given election candidate but are not prevented from donating to multiple candidates.

The general lack of regulation in South Africa inevitably creates a subsidiary research project: namely an attempt to understand the legal premise on which such legislation could be founded, and why such a premise has not been adopted. It is in this context that the "potential consequences" of the current situation can be assessed. The aim is to look at the aforementioned absence of legislation and consider whether it provides scope for unethical, unlawful or undemocratic transactions to take place. In current political discourse there are various questions hanging over party funding, including; what do donors expect in return for their injection of funds? The research paper will explore how many of these questions shape public political concerns in contemporary South Africa.

[2] Institute for Democracy in South Africa and Others v African National Congress and Others (9828/03) [2005] ZAWCHC 30; 2005 (5) SA 39 (C) [2005] 3 All SA 45 (C) (20 April 2005).

This research paper will develop the argument through four chapters and a final conclusion. Chapter One will explain and discuss the technical and procedural side of this paper. As with any extensive research work a significant amount of literature was pored over to be able to provide an accurate and objective perspective. Naturally, this requires a literature review to serve as an exposition and evaluation of the work that has covered the topic of party funding prior to this paper. This will be accompanied by an explanation of the research methodology employed by this paper.

Chapter Two will provide the foundation on which the rest of the research paper is built. It will provide the vital context and definitional distinctions needed. Specifically, an explanation of the difference between public and private funding will be given. This will require a thorough investigation into the relevant legislation. Private funding, however, is not mentioned at length in any South African legislation and is effectively unregulated. This reality has been a point of consternation for many in the political sphere to the extent that civil society organisations have taken the matter to court on two different occasions. This chapter will recount what has occurred in court and outline the main arguments of each case (the second of which was still under way at the time this research was completed). It is here that the research paper will begin to touch on what is a recurring theme in the legal discourse; the classification of political parties as private entities – not public ones. As this paper will explore, this distinction has massive ramifications from a legal – and political – standpoint.

This paper will contend that the South African discourse on the private funding of political parties is insufficient. What is meant by this is that in various ways the debate can be strengthened and, ultimately, be of more benefit in the country's democratic environment.

Chapter Three will thus focus on the public and scholarly discourses around the funding of political parties. It will be argued that too often the approach to this contentious issue is one-sided and one-dimensional. It is one-sided in the sense that the vast majority of commentators on the matter adopt the same viewpoint; the current private funding procedures are undemocratic and a fully transparent system of donations must be established. What makes this problematic is that too few thinkers and activists are engaging with the issue from the other perspective; they do not consider the potential ramifications of complete transparency. In this chapter, I will advance the argument that there is certainly scope for multi-dimensional and more complete pieces to be written on party funding.

Chapter Four will address the crux of this research paper's investigation: the analysis of cases. In South Africa there have been numerous cases, or alleged cases, over the last 20 years and so there is an abundance of material to examine. The cases in this research paper were chosen to cover a wide variety of issues pertaining to this subject matter. For instance, not all the cases discussed directly involve the private funding of political parties, but they do help establish an overall perspective on what is indeed a very complex issue. It is by evaluating the cases presented that we will be able to answer the question: What are the potential consequences of South Africa's current legislation on political party funding?

Chapter One

Literature Review

Like any extensive work this research paper will draw on multiple secondary sources. Fortunately, there have been several scholarly and popular discussions on the issue of party in the South African context. Discussions on the issue have taken up various forms: academic scholars have often expressed their concern regarding funding legislation while the popular media has not shied away from printing damning allegations related to this topic. This research paper will draw extensively on both mediums. In the following pages I will first consider the scholarly literature and then popular discourse insofar as it is relevant to this project. This will be followed by a consideration of the methods I have adopted, and the potential ethical considerations that have shaped the writing of this research report.

Scholarly Literature on Party Funding in South Africa and Comparatively

Regarding academic literature, there is one primary text that serves as the fulcrum of the paper's initial research: Anthony Butler's *Paying for Politics*[3]. This book is the most comprehensive work on the political party funding issue in South Africa to date. Butler is the editor of the work (supplying the introduction and conclusion) but it is in fact a collection of various essays. In it, the South African experience is examined in the context of the "Global South" – nations looked at include Brazil, Malaysia, and Botswana. The reason southern nations are chosen, as opposed to Western ones is explained in the introduction: these are

[3] A. Butler, *Paying for Politics*, Johannesburg: Jacana Media, (2010).

developing countries, just like South Africa. Therefore, as Butler argues[4], there is more that can be gleaned from conducting a comparative study between these so-called third-world nations because their experiences and challenges are likely to resemble a sense of similarity.

In the introduction, Butler acknowledges that each country is entirely unique in most of it aspects, but nonetheless he feels that a developing country is more likely to closely mirrored by another developing as opposed to a developed one. This contributes to what can be described as the overall motif for the first half of the book: lessons to be learned for South Africa. As mentioned various cases are looked at by the different authors, with the overall intention being to acknowledge the pitfalls that others may have stumbled into and presumably avoid them, or possibly even learn from the successes of others. A typical example of this is Kenneth Greene's essay "Party finance and single-party dominance in Mexico and beyond"[5]. As the title suggests, Greene extrapolates on the idea that party finance is an inextricable component of the perpetuation of single-party dominance within a democracy. His main focus is Mexico but he does discuss how the situation has similarities in South Africa and Botswana, hence, Mexico serves as a lesson. Greene points out that at the time of writing there have been only 17[6] democratic dominant party systems. The criteria for this classification is persistent dominance at the polls while not suppressing other parties or engineering election fraud. Both South Africa and Mexico have experienced dominant party systems and therefore any significant troubles which the latter has endured will serve as particularly poignant warnings to the former.

[4] Ibid, p7.
[5] KF. Greene, "Party finance and single-party dominance in Mexico and beyond", p. 20 in A. Butler, *Paying for Politics*, Johannesburg: Jacana Media, (2010).
[6] Ibid.

It appears the book adopts a split composition. The first half, as has been discussed, is a collection of essays focussed on various developing countries, while the second half comprises essays that specifically discuss political party funding in South Africa. Because the research paper focuses on the South African context, the latter will naturally be our main concern. The essays on South Africa in *Paying for Politics* often take a similar structure to one another. Most of them generally begin the same way; explaining the context for the discussion. This includes talking about the current legislation in place and the history of attempts to challenge said legislation. Following this, is typically a discussion on the potential implications which current party funding practices might have on democracy. The logical follow-on from this is to provide suggestions as to how to improve the political system with regards to this issue. What all the writers have in common is their shared belief that party funding processes are, at the moment, far from perfect. This is perhaps indicative of the distrust scholars and sections of the general public have for the motives of those who bankroll parties.

The structure of Butler's book does invite certain criticisms, however. The first is that there is a lot of overlap of information. The individual essays are standalones, as opposed to representing pieces of a larger puzzle. After the first half of the book, in which each chapter covers a different country, the essays begin to echo one another. After reading the first – Steven Friedman's "Government buy the people? Democracy and the private funding of politics in South Africa" – one is unlikely to be overwhelmed by new information in the following sections. This not to claim they are identical – each offers unique areas of focus, for instance Sam Sole provides a more in-depth discussion on the possible examples of

dubious private funding than the other authors. Nonetheless, there is a sense of familiarity present in each contribution.

All of the authors in *Paying for Politics* appear to be approaching the subject matter from a practical basis. In other words they are concerned with current situations and potential solutions to what they perceive as issues. Their approach is on a case by case basis – comprised of discussions on what the realities are in South Africa, Malaysia, *et alia*. As a result of this focus the work is arguably lacking a general theoretical perspective. What is meant by this is that the authors take a primarily empirical approach as opposed to thinking about the issue in more abstract terms. This leaves room for debate on the theoretical aspects of political party funding. For instance, does private funding contribute to the value of the modern concept of democracy? Or is it a hindrance? In terms of public funding, should taxpayers forcibly contribute funds to all parliamentary elected political parties? These are just some of the theoretical issues which arguably the authors here do not engage with sufficiently.

With this in mind, Butler's book is perhaps the most comprehensive work that there is on the South African context. However, there are various angles and aspects which it does not tackle and which subsequently provide directions for this dissertation to explore. Firstly, there is the scope that remains to have a thorough theoretical discussion on the consequences of unrestricted private funding. This leaves considerable scope to explore the theoretical angle of this subject. The goal here is to begin a discussion on how current legislation may provide an opportunity for the integrity of democracy to be compromised.

In addition, Butler's book centres around the "Global South", i.e. developing countries. While this may be useful, there are certainly valuable lessons to be learnt from developed

countries as well. Often, these are democracies which have debated the political party funding issue extensively and, in response, implemented particular regulations or restrictions. It could certainly be beneficial to examine the legislation in these countries and determine whether parts of it might be viable for the South African context. In the general literature as well, there appears to very little in the way of comparative studies between South Africa and a developed country in the context of political party funding regimes.

Arguably, the biggest omission in *Paying for Politics*, and something which appears to not be extensively discussed elsewhere, is the question of whether or not political parties should be considered private entities.

This question is derived from perhaps the most significant attempt to alter current legislation on political party funding – the Institute for Democracy in Africa's (IDASA's) effort in 2005[7]. IDASA called for a court order to require parties to disclose donations of R50 000 and above along with the donors. The case was aimed specifically at the African National Congress (ANC), Democratic Alliance (DA), the Inkatha Freedom Party (IFP) and the former New National Party. The High Court application cited the Promotion of Access to Information Act (No. 2 of 2000) and insisted it was unconstitutional for funding details not to be disclosed. The parties opposed this order, insisting that transparency would cost them funding. In their defence, the political parties all adopted a similar stance in insisting that they were private bodies – as opposed to public bodies – and therefore had no obligation of disclosure.

[7] Institute for Democracy in South Africa and Others v African National Congress and Others (9828/03) [2005] ZAWCHC 30; 2005 (5) SA 39 (C) [2005] 3 All SA 45 (C) (20 April 2005).

Ultimately, Judge Benjamin Griesel concurred with the political parties that they were private entities in terms of the Act. However, he was adamant that that not necessarily be the end of the story. He stated:

> *"This conclusion does not mean that political parties should not, as a matter of principle, be compelled to disclose details of private donations made to their coffers. It merely means the political parties are not obliged to disclose such records… private donations ought to be regulated by way of specific legislation in the interest of greater openness and transparency."*[8]

It is clear that political parties being considered private bodies in the eyes of the Information Act has huge ramifications in terms of legislation.

Therefore, the research paper will provide a discussion on the court's ruling and the possibility of political parties being considered public entities in this sense. In doing so, I will draw upon other works that engage with the legal status of party funding regimes. An example of such a work is Shannon Bosch's essay "IDASA v ANC – An opportunity lost for truly promoting access to information"[9]. In this paper the writer (who is a senior law lecturer) discusses the aforementioned attempt to get the major political parties to disclose their funders. She discusses the intricacies of the court case, the implications of the judgment as well as the conception of political parties as public bodies. This in-depth perspective of the law is essential for the research paper.

[8] Institute for Democracy in South Africa and Others v African National Congress and Others (9828/03) [2005] ZAWCHC 30; 2005 (5) SA 39 (C) [2005] 3 All SA 45 (C) (20 April 2005).
[9] S. Bosch, "IDASA v ANC – An opportunity lost for truly promoting access to information", in *South African Law Journal*, Vol. 123, Issue 4 (2006), pp. 615-626.

Popular media discussions of Party Funding in South Africa

Apart from academic writing, another resource which will be used extensively is the popular media. This is mainly comprised of newspapers and online articles. The issue of political party funding has featured prominently in the headlines of the media, especially during the last decade in particular, and as such there is no shortage of information. The main difference between the media and academic writing as a source is that the former is more sensationalist and more interested in exposing the players rather than questioning the rules of the game. Regardless, it most certainly has its uses. Using the media, the research paper will be able to draw on real-world examples when discussing the consequences of political party funding legislation. As mentioned earlier, it will be useful to discuss, hypothetically, how a current lack of regulations and restrictions could be exploited. The research paper will use the cases discussed, or "exposed", in the media and hypothetically determine what negative outcomes might arrive from the situation in question.

For instance, it was the media that reported on the interesting DA-AgangSA merger case. The two parties briefly merged together in January 2014, in the run-up to the national elections of that year, before the latter withdrew. It was widely suggested, and reportedly stated by Helen Zille, the leader of the Democratic Alliance, at the time that it was multiple donors that put pressure on the two parties two merge[10]. The media provided a platform in which the issue was extensively discussed and debated.

There have also been widespread suggestions that business has previously exerted influence on politics while seemingly also receiving a myriad benefits from certain relationships. An example of one of the exposés reported include the case of alleged tender fraud involving

[10] S. Aboobaker, "Exposed: DA-Agang mystery funder", *http://www.iol.co.za/news/politics/exposed-da-agang-mystery-funder-1.1644076#.U9mhsPmSzux*, (2014), accessed on 30 July, 2014.

the Sekunjalo consortium[11]. It was the *Cape Times* that reported on the strangeness of the business being awarded a fishing tender by the Department of Forestry and Fisheries despite its lack of experience in the sector. The exposé raised questions about the potential benefits a suspected ANC funder may receive.

It is in these cases that we see the value of drawing upon media sources. News and investigative articles provide the public with information they otherwise would not have been privy to. This research paper has drawn heavily upon media sources, however, the sources cited and drawn upon were not done so at random. Rather within any section I searched thoroughly for all the relevant sources/articles I could find. However, considering the amount of dubious articles that get published, I only used ones that thoroughly back up their arguments/accusations/revelations with evidence – for instance in the form of released document and on-the-record statements. Also, the reputation of the media house is often a good barometer of the extent to which the given media source can be trusted to deliver accurate and truthful information. For instance, in terms of newspapers, automatically, more credence will be given to a *Sunday Times* article than a *New Age* story. Ultimately, however, every media source used in this research paper was scrutinised to ensure it could be legitimately used in this research paper.

[11] S. Sole, "Madonsela scents something rotten", *http://mg.co.za/article/2013-12-12-thuli-scents-something-rotten*, (2013), accessed on 30 July, 2014.

Research Methods

The research paper has utilised three primary research methods. These are the evaluation of scholarly writings, the engagement with the popular media and conduction of research into legal writings, judgments, and debates. Each method has significantly contributed to helping this paper form its overall perspective, and various arguments and suggestions.

Secondary source analysis:

I have embarked on a careful analysis of written works that have been published in books and political journals. It is through this medium that the research paper's theoretical framework has been established. There is a wealth of information on the concerned subject within scholarly writings and generally this is a good place to start to get a sense of the current debate surrounding party funding. Additionally, through extensive readings, one can establish the general leanings of the intelligentsia and assume whether or not there is a popular view on the matter or not. The major advantage of this research method is that sources are fairly easy to obtain; a plethora of books on the subject can be borrowed from the university's libraries while online journals such as JSTOR offer a seemingly endless well of information on any topic.

Popular media analysis:

The issue of political party funding has featured prominently in South African media over the last few years. Media articles differ from academic writings usually in their exposé aspect. While scholars will generally analyse the situation and its implications, the primary objective of the media is often to uncover possibly corrupt donor influences – or at least raise questions over a particular donor relationship. However, this is still useful to the research paper as its aim is to support the theoretical discussion with possible real-world

dangers to democracy. The media plays a key role in a democracy, ensuring that public figures are held accountable for their actions and it is no different with the party funding issue. As such this research method should be essential in any academic discussion on political party funding. There is a pitfall though: the sensationalist nature of the media means extra care must be taken to ensure any article used is from a reliable journalist and newspaper and sufficiently substantiates its claims. I have explained in the literature review the methods I used discern between reliable and unreliable sources. Most major newspapers keep an online catalogue of most of their published articles and so basically one can peruse through all articles on political party funding published in the last few years

Legal Judgments analysis:

A significant portion of the research will focus on the legal aspects of party funding. This includes the legislature surrounding it and the legal attempts to force funder disclosure. Therefore, it is necessary to critically engage with legal resources and attempt to form a robust understanding of this area of the law. This analysis of legal judgements has come primarily from law journals. An example of where I received sources from is *www.heinoline.org.* This is an online resource that provides access to all major law journals. Another resource I have taken advantage of is *www.saflii.org*. This website has records of all of South Africa's major court cases in the last 20 years and therefore has been used extensively in the sections in which I have discussed relevant court battles.

Chapter Two

The funding of political parties in South Africa can be separated into two categories – public and private. The latter is the focus of this paper and thus, naturally, will be covered in extensive detail. An examination of the former, however, is still imperative for the development of an overall context. This chapter will seek to not only distinguish between public and private funding but also provide a thorough explanation of each. Following this, the chapter will provide an account of the history of the attempts to legally force parties to disclose their funders. In addition, in this section the research paper will begin discuss the extremely significant classification of political parties as private entities.

Public Funding

All the legislation and relevant guidelines regarding public funding can be found in the Public Funding of Represented Political Parties Act, (No: 103 of 1997). The procedures and rules within the Act are what control the Represented Political Parties Fund – which is where eligible parties receive their funding allocations from.

To qualify for public funding in any given financial year a political party must have representation in either the National Assembly (Parliament) or a provincial legislature. Representation in municipal councils is not sufficient for parties to receive state funds in this respect.

According to the Act, the funding political parties receive from the Fund can be spent on "any purposes compatible with its functioning as a political party in a modern democracy"[12]. These include, but are not limited to, the following:

(i) the development of the political will of people;

(ii) bringing the political party's influence to bear on the shaping of public opinion;

(iii) inspiring and furthering political education;

(iv) promoting active participation by individual citizens in political life;

(v) exercising an influence on political trends; and

(vi) ensuring continuous, vital links between the people and organs of state.[13]

Hence, a beneficiary may spend the public funds they have been allocated at their discretion but within certain parameters. Put simply: The money must be spent in the realm of politics. Clearly the Act was drawn up with the intention of providing parties with funds that would, in essence, Improve the democratic value of society at large.

Naturally, the Act also lists what spending using public funding is prohibited. This list is also in keeping with the clear intention for the funding to remain in the political sphere, as opposed to being used in other party endeavours. The prohibitions are listed as follows:

Moneys allocated to a political party from the Fund may not be used-

[12] Public Funding of Represented Political Parties Act (No. 103 of 1997), Accessed from http://www.elections.org.za, p3.
[13] Ibid.

(a) for the purpose of directly or indirectly paying any remuneration, fee, reward, perquisite or other benefit to any person representing the party in the National Assembly, National Council of Provinces, any provincial legislature or any local authority, or who holds any other office of profit under the State, whether on the national, provincial or local sphere of government;

(b) with a view to financing or contributing to any matter, cause, event or occasion, whether directly or indirectly, in contravention of any code of ethics binding on the members of Parliament or of any provincial legislature, as the case may be;

(c) directly or indirectly for the purpose of establishing any business or acquiring or maintaining any right or financial interest whatsoever in any business, or in any immovable property, except where the right or interest in the immovable property is to be used by the party solely for ordinary party-political purposes; and

(d) for any other purpose that is incompatible with a political party's functioning in a modern democracy, as may be prescribed.[14]

[14] Ibid, p4.

It is clear from these extracts of the Public Funding of Represented Political Parties Act that a certain amount of accountability is expected from South Africa's political parties. We can surmise that public funding is intended to be spent within the public sector and not on private party matters. Evidently when political parties are elected to Parliament they implicitly agree to adhere to various codes, rules and regulations. Legislation like this Act is put in place to ensure that parties do not neglect or inadequately serve the electorate which put it in a position of power. The Represented Political Parties Fund is derived from the state's budget; therefore taxpayers have an expectation that all funds will be spent responsibly. This Act is designed to ensure that this expectation is upheld.

To ensure political parties respect the provisions and spending restrictions of the Act, Section 6 declares that they must account for all spending which used the public funds. To ensure that parties correctly and honestly account for all funds, an auditor will audit their books and all relevant records. This section enables the Auditor-General to step in at any time and conduct this audit. If it is found that a party has contravened any of the regulations set out by the Act, that party must repay the relevant amounts to the Electoral Commission of South Africa. It is then also liable to have a civil suit filed against it by the commission.

The size of the slice of the fund pie the political parties receive is determined on a proportional basis, with respect to the amount of seats held in the National Assembly. Thus, the party that holds the majority will be allocated the majority of funding. For instance, at the end of the financial year ending in March 2014, according to the Electoral Commission of South Africa's annual report on the Represented Political Parties Fund, a total of R103.3-million[15] was allocated to the 14 parties represented in the National Assembly. R69.2-million

[15] 2013/2014 Represented Political Parties' Fund Annual Report, Accessed from *www.elections.org.za*.

of this amount, which is 67 percent of it, went to the ANC while R16.4-million went to the DA. That means that the ANC and the DA combined received 82 percent of the public funding distributed to Parliament's representatives. The situation in the provincial legislature is different. The ANC, DA and the Congress of the People each received approximately R2.5-million. In total, only about R11.5-million was assigned to provincial legislature distribution. Therefore it is evident that the great majority of public funding is distributed at the national level and minimally through the provincial level.

This specific structure to public funding has drawn much criticism in the past. The contention is that democracy is potentially being hampered by this proportional distribution. Susan Booysen and Grant Masterson, for instance, argued that the funding structure allowed the ANC to entrench its power. The difference between what the ruling party and its opposition receive for its representation in Parliament is such a significant amount, the former will perpetually have the advantage in terms of securing future seats in Parliament. The process is circular and will likely continue to repeat itself. After being in power for 15 years the ANC has consolidated its position and "other political parties found it hard to compete"[16].

Because political parties in South Africa are classified as private entities (this concept will be discussed later in this chapter), the general public have no access to their books. One result of this is that it is difficult to estimate to what extent public funding is relied upon. Many commentators and analysts estimate that parties, particularly the larger ones, in fact receive more money from private funding than from public funding. The Electoral Institute for Sustainable Democracy in Africa, for instance, drawing upon Tom Lodge's and Ursula

[16] S. Booyson & G. Masterson, "Chapter 11: South Africa" in D. Kadima and S. Booysen (eds) *Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy*, Johannesburg: EISA, 2009, p415.

Scheideggar's research[17], state: "For all parties, party-owned business interests, membership fees and funds raised by branches represent only a small proportion of total funds. Smaller parties are highly dependent on public funding while larger parties obtain the bulk of their funding from donations from the private sector and foreign governments and companies."[18]

Even if it were indeed true that the larger parties receive the majority of their funding from private funding, evidently it would be erroneous to underestimate the significance of public funding. A recent case highlights the extent to which a shift in public funding amounts can impact on the financial situation of a party. In October 2014 the *Mail & Guardian* reported that the ANC was essentially insolvent. Initially the information that was fed to the newspaper came via undisclosed insiders; however, it was the corroboration by ANC Secretary General Gwede Mantashe that was of particular interest. He confirmed that the party was indeed experiencing financial difficulties. The reason he provided was that in the general elections of that year, the ruling party performed worse than previously and lost 16 seats in the National Assembly. The consequence of this loss of seats, Mantashe said, was that the party received R20-million[19] less from public funding than the previous year – a relatively large amount. He admitted to the disgruntlement of some ANC employees outside of Parliament who did not get the salary raises they desired, and revealed that he attempted to calm them down: "We said to them: 'Comrades, please bear with us … the

[17] T. Lodge & U. Scheideggar, "South Africa: Country Report based on Research and Dialogue with Political Parties", International IDEA/EISA, Accessed from *http://www.idea.int/parties/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=15063*.
[18] Electoral Institute for Sustainable Democracy in Africa, "South Africa: Political party funding", *http://www.content.eisa.org.za/old-page/south-africa-political-party-funding*, (2011), Accessed on December 12, 2014.
[19] Q. Hunter & M. Letsoalo, "The ANC is broke", *http://mg.co.za/article/2014-10-30-broke-anc-may-have-to-cut-jobs-for-comrades*, (2014) Accessed on November 14, 2014.

ship is tight.'"[20] If Mantashe's claims are true, then it certainly speaks for the significance of public funding – by virtue of the assertion that a loss of a significant portion of that funding can cause significant financial issues. On the other hand, we do know that private funding is very important to South Africa's parties. So, because we cannot be sure if political parties receive more from either type of funding, it would be safe to assume that, in general, political parties, both large and small, rely heavily on both private and public funding.

Private Funding

The private funding of political parties in South Africa takes two forms: direct, and indirect. Financial contributions given to parties are known as direct funding, while services rendered to political parties, such as office space lent or volunteer work, is known as indirect funding. The latter is essentially composed of contributions that are made which are not a direct exchange of resources, i.e. a direct contribution to a particular party's coffers. For instance, paying for an advertisement on behalf of a party, printing party pamphlets or loaning or giving any equipment for party purposes, are all examples of indirect funding[21]. With this in mind direct funding is self-explanatory; financial contributions paid straight to the accounts of parties. Essentially, any transaction that occurs in which money is received from an individual, organisation, business, foreign government or other entity is considered direct funding. This paper is primarily concerned with direct funding.

There is essentially little legislation regarding private funding. Public funding has an entire act dedicated to ensuring it is distributed correctly, yet private funding is barely mentioned

[20] Ibid.
[21] Electoral Commission of South Africa, "Party Funding", in Parties and Candidates, *http://www.elections.org.za/content/Parties/Party-funding/*, Accessed on December 5.

in South African law apart from the implication that it is permissible. There are no formal regulations in place on private funding. This means political donations have no limits in terms of size – one can donate as much as one likes to a political party. There is no forced disclosure, so donors can remain anonymous or reveal their identity as they see fit. Also, donors are free to do what can be termed "hedging their bets"; the practice of donating to more than one political party. In the Public Funding of Represented Political Parties Act, as well as the Electoral Act (No: 73 of 1998), there is no mention of private funding.

History

This paper will focus solely on the party funding structures post-1994, i.e. after South Africa transitioned from apartheid into democracy. While it is imperative that most South African discourse is conducted within the context of the country's extremely complex past, the contemporary party funding debate arguably does not need to be. Rather, the transition from the National Party to the democratically-elected ANC can be seen, to a certain extent, as a paradigm shift. Therefore, the concerns which the parties that ran in the exclusionary pre-1994 elections had to deal with, with regards to party financing, are entirely different from those faced by contemporary parties.

There have been two major previous attempts – in terms of legal action – to force parties to disclose the sources of their funding. The first was the Institute for Democracy in Africa's effort in 2005. IDASA called for a court order to require parties to disclose donations of R50 000 and above along with the identity of the donors. The case was aimed specifically at the ANC, DA, IFP and the former New National Party. The high court application cited the Promotion of Access to Information Act and insisted it was unconstitutional for funding details not to be disclosed. The parties opposed this order, insisting that transparency would

cost them funding. In their defence, the political parties all adopted a similar stance in insisting that they were private bodies – as opposed to public bodies – and therefore had no obligation of disclosure. Ultimately, Judge Benjamin Griesel concurred with the parties that they were private entities in terms of the Act. However, he was adamant that that not necessarily be the end of the story. He stated: "This conclusion does not mean that political parties should not, as a matter of principle, be compelled to disclose details of private donations made to their coffers. It merely means the political parties are not obliged to disclose such records… private donations ought to be regulated by way of specific legislation in the interest of greater openness and transparency."[22]

It is fair to say Judge Griesel intended that statement to have significant ramifications on policy formation going forward. He concluded that the authority to compel parties to disclose details of their funders did not lie with him, but rather, the issue was one that needed to be discussed in a relevant parliamentary mechanism. Hence he did not declare or insinuate that IDASA's attempt was unreasonable or extraneous. To the contrary, he did say, in the "interest of greater openness and transparency", that the current regulations should be revisited and likely changed. It was his explicit recommendation that his ruling not be the conclusion of the private funding debate. Rather, he instructed that it be discussed in the relevant structures of Parliament. Therefore, what we can conclude from Judge Griesel's ruling is that while he believed it was not within his power or within his mandate to alter these particular regulations, they were, nonetheless, problematic, and should be debated in the National Assembly.

[22] Judge Benjamin Griesel, Judgement delivered in Case No. 9828/03

During the trial, the ANC, for its part, declared that it would be prepared to revaluate its funding procedures and engage in discussions on making the entire process more transparent.[23] From an objective standpoint it would be fair to say that the party has not upheld its commitment, rather there has been little official attempt to revisit the issue. Part of the ire of many activists stems from this pledge that has remained unfulfilled. This apparent lack of initiative to change current policies does not belong to the ANC alone but to seemingly all parliamentary parties bar the Congress of the People and the United Democratic Movement[24]. From an outsider's perspective the majority in Parliament seem content with the current procedures and regulations. This perceived lack of action culminated in the second major legal challenge – almost 10 years after the conclusion to the first.

My Vote Counts is a campaign that was launched in 2012 aimed at improving the "accountability, transparency and inclusiveness of elections and politics in SA to give us all a stronger voice"[25]. They have two major demands; firstly, a revamp of the electoral system that will enable the public to directly elect Members of Parliament from their constituencies and secondly, party funding must become completely transparent – the campaign does not want a situation of "one rand, one vote"[26]. In 2014, the organisation began its attempt to bring about complete transparency. The Constitutional Court was approached with the intent of forcing the disclosure of political funders. The premise of the My Vote Counts' argument is that The Promotion of Access to Information (Act 2 of 2000) (PAIA) is insufficiently protecting the constitutional right it was created to guard (specifically Section

[23] Electoral Institute for Sustainable Democracy in Africa, 2011.
[24] A. Sokomani, "Party financing in democratic South Africa: harbinger of doom?", p170-187 in A. Butler, *Paying for Politics*, Johannesburg: Jacana Media, (2010), p173.
[25] Mooki, 2014.
[26] My Vote Counts, Website frontpage, *http://www.myvotecounts.org.za/.*

32 of the Constitution). PAIA states that its purpose is: "To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith."[27]

The lawyers of My Vote Counts are arguing that PAIA is unsatisfactory because it provides no obligations for political parties to disclose their funders or the particular amounts of moneys being exchanged. However, it is argued, information of this kind is essential if voters are to make objective and informed decisions when they go to the polls. The general public requires this information if they are going to be able to perform their democratic duty adequately. As lawyer for the organisation David Unterhalter put it, "the right to vote is at the heart of this matter". Simply put: South African citizens have the right to information that is relevant in the public domain, particularly if it may influence voters' decisions during elections; PAIA does not ensure financial records are disclosed; citizens have a right to all information which may influence who they vote for which financial records fall part of; therefore, PAIA does not comprehensively protect this particular constitutional right and must be altered. Unterhalter argues: "There's no obligation under PAIA to keep records. What we say is that PAIA has simply not regulated this issue. There's an absence of regulations on this matter. What we have in PAIA is a narrow case."[28]

The argument on behalf of Parliament attempted to disprove this reasoning by showing that the logic was circular. Representing Parliament, William Trengove stated: "The application is self-defeating because it is founded on the applicant's contention that access to information about the private funding of political parties is essential for the effective exercise of the

[27] The Promotion of Access to Information (Act 2 of 2000), Accessed from *http://www.dfa.gov.za/*, p1.
[28] Mooki, 2014.

right to vote. If this contention is correct, then PAIA already provides for public access to the information concerned." Following this Trengove tabled the same argument that was the kernel of the judgment in IDASA's failed court bid: that political parties are private entities and therefore are not obligated, nor is it beneficial to them, to disclose their funding process. Specifically he referenced Section 14 of the Constitution which declares that all private entities have a right to privacy – including privacy of correspondence. Trengove argued: "Political parties are private bodies who carry out public functions. When they receive funds, it is hard to say how that function can be public." [29] In addition to this he later insisted that a policy forcing the disclosure of all funds would be an exercise in futility because in many cases transactions between parties and their donors were done in private and on a personal level, therefore leaving no paper trail.

From the time of publication, the outcome of the trial has not yet been decided. Arguments have closed, however, and Chief Justice Mogoeng Mogoeng has reserved judgment. Obviously all political parties, activists and commentators will be watching the eventual outcome of the trial very keenly. It is difficult, however, to guess what the chief justice will decide. While IDASA failed in the courts before, this is a challenge from a different angle – the My Vote Counts campaigners explicitly believe that a constitutional right is being perpetually violated, and such a suggestion cannot be taken lightly.

What is clear is that the political funding debate, from a legal perspective, is hinging on one key distinction. Namely, parties being recognised as private entities as opposed to public ones. In both cases discussed here the defence's argument was built around the contention, or rather fact, that political parties are private. They, therefore, are protected

[29] Ibid.

constitutionally: they have the right to not disclose their inner finances against their will. What makes the latter court challenge particularly interesting is that a situation has been potentially set up in which two constitutional sections come into conflict. This will certainly be the case if it is found that the opaque reality of private funding does indeed contradict Section 32 of the Constitution. This is far from a certainty, however. The Constitutional Court will have to decide whether My Vote Counts's argument that the non-disclosure of party financials compromises the electorate's capacity to make an informed decision at the polls. If this is indeed what he concludes, then predictably, Parliament will have a long road ahead in resolving what would become a contradiction in the Constitution.

To conclude this chapter, political parties rely on both public and private funding. What is particularly interesting is the contrast in rules and regulations between the two. Public funding is entirely regulated, meaning every aspect from its distribution to its restrictions are legislated. Private funding meanwhile has no regulations – donors are free to give as much as they like, to as many political parties as they like. It is this legislative disparity that has seen the matter taken to court on two occasions. It has been from these court cases that it has become apparent that classifying political parties as private entities has major ramifications for – and has so far prevented – private funding regulations.

Chapter Three

South African discourse surrounding the private of funding of political parties has arguably been gradually increasing in prevalence since the turn of the millennium. The failed attempt by IDASA in 2005 to force transparency on parties, in particular, is seemingly the watershed moment in which the public, the media, political commentators and politicians began to stand up and recognise the importance of the issue.

The sheer numbers of op-eds and other pieces of analysis published after 2005, compared to before, add credence to this claim. Despite the volume of opinion in the public domain, it is debatable as to whether the discourse has been comprehensive enough – have the issues been expressed in enough detail? Is there a wide variety of opinions to draw upon? To what extent are implicit political perspectives influencing the dialogue? This chapter will seek to answer these, and other, questions in its analysis of the South African party funding discourse. This is essential so that this paper can contribute specifically to facets of the debate which have received a minimum amount of attention.

As with most subjects in South Africa, the issue of private political funding has been covered and discussed in a variety of sites. There is little doubt that the most used channel of discussion has been the media at large. The reason for this is simple: it is an extremely accessible avenue for one to broadcast an opinion that will be received by a substantial amount of people. Usually discussion on funding in the media comes in the form of opinion pieces published in newspapers or on political or news websites.[30] Additional there have been a variety of debates and discussions that have been broadcasted on television

[30] For instance on the Daily Maverick, see for example the Poplak and Davis articles in the bibliography.

channels such as eNCA and ANN7. An example of this is an episode of eNCA's regular show *Judge for Yourself* which dedicated an episode to the issue of party funding, featuring Adam Habib, Stefan Gilbert and Mzoxolo Mpolase as guests.[31]

As with most political issues the academic perspective must also be considered when examining the discourse as a whole. While this avenue has not been utilised as frequently as the media, there have still nonetheless been various opinions published aimed at a more academic audience. The most obvious being Anthony Butler's *Paying for Politics* which this research paper has discussed in detail. [32]

A third broad contributor to the overall discourse has been the courthouse. During the two attempts to change the relevant legislation – IDASA's in 2005 and the ongoing challenge by My Vote Counts – legal and ideological perspectives were inevitably discussed. Thus, we can consider the courts to have also been a major contributor to the discourse. Finally, there have also been various discussion forums, arranged by organisations such as the Right2Know Campaign, which have also sought to discuss the issue of party funding. It must be said that this is the most infrequent avenue through which the discourse flows.

When examining the relevant South African debates it becomes apparent that there is a consensus among most commentators that the current legislation regarding party funding is harmful to the values and integrity of democracy.[33] While the majority of those who engage in the debate are of this opinion, this excludes most politicians. In this instance it is probably safe to generalise and assume that most of those who have voiced their discontent about the current rules and regulations take up that position because of one core argument.

[31] *Judge for Yourself*, Season 11, Episode 10, eNCA, (2013).
[32] Butler, 2010.
[33] See, for example: S. Sole, "Money Politics in South Africa: from covert party funding to the problem of black economic empowerment", pp187-200 in A. Butler, Paying for Politics, Johannesburg: Jacana Media, (2010).

Essentially this argument is that with the current lack of funding transparency there is significant danger that any amount of nefarious or undemocratic dealings could occur.

To develop this: the implicit assumption is that political parties are constantly on the hunt for more funds. It is only natural, it is assumed, that wealthy individuals or businesses looking to invest millions into a party will expect something in return. If such reciprocation had to occur, which would of course be highly unethical not to mention illegal, it would be difficult to prove, or even come to suspect, without access to the necessary books which would enable one to draw the respective connection.[34] In a nutshell the trepidation evident in the South African discourse is the country's politicians are being controlled and influenced with the financial means to do so.

Essentially this is the narrative of the majority of the South African discourse. Most of what has been written on private party funding stands as a warning to the dangers of non-transparency. Articles, both academic journalistic, predominantly demand that democracy be protected through a change in regulations.[35] One erroneously gets a sense that there is a universal plea for all private funders to be disclosed. It is then at this juncture that we can begin to critique the contemporary discourse with which we are concerned. It is extremely repetitive. When poring over much of the written discussion, the reader may soon find it difficult to discover information or theoretical reasoning that is unknown to her. Specifically in the media, there are endless articles that are virtual carbon copies of one another – in the sense that their underlining argument and conclusion is the same. Even in the much shallower pool of academic sources it is difficult to find an opinion that is not borne from

[34] For instance see the Brett Kebble discussion in Chapter Four. Details of the reciprocation the mining magnate may have received for his donations only began to be revealed approximately five years after his death.

[35] An example of this is S. Bosch, "IDASA v ANC – An opportunity lost for truly promoting access to information", in *South African Law Journal*, Vol. 123, Issue 4 (2006), pp. 615-626.

the same sentiments as the others. For this reason we can assert that the South African debate is perhaps crying out for new perspectives and approaches.

When examined it becomes apparent that the discourse is not only repetitive but arguably over simplistic. It generally does not go in-depth often enough. We can observe a similar pattern that emerges in most discussion, particularly in the written media. The writer will identify the issue, i.e. that there is no legislation requiring the disclosure of party funds, and proceed to insist that this must be corrected – ideally with a policy of full disclosure.[36] What makes this discourse simplistic is the implicit assumptions that are made. Too often it is basically reasoned *a priori* that it will be beneficiary for political parties to auction off their influence to the highest bidder – therefore this is precisely what they do. This is not a deductively sound argument. Of course there are instances when practical arguments are cited or examined – particularly in investigative journalism – but too often this is not the case.[37] The second major assumption that is regularly made is that full disclosure would naturally be the best alternative to what is place at the moment. However, even though the full disclosure option is so heavily discussed, its limitations and negatives are rarely explored. This is a major issue considering that arguably - if full disclosure was implemented - there would be a new set of problematic issues that arise.

The live forums often fall into the same trap as the written opinions do, in that they tend to be ideologically one-sided. Of those attended, it was clear that the entire panel which presented was like-minded on the issue – providing the same repetitive argument often

[36] (Bosch, 2006) is again an example here.

[37] For example see V. Pillay, "Is an eccentric billionaire funding the EFF? We'll never know", *http://mg.co.za/article/2015-03-24-is-a-jewish-billionaire-funding-the-eff-well-never-know*, (2015), Accessed on March 25, 2015.

found in the media.[38] There was in effect no challenge to their reasoning either from an invited speaker or from the audience. Essentially such events typically become an exercise in preaching to the choir. However, one medium in which the discourse does appear to be approached from a more well-rounded perspective is the verbal debates and discussions that have taken place on television – particularly the news channels. This is likely because those invited to partake are of a high profile and often of a high calibre. Naturally, the arguments presented are evidently more thought out than their average counterparts in the written media. Politicians are often invited to engage with the guest political commentators and this often results in an engaging encounter which can be incredibly informative and educational for the viewer. This kind of discourse is incredibly healthy for democracy as it gives the populace information which is balanced and multidimensional.[39]

With regards to academic writing, party funding is evidently one of the more infrequent topics of discussion. While the subject has been discussed, there is certainly room for expansion and an elaboration on various ideas and arguments.[40] In particular there appears to be a lack of academic papers that comprehensively discuss and deliberate on the various alternatives to the current regulations South Africa has at the moment. While there has been plenty of discussion on the harmful consequences of allowing the private funding of political parties to remain anonymous, there has been far less on what the country could potentially have instead. It is vital that academics do engage significantly on the potential alternatives – and there pros and cons – as it is often these theoretical dialogues that provide the foundation for the formation of policy frameworks.

[38] For instance Right2Know, Party funding panel discussion, Wits University, Senate Room, (April 12, 2014)
[39] For an example of this process see again *Judge for Yourself*, Season 11, Episode 10, eNCA, (2013).
[40] I have discussed the academic literature in the first chapter of this report.

As discussed above, the South African discourse on political party funding, while not uniform, is certainly skewed in one ideological direction. This is possibly a result of liberalism evidently becoming the dominant discourse in the political sphere of post-apartheid South Africa (and the larger part of the Western world). Democracy has become something that is inalienably sacrosanct. One characteristic which most democratic theorists demand of the state is transparency – with regard to all decision making processes. This demand is usually backed up by consequentialist reasoning: government processes that are secret will likely breed corruption and patronage. In this context it is then of little surprise that many South African commentators adopt a liberal-democratic perspective in their reasoning and thus advocate full disclosure when it comes to the private political party funding. In the dominant Western discourse opaqueness is generally seen as a firm negative when it comes to government. There is an unanimous calling for an ubiquitous accountability within the leadership: those in power must be able to justify their actions. Hence, the condemnation of the perceived lack of funding regulations in the general discourse can be interpreted to have been borne from the dominant liberal standpoint.

Another argument to consider is that is that much of the prevailing discourse on party funding originates from a position of scepticism of the ANC as a dominant party. This not necessarily a negative thing, however. For a democracy to flourish and function effectively it is healthy for there to be a regular critique of those in power. Those who ultimately make decisions on behalf of the electorate must be accountable for their actions. Thus, in South Africa, political commentators rarely shy away from critiquing the ANC, scrutinising its decisions and lambasting its missteps. Arguably, because the party rules with such a significant majority, opponents and objective analysts alike are particularly wary of any

dictatorial-like tendencies creeping into the republic. One could even say that a culture of suspicion has developed in the South African discourse regarding the intentions of the ANC.

Evidence of this claim can be seen in the ferocious outcries which greeted the introduction of the Protection of State Information Bill in 2010.[41] Similarly, many have jumped at the opportunity to label the removal of the Economic Freedom Fighters from Parliament in 2014 and 2015 as evidence that the ANC is flirting with totalitarianism.[42] It is entirely plausible, and likely, that this culture of ANC scepticism is producing implicit perspectives which are influencing South Africa's party funding discourse. Arguably, this is hindering the development of much of the discourse in question. Commentators do not appear to be engaging with the issue from a neutral perspective but rather from one in which there is a constant fear to allow the ANC too much power. Essentially, the reason much of the discourse we are concerned with is skewed and repetitive could be that an implicit political perspectives of the ANC as power seeking would cause one to seek as much transparency as possible – hence the desire to implement a legislation of full disclosure.[43]

In summary, the nature of the South African discourse on political party funding is not as developed and complete as some might perceive as ideal. It has been established that there are various platforms upon which discussions have taken place – yet it is obvious that most opinions are presented through written media. The issue is, however, that much of what has been written is too simplistic in the sense that the writer's scope is often not expanded to

[41] See: S. Hlongwane, "Major international news agencies warn Zuma over media freedom", *http://www.dailymaverick.co.za/article/2010-09-06-major-international-news-agencies-warn-zuma-over-media-freedom#.VRg6HPmUdK1*, (2010), Accessed on November 22, 2014.
[42] This claim, for example, was made in K Dlanga, "Chaos in Parliament: ANC should have walked out", *http://mg.co.za/article/2015-02-13-chaos-in-parliament-anc-should-have-walked-out*, (2015), Accessed on February 14, 2015.
[43] See: KF. Greene, "Party finance and single-party dominance in Mexico and beyond", p20 in A. Butler, *Paying for Politics*, Johannesburg: Jacana Media, (2010).

include a thorough discussion on the matter. The general discourse is very effective at identifying the potential shortcomings of South Africa's current legislation but this is only half of what is required. What is distinctly lacking is a comprehensive analysis on the possibilities, limitations and potential paths moving forward. If it is to be agreed that the integrity of democracy is under significant threat due to a lack of private funding regulations, then a wide variety of alternatives must be considered and examined. At the moment the clear major weakness of the South African discourse is the tendency to assume that a process of full disclosure is the undisputed best alternative. It is safe to say that this line of thinking is rather repetitive. Ultimately, it must be asserted that in the interests of democratic discussion, there is certainly room for more considered and comprehensive ideological approaches to the issue of the private funding of political parties in South Africa.

Chapter Four

Because political parties are under no obligation to disclose their funders, it is impossible to know the true extent to which donations occur and what their effects might be. For this reason it is imperative that any information on the topic we do possess is highly scrutinised. This chapter will examine some of the most publicised cases of political donations since the inception of democracy, and hypothesise as to their potential effects. Each of the four cases presented in this chapter contributes value to, and improves, the overall discussion of party funding. Each case examined here presents a different aspect that is vital to consider when discussing party funding. In short, the case of Brett Kebble encourages us to ask important questions about the democratic values the country holds, such as: is it acceptable for South Africa's ruling party to funded by the potential proceeds of crime? With Regard to the Sol Kerzner examination, we see how the current political funding climate may result in "whistle-blowers" being ostracised and expelled from their parties if they expose what they view as an immoral donor-party relationship. By looking into Schabir Shaik and the arms deal we can gain a greater sense of how politicians in need of funds can potentially sell their influence or their decision-making powers. The example of Chancellor House adds another dimension to the party funding debate. We can examine the value, efficacy, and potential consequences of a party possessing an investment arm – particularly one that is involved in government contracts. The study of Chancellor House is important because if stringent or

transparent private funding regulations were introduced, political parties may increasingly begin to explore alternative funding methods such as this.

Brett Kebble

Kebble was a prominent mining magnate who became infamous for his alleged fraudulent dealings and corporate theft. It is also well-known that he had various political connections – most notably with President Jacob Zuma and the ANC Youth League. In 2005, shareholders and investors from various companies of his managed to depose him. One of the companies, Randgold & Exploration, conducted an investigation soon after to determine what had happened to R2-billion[44] worth of shares]. By September that year, Kebble would meet his end. On the 27th he was shot dead close to the bridge passing over the M1 near Melrose Arch, Johannesburg. Further investigations would reveal that this was in fact an "assisted suicide". In 2008, the National Prosecuting Authority officially recognised this as the truth.

Since his demise, Kebble's legacy has refused to follow him to the grave. Investors have continued to look for unaccounted for shares while liquidators have sought to recoup what they perceive as owed to them. The most interesting case, at least to the purposes of this paper, involves the ANC. Since 2006 the party has been embroiled in court battles with liquidators over donations made by Kebble. The ruling party has in fact acknowledged donations to the tune of R10.8-million[45] – however, some sources claim it may be as much as R22.2-million[46]. The liquidators' case against the ANC is that the mining magnate made

[44] T. Farber, "Mystery still shrouds Kebble killing", *http://www.iol.co.za/news/south-africa/mystery-still-shrouds-kebble-killing-1.295422?ot=inmsa.ArticlePrintPageLayout.ot*, (2006), Accessed on October 17, 2014.
[45] P. De Wet, "ANC to pay to make Kebble dirt go away", *http://mg.co.za/article/2014-12-11-anc-to-pay-to-make-kebble-dirt-go-away*, (2014), Accessed on December 13, 2014.
[46] Ibid.

said donations when he was insolvent. According to the Insolvency Act (No. 24 of 1936)[47], any money/gifts given by an insolvent individual which are not reciprocated by a product or service, i.e. the individual didn't receive *value*, may be reclaimed after his death. Donations fall into this category, hence, the court efforts to retrieve the proceeds of fraud and theft. Simply put, Kebble's liquidators are attempting to reclaim donations which Kebble made to the ANC while he was allegedly insolvent.

The case against the ANC thus depends on whether Kebble benefitted, or received value, from his donations. Ironically, it is problematic for the ruling party to argue that he did in fact receive value for his donations because that would mean acknowledging the possibility he could exercise undue political influence in exchange for funding. In 2006, then-Western Cape ANC secretary, and now deputy minister of rural development and land reform, Mcebisi Skwatsha did indeed deny any dubious dealing. In court proceedings he was asked by Alec Brooks, a lawyer for the liquidators: "Did the ANC Western Cape give anything back to Brett [Kebble] because he had given them this money?" To which Skwatsha replied: "No certainly not."[48]

The ANC would soon develop an argument in court that Kebble did in fact receive value for his donations while still maintaining that they were not conditional. In 2007, The party reasoned that Kebble was receiving value merely because his funding was helping the ANC stay in power – their ability to uphold democracy and create an environment to flourish apparently superior to all else and thus benefitting him. The party claimed that through his donations, Kebble was "maintaining an institution of democracy which [enabled] him to acquire his wealth, which in [turn], enabled him to operate his business in a democratic

[47] Insolvency Act (No. 24 of 1936), Accessed from *http://www.justice.gov.za*.
[48] De Wet, 2014.

state free of racism, economic sanctions and free of all the negativity brought by (apartheid)".[49]

The ANC would again backtrack on its stance in court a few years later, in 2012, however. Years later, in 2012, the ruling party frankly admitted in court documents that Kebble had, in fact, received direct benefits from his donations. It stated: "In return for the disposition, Kebble obtained the benefit of access to political decision-makers and lawmakers that would be beneficial to him, both directly and indirectly, by virtue of its benefits to companies in which he had an interest … to promote for his benefit and that of those companies in which he had an interest conditions more favourable for the conduct of his business and those of the companies in which he had an interest."[50] Despite this forthright admission, it is difficult to estimate the exact extent of the influence Kebble had bought within the ANC – the party was under no obligation to provide specifics.

In the most recent court developments, as of February 2015, the ANC was believed to be on the verge of entering into a settlement with Kebble's liquidators. The settlement is reported to be R1.7-million – a paltry 15 percent of the R10.8-million[51] the party has acknowledged receiving. Settling now will almost certainly save the ANC from further damaging revelations regarding its questionable dealings with Kebble.

The case of Kebble clearly provides us with reasons to be cautious about the current lack of private funding regulation in South Africa. Ultimately, what we have here is an admission from a political party that it received upwards of R10-million from an insolvent businessman

[49] P. De Vos, "Kebble got value for donation says ANC", *http://constitutionallyspeaking.co.za/2007/06/*, (2007), Accessed on November 2, 2014.
[50] A. Basson, "How Kebble bought ANC favour", *http://www.news24.com/SouthAfrica/News/How-Kebble-bought-ANC-favour-20120429*, (2012), Accessed on September 20, 2014
[51] De Wet, 2014.

known to be involved in fraudulent dealings. This is problematic for two main reasons. First, are the moral implications. Intuitively, it seems immoral that the ruling party of a republic has its election and other campaigns funded by the potential proceeds of fraud and theft. In a democracy it is natural to expect all parties to conduct themselves in a manner that is becoming of principled and ethically-strong leaders – benefitting from fraudulent and dishonest activities seems to contradict this. The second major issue we can identify is one which is ever present in the private funding debate: What, if anything, was promised in exchange for the funds? In this specific instance we have an admission from the ANC that Kebble had "access to political decision-makers and lawmakers that would be beneficial to him, both directly and indirectly". What precisely did these lawmakers do that was beneficial to him? If Kebble's businesses were involved in criminal dealings and the ANC assisted said businesses, then surely this must imply the ANC were potential accomplices to illicit activity. This is an argument in itself for the potential dangers of nondisclosure of donors.

Sol Kerzner

The case of casino magnate Sol Kerzner illustrates the disincentives present within the party structure that may dissuade members from exposing potential funding corruption. Without legislation forcing disclosure on funds, internal revelations are perhaps the primary way the public may find out about private funding relationships – whether they are completely legal or illicit. Therefore, it becomes an issue in the current system when party members are too afraid to speak out against any relationships that may be producing illegal negotiations.

In 1996, the current president of the United Democratic Movement and then-deputy minister of Environmental Affairs Bantu Holomisa gave testimony to the Truth and Reconciliation Commission. His accusations regarding Kerzner and the ANC were not completely new but his voice behind them gave them credence and South Africa's new ruling party were not too impressed. He alleged that then-Public Enterprises minister and ANC member Stella Sigcau received R50 000[52] as part of a R2-million[53] bribe Kerzner paid to then-prime minister of Transkei George Matanzima. The bribe supposedly granted the casino magnate gambling rights within the Transkei region. These charges would later lead to suggestions that Kerzner secretly donated heavily to the ANC itself in 1994 – some estimating a total of R500 000[54]. Former president Nelson Mandela himself would later go on to admit that the ANC had received funds from Kerzner[55].

What is most interesting about the Kerzner saga is the manner in which the ANC saw fit to deal with the "whistle-blower" Holomisa. Shortly after he gave evidence at the TRC, he was forced to face an ANC NEC disciplinary committee, a hearing he described as a "kangaroo court"[56], and on appeal was expelled from the ANC – and subsequently from Parliament. The party believed that Holomisa had the responsibility of discussing any grievances he had internally, as opposed to publicly, and they bemoaned that he did not discuss his TRC testimony with the party prior to his appearance at the commission. An article published on the ruling party's official website perhaps epitomises the attitude at the time. The title itself, "The rise and fall of Bantu Holomisa", insinuates a Greek tragedy-esque narrative of a man

[52] R. Southall, "The Centralisation and Fragmentation of South Africa's Dominant Party System", African Affairs, Vol. 97, issue 389, (1998), p455.
[53] A. Sokomani, "Party financing in democratic South Africa: harbinger of doom?", p170-187 in A. Butler, *Paying for Politics*, Johannesburg: Jacana Media, (2010), p174
[54] Ibid.
[55] Southall, 1998, p455
[56] K. Ferree, *Framing the Race in South Africa: The Political Origins of Racial Census Elections*, New York: Cambridge University Press, (2011), p202.

who overestimated his mortal role and flew too close to the sun. In the article the now respected UDM leader and MP is slammed for his indiscipline and gung-ho behaviour –his military background supposedly rendering him volatile and unpredictable. When the Kerzner fiasco is brought up there is no mention that Holomisa may have furthered the cause of democracy by speaking out against potential corruption. Instead, it states:

Holomisa was censured by Deputy President, Thabo Mbeki, for his ill-considered reference to Minister Sigcau. Instead of accepting the censure in a disciplined and constructive way, Holomisa struck out publicly. In the following weeks and months, he levelled increasingly hysterical attacks and all kinds of wild allegations against a wide range of comrades, including Thabo Mbeki, Steve Tshwete, Tokyo Sexwale, Geraldine Fraser-Moleketi, Kadar Asmal, Zola Skweyiya, Derek Hanekom and President Mandela himself[57]

By using terms such as "hysterical" the party effectively reduces Holomisa's allegations to nothing more than a disgruntled member attempting to cause waves. Such a rebuke arguably does not further the cause of democracy. Especially in the context of nondisclosure regarding party funds, it is potentially dangerous for political parties to manufacture a climate in which members are afraid to speak out against corruption. It is additionally worrying that the ANC clearly prioritised taking action against "indiscipline" rather than investigating the claims in question. As Southall elucidates: "The nature of Holomisa's dismissal, and that the ANC seemed more concerned with disloyalty than investigating possible corruption within its ranks, reportedly left many MPs unnerved and worried about a drift to authoritarian leadership."[58]

[57] African National Congress, "The Rise and Fall of Bantu Holomisa", official website, *http://www.anc.org.za/show.php?id=2660*, (1997).
[58] Southall, 1998, p455.

Schabir Shaik and the arms deal

The Strategic Defence Procurement Package, more commonly known as the arms deal, is an extremely significant sequence of events. It involved the obtaining of military equipment – mainly submarines, corvettes (small warships) and Gripen fighter jets – via tender processes that were openly advertised. In 1999, government signed deals worth billions of rands for the acquirement of the arms.

Arguably, the first suggestion of corruption in the arms deal came from current Cape Town Mayor Patricia de Lille in 1999, who at the time was a Pan African Congress MP. She alleged, via documents submitted to Parliament, that the ANC had taken various bribes, including a R500 000 direct donation[59], in exchange for a favourable tender selection process. Despite De Lille requesting that then-president Thabo Mbeki implement a committee to investigate there was little action taken. To this day she still laments that corruption in the arms deal period has drifted on with impunity.

One man who did end up facing the repercussions for his involvement in the arms deal, and various other fraudulent dealings, was Schabir Shaik. While his prosecution may not relate directly to the private funding of political parties, investigations and his own admissions reveal some interesting ways in which he would facilitate the gaining of funds by the ANC. In October 2004, the former financial advisor to Jacob Zuma when he was deputy president, was found guilty of two counts of corruption and one count of fraud, and respectively sentenced to two terms of 15 years and one term of three years which would run concurrently[60]. During his verdict, Judge Hilary Squires argued that Shaik's ostensible

[59] S. Evans, "Lekota rejects claim that ANC benefited from arms deal", *http://mg.co.za/article/2014-06-11-lekota-has-no-knowledge-of-anc-benefiting-from-arms-deal*, (2014), Accessed on October 14, 2014.
[60] As is well-publicised in South Africa, Shaik has as of yet only served ?? of this in prison after being released early on medical parole.

contributions to the ANC were intended to further Zuma's cause, that he saw the potential for Zuma to become president and wanted to curry favour. He stated that Shaik had "a longer term vision of cultivating and maintaining the goodwill of a patron whose political stature promised to be a source of protection and promotion for Shaik's contemplated business enterprises. We do not believe him when he says he regarded these as contributions to the ANC. That is plainly an afterthought designed to make his payments to Zuma look less than they were."[61]

On Shaik's second corruption charge he was found guilty of soliciting a bribe from French manufactures Thomson-CSF, now known as Thales. Incidentally, Shaik was director of the sister company of Thompson-CSF, African Defence Systems. It was alleged the defence company coveted the influence Shaik held in Zuma's company and hoped to buy protection from Zuma with the bribe. As state prosecutor Wim Trengove SC stated: "Why did Thomson go into business with Shaik? Was it because of his arms business experience, his wealth or his charm? The answer is obvious: they did it because Mr Zuma was in Mr Shaik's camp, and Mr Zuma was in his camp because Mr Shaik was paying him to be in his camp. Shaik could wave him [Zuma] as his prize to anyone who got into bed with him."[62]

Former ANC MP Andrew Feinstein provides an insider perspective of how foreign companies may have bought influence within the arms deal selection process. He led the parliamentary Standing Committee on Public Accounts that investigated the procurement process and would later go on to write a book detailing his experiences in this position. In one particular

[61] Judge Hillary Squires, Judgment in the case of Schabir Shaik, In the High Court of South Africa (Durban and Coastal Local Division) Case No: CC27/04, (2005)
[62] K. Maughan, "'Shaik did bribe Zuma'", *http://www.iol.co.za/news/south-africa/shaik-did-bribe-zuma-1.391024#.VRc-ufmUdK0*, (2008), Accessed on October 6, 2014.

instance he recounts the frank admission by an influential ANC member that the party was receiving funds from abroad in exchange for favour:

"*Another senior member of the ANC's NEC invited me to his house one Sunday. Sitting outside in the sunshine, he explained to me that I was never going to 'win this thing'. 'Why not?' I demanded. 'Because we received money from some of the winning companies. How do you think we funded the 1999 election?' I didn't know what to say. I tried to think of a reason why this comrade might want to mislead me, but couldn't.*"

There was certainly a lot revealed during investigations into the arms deal but this illuminating exchange, alleged as it may be, indicates that many parts of the broad story may still remain hidden. In addition, if this account really did take place, it speaks to the incredible influence of funding. Essentially the message is: paying for an election may be enough to secure a government contract.

Although Shaik was found guilty of attempting to unduly influence the arms procurement process through his relationship with Zuma, the extent to which the ruling ANC may have benefitted from the procedure remains unclear. However, there is certainly enough evidence to suggest that theoretically joining the dots may have some merit to it. In 1996, Shaik's company Nkobi Holdings and Thomson-CSF entered into a deal in which they decided to collaborate on all of the latter's future ventures[63] . In addition, Nkobi Holdings also owns a 25 percent share in the French company[64]. Nkobi Holdings is in turn comprised of various shareholding companies, one of which is Floryn Investments. The significance of

[63] Corruption Watch, "The arms deal – what you need to know", *http://www.corruptionwatch.org.za/content/arms-deal-what-you-need-know*, Accessed on December 22, 2014.
[64] P. Kirk & M. Soggot, "Evidence of ANC arms deal link", *http://mg.co.za/article/2001-01-19-evidence-of-anc-arms-deal-link*, (2001), Accessed on December 22, 2014.

this company is that Shaik has since admitted that he set it up with the primary intention of channelling funds to the ANC[65]. This led the now-defunct Scorpions to make the following connections in its charge sheet: "Floryn Investments is ostensibly owned by [Shaik]. [Shaik] holds the shares as nominee or credent for the African National Congress, making the latter a 10 percent shareholder in Nkobi Holdings."[66] The gravity of these allegations becomes apparent when we consider that the consortium that was awarded a R1.3-billion[67] portion of contract to acquire corvettes comprised partly of Nkobi Holdings, Thomsom-CSF and African Defence Systems. Nkobi Holdings also has a 10 percent[68] share in the latter. Therefore, if these allegations are true and the ANC had a stake in the above companies, it would have benefitted greatly from the corvette contract acquisition.

Chancellor House

The controversy surrounding the arms deal is not the only incident in which the ANC was suspected of having links in companies profiting from state contracts. Chancellor House was established in 2003 but it was only three years later in 2006 when an exposé revealed its true purpose. It was found it was an investment arm of the ANC, specifically founded to profit from ventures in the mineral and energy sectors – with profits intended to go to the ruling party. The ANC has since admitted that it is indeed in control of the empowerment company[69]. Since this revelation, Chancellor House has been the subject of much debate and criticism following the awarding of various government contracts in which it has greatly benefitted. The most publicised of its endeavours has been its ongoing relationship with parastatal Eskom.

---

[65] Sokomani, 2010, p176
[66] C. Phalani, "Did ANC gain in arms deal?", *The Cape Times*, (August 27, 2003).
[67] Sokomani, 2010, p175
[68] Ibid.
[69] S. Sole, "Money Politics in South Africa: from covert party funding to the problem of black economic empowerment", p187 in A. Butler, *Paying for Politics*, Johannesburg: Jacana Media, (2010).

The controversy began in 2007, when Hitachi Power Africa was awarded a R40-billion rand contract to supply boilers for Eskom's Medupi and Kusile power stations. The issue was that Hitachi Power Africa, which is a subsidiary of Hitachi Power Europe, had 25 percent of its shares owned by Chancellor House. It is quite obvious why some might consider this problematic. By merits of it being a majority ruling party, the ANC of course had the most influence over Eskom's tender processes. As such, any tender consideration process cannot be considered fair and legitimate when the selectors have a clear interest in the outcome.

Since 2007, Hitachi Power Africa has continued to benefit from Eskom contracts and to date has a monopoly on supplying boilers to the parastatal's power station. However, this was not the only company in which Chancellor House, and by extension the ANC, allegedly benefitted from a sympathetic tender process. In 2012, the investigative journalists of the *Mail & Guardian* reported on a R2-billion materials-handling at Kusile power plant contract awarded to Bateman Africa[70]. The situation was reminiscent of the Hitachi Power Africa case: Bateman Africa, the empowerment branch of Bateman Engineering Group, was 10 percent[71] owned by Chancellor House. Again, if the dots have been joined correctly, the ANC stood to benefit immensely from Eskom contracts being awarded to companies in which it had a stake.

Around 2010, many government commentators began to question the conflict of interest that could possibly have arisen from the ANC's relationship with Eskom, via its investment arm. This time questions were not raised about profiteering, but rather the ruling party's objective ability to make key decisions regarding the parastatal. The issue in particular that

[70] T. Timse, "ANC's Chancellor House lands new deal", *http://mg.co.za/article/2012-07-27-00-ancs-chancellor-house-lands-new-deal*, (2012), Accessed on November 15, 2014.
[71] Ibid.

drew attention to the situation was Eskom's apparent need to substantially increase tariffs to fund certain operations and projects. It had requested an increase in tariffs to help reach the R385-billion[72] it predicted would be necessary for the planned construction of new power plants. The ANC had previously vocally opposed an increase to tariffs[73] but now, however, it had a vested interest in the financial health of the power utility. The public and state officials alike predictably questioned how the party could be trusted to deal with any tariff decisions impartially when said decisions could directly affect the its bottom line. Congress of South African Trade Unions general secretary Zwelinzima Vavi perhaps summed up the apprehensiveness towards the state of affairs perfectly: "The problem with this is that the ANC will not be able to ward off genuine concerns that it might have decided to accept the extraordinarily high tariffs imposed on the poor and industry because it stands to benefit. If it is true that the ANC company has invested in Eskom, then God help us all."[74] Whether Vavi's last phrase is hyperbole or not, an ANC financial investment in Eskom is clearly worrying.

Many opponents of the Chancellor House-Hitachi relationship believe there is tangible evidence that the association has been detrimental to the power situation in South Africa and ultimately the lives of ordinary citizens. They argue that Hitachi Power Africa has been incompetent in delivering quality boilers for Eskom's power stations on time. It is insinuated that the Japanese company only received the parastatal contracts in the first place because of their business connection to the ANC. Thus, South Africa's power crisis and resultant load-shedding has been firmly placed on the shoulders of this potential conflict of interest

[72] S. Lakmidas, "Eskom build programme 'economy's biggest stimulus'", *http://mg.co.za/article/2011-06-27-eskom-build-programme-economys-biggest-stimulus*, (2011), Accessed on December 22 2014.
[73] Sole, 2010, p195.
[74] Ibid.

that exists. DA parliamentary leader Mmusi Maimani, for instance, has ominous estimates for the exact extent of the consequences of this situation: "Because of these endless delays, South Africans continue to suffer the burden of load-shedding every day. And the impact of load-shedding on the South African people has been severe. The economy has lost R300-billion and 1 000 000 jobs since load-shedding began in 2008."[75]

After about eight years and billions of rands worth of contracts, Chancellor House parted ways with Hitachi Power Africa. In February 2014, the ANC announced that its investment arm had sold its 25 percent in the company to its parent company Hitachi Power Europe. The party cited a "conflict of interest"[76] for the reason of sale. This admission validates previous suspicions and criticisms of the situation but the eventual sale surely would have contented many critics. The Eskom-ANC relationship would not end there, however. Little more than a month after the Hitachi share off-loading, it was reported that Chancellor House had acquired Pietermaritzburg-based company Pfisterer SA for R170-million from its parent company in Switzerland[77]. The significance of the deal is that Pfisterer manufactures power grid accessories. At the time of purchase, the company had a R550-million contract to supply Eskom with these accessories. Thus, all the trepidations that accompanied Chancellor House's relationship with Hitachi Power Africa resurfaced and automatically attached themselves to the Pfisterer deal.

---

[75] M. Maimane, Address by Democratic Alliance Parliamentary Leader, on the electricity crisis, Chancellor House, Johannesburg, September 2, 2015, Accessed from *http://archive-za.com/za/p/polity.org.za/2015-02-11_5417674_15/DA_Mmusi_Maimane_Address_by_Democratic_Alliance_Parliamentary_Leader_on_the_electricity_crisis_Chancellor_House_Johannesburg_09_02_2015/*

[76] F. Wild, "Hitachi Buys ANC Stake in S. Africa Unit After Criticism", *http://www.bloomberg.com/news/articles/2014-02-27/hitachi-buys-anc-stake-in-s-africa-unit-amid-conflict-criticism*, (2014), Accessed on November 28, 2014.

[77] R. Philip, "ANC's Chancellor House in secret R170m Eskom supplier deal", *http://www.citypress.co.za/business/ancs-chancellor-house-secret-r170m-eskom-supplier-deal/*, (2014), Accessed on January 20, 2015.

Despite the seemingly universal condemnation of the existence of Chancellor House and its purpose to fund the ANC, there is another perspective to consider. In 2010, political commentator Jabulani Sikhakhane raised several salient points about the fiasco and put forward a thoughtful argument. Essentially, he argued that Chancellor House is the "lesser evil". The *Business Day* columnist articulated that because the ANC was the ruling party, it would receive by far the most funding from private sources. The reason being that by virtue of it being the majority, government positions would be filled most prominently by its members – members who now had influence over the handing out of state contracts. Party funders would logically want to attach themselves to the ANC because that would be the greatest chance of reciprocation. This reality is problematic (as this chapter has supported). The other reality, however, is that political parties require money to keep functioning. Thus Sikhakhane argues that Chancellor House, "evil" as it may be, is far preferential to relying on funders clamouring for favours in return. Via its investment vehicle, the ANC can prosper financially while maintaining its leadership integrity – it can dispel any notions that the party is for sale. While the existence of Chancellor House is not ideal, it is not nearly as undemocratic as a government that has its decision-making influenced by funders. The purpose of Chancellor House was to "cut the ANC loose from the suckers who have attached themselves onto the ruling party. In time, Chancellor House would have made the party self-sufficient, or at the very least reduced its dependence on the leeches that cling so hard to the ruling party"[78].

[78] J. Sikhakhane, "Chancellor House lesser evil than party donors", *http://www.bdlive.co.za/articles/2010/04/12/jabulani-sikhakhane-chancellor-house-lesser-evil-than-party-donors;jsessionid=0E4913B53A8D4684C2EFBCE3AAC104FD.present2.bdfm?service=print*, (2010), Accessed on November 5, 2014.

Conclusion

The subject of private party funding is complex and convoluted. This research paper has sought to answer the question "Should South Africa regulate the private funding of political parties?" First, we need to understand why this research topic is particularly relevant in the country's discourse –there have been countless calls from activists, various organisations, political organisations, private sectors of the populace and some politicians for the regulation of donations made to political parties by private individuals, organisations, businesses and foreign governments. We need to understand what their argument is and why are they making it and look into the steps that have been taken resolve these issues. As we have seen this action has taken the form of court cases and it is important to discover what the most prominent cases in South Africa have taught us. Naturally, we would only consider adopting additional legislation on party funding if we can show that there are significant reasons to do so. Inherently, part of the research question also involves providing and critiquing possible alternatives to absence of legislation South Africa has now. We cannot suggest something is changed if we do not simultaneously offer solutions.

The context we find ourselves in in South Africa is one where there are no regulations governing the private funding of political parties. The country has no restrictions on individuals or entities who wish to donate to a party of their choice. They can donate as much as and as frequently they want. Also, they are not prevented from giving to multiple parties. One consequence of the lack of regulations appears to be the biggest issue: political

parties are not forced to disclose their funders. It is this lack of transparency which is most troubling for many.

It is here that we come to what this research paper has found to be the most common argument for an implementation of legislation regarding private funding. Essentially it is argued that because donations are not regulated, and therefore political parties are under no obligation to disclose their funders, there is no way to ensure nothing illicit, illegal or immoral occurs. It is clear from the general discourse that there are fears that donors could exert influence on political parties. Because parties need funds to operate, donors could demand anything from government contracts to favourable policy in return for their funds. Of course, if this were to occur it would not be within the spirit of democracy. Hence, it is argued that not having policy legislating private funding is undemocratic. It is untransparent and political parties cannot be held accountable for their actions.

It is this mistrust of the current party funding dynamics that has seen the transparency agenda forced to court on two occasions. This paper has discussed and examined the two court cases in which the applicants fought for transparent legislation forcing political parties to disclose their funders. The organisations involved on the two occasions were IDASA and the My Vote Counts campaign. As this research paper discussed, the first attempt was unsuccessful and judgment has been reserved on the second. From the arguments of each we can identify one distinct commonality or mutual thread: the distinction between public and private bodies. One of the primary reasons IDASA failed in its attempt was because the advocates for the political parties in court successfully reasoned that political parties are private not public. Therefore, under South African law, they are under no obligation to open

their books. Similarly, this is the same defence used against My Vote Counts and again, could potentially prove decisive.

It is thus easy to conclude that the private-public distinction is vital in any legal discussion regarding this topic. Because South African legislation provides certain rights to private entities, it is clear that it will be difficult to move forward with new party funding legislation. As long as it is in the best interest of political parties not to disclose their funders, they will always point to the fact that being forced to do so violates Section 14 of the Constitution; the section that specifies that private bodies have the right to privacy. However, intuitively, there appears to be more to this issue than a *prima facie* reading of the Constitution. Although political parties are undoubtedly private entities, when they are elected into Parliament, i.e. placed into a role of governance, they assume a certain level of accountability towards the electorate. To a certain extent they transcend their status as private bodies because once they have assumed power many of their members assume *public* roles. So, although the organisation may be private, those who control it are assuming very public responsibilities. Simply put, intuitively it seems unfitting that political parties elected into Parliament are protected by the identical constitutional rights as other private bodies – for instance businesses. It is apparent that if South Africa is to adopt new legislation on this matter it may be necessary to reconsider if an elected-party should be covered by the same rights enjoyed by other private entities. To conclude on this particular aspect; a discussion on the current distinction between public and private bodies, particularly with reference to the change in responsibility when a political party is elected to office may be necessary before new private political party finance legislation can be implemented.

This research paper has examined various prominent South African cases. Not all the cases directly involved a private funding relationship, but all help to provided perspective for what is a very broad issue. The case of Brett Kebble was particularly interesting because it highlighted a couple of issues. First, it emerged that the mining magnate donated significant amounts to the ANC –upwards of R10.8-million. The serious concern that emerged in the liquidation trial following Kebble's death was that he directly benefitted from his donations. This is on the admission of the ANC, which stated in court that Kebble gained direct access to political decision-makers. This is precisely what the advocates of new funding legislation are afraid of – private individuals having political influence – and to a certain extent this vindicates them. The second issue the Kebble case highlights is a moral one. We must ask ourselves whether it is morally correct in a democratic context for the ruling party to receive funds from a known fraudster. Because political parties are not compelled to disclose their funders the general public is prevented from being aware of such situations unless they are exposed in the media.

Ultimately, there is ample evidence to suggest that the current dynamics of private funding are democratically unhealthy. The practical cases in Chapter Four highlight significant moral, democratic and political dangers of the present system of party funding. In addition, the arguments provided by activists for legislation change are deductively sound. Therefore, at least to a certain extent, this research paper has found there certainly are issues with having no regulations governing private party funding. What are the alternatives to the lack of legislation? This question is not easily answered.

Full disclosure is undeniably what the most fervent of campaigners have pushed for. The title is self-explanatory: Any legislation based on this principle would require all political

parties to reveal any and all donations received. A large degree of specificity would likely be required as well, with exact amounts having to be disclosed. This would mean parties would have to make their books available to the public – this is perhaps the only way in which it can be ensured that every instance of funding is indeed disclosed.

The two major legal pushes for a change in funding regulations – the Institute for Democracy in Africa's effort in 2005 and the ongoing challenge by the My Vote Counts campaign – both identified full disclosure as the ideal method with which to safeguard South Africa against undemocratic and corrupt dealings which may occur between political parties and their donors. The logic behind the avid backing of the full disclosure alternative is essentially that politicians will be unable to disguise any adverse or alternative intentions behind their actions. Because all financial transactions will be able available publicly, if illicit donor influence is suspected, the financials could be accessed and the dots joined. Objectively, the merits of full disclosure can't be denied; with it the funding secrecy of today will be a thing of the past.

One major criticism observed regarding the general public discourse surrounding private party funding is that it appears to be very one-sided. The discussions often implicitly assume that having full-disclosure over party funds is the right thing to do. The question is rarely *should* we implement new transparent legislation, but rather *how* are we going to implement new transparent legislation. Of course, this is not including the general responses of political parties, who, as discussed, have generally resisted the implementation of legislation that would bring transparency, but the consensus among activists, media and political commentators would appear to be that transparency should be an inalienable attribute in our political system. From an academic standpoint, however, It is vital that we

fully explore the merits of introducing new laws regarding the issue in question – and indeed if they should be implemented in the first place.

The current laws on monetary disclosure in South Africa suit the vast majority of political parties perfectly. It is only common sense to suggest that if they didn't, then they wouldn't fight so hard to maintain them. A revelation of funders may significantly hurt a party's reputation – if, for instance, it is revealed that the financial backer in question is an individual or business known for questionable dealings. This is, of course, a two-way street. Businesses and prominent individuals may have specific reasons for wanting their party donations kept quiet. It is fair to say that political parties would lose a significant amount, perhaps even a majority share, of their funding if they were forced to disclose their funders. Anonymity is something many funders simply would not be willing to compromise on for the reasons discussed. Without it, investing becomes more than just a financial investment – it becomes a reputational one as well. Some simply won't be willing to continue or begin to contribute.

One might intuitively think that a decrease in private funding would affect all parties equally and that a level playing field would be created. All parties would, after all, be subject to the disclosure laws. However, this is unlikely to be the case. More funding transparency may, in fact, be detrimental to small and emerging parties specifically. If funders become discouraged from backing parties, it will become extremely difficult for new ones to emerge. There is no doubt that starting a party requires a significant amount of capital and state funding only comes once seats in Parliament are acquired. Therefore, if the funding climate in South Africa had to change to one of scarcity, emerging political parties would find it increasingly difficult to rise to a level where they can competitively jostle for seats in

Parliament. If this hypothetical situation had to come to pass, what we would likely see is a preservation of the status quo. The current hegemony in the South African political structure would remain intact – the dominant ANC and DA would likely receive little challenge to their positions as the ruling party and official opposition respectively.

In Chapter Four the case of Chancellor House was examined. Generally, there is a very high level of scepticism around the ANC's investment arm. However, a different perspective was offered by Jabulani Sikhakhane. He suggested that Chancellor House was the lesser evil, in the sense that it enabled the ANC to not to sell influence in exchange for funding. If the ruling party can fund itself, then it will not have to depend on external donors, thus eliminating the possibility of many of the problems discussed in this paper. Although Sikhakhane was referring specifically to the case of Chancellor House, his logic can be applied to the broader spectrum. There is the possibility political parties can acquire necessary funds from investment arms such as Chancellor House. This would indeed prevent many of the issues that arise from corrupt donor relationships. If funding transparency had to be introduced and political parties did lose funders, this mechanism would be a plausible solution to accumulating funds. This suggestion is not perfect but it does offer an alternative that is worthy of consideration in the South African discourse.

In closing, the evidence suggests that South Africa should regulate the private funding of political parties. From a theoretical perspective, unregulated private funding presents significant dangers. The fact that donors can remain completely anonymous while not having their party spend prohibited in anyway is problematic for the values of democracy. In addition, the cases presented in this research paper help support the notion that the current funding environment is not conducive to a healthy democracy. Ultimately, this has

left little doubt that regulations on private funding *should* be implemented in South Africa. However, exactly what type of regulations should be implemented is not clear. In this matter the populace and government of South Africa need to engage in meaningful discussions as to what would be the best step forward. This paper has been highly critical of the quality of South African discourse on the matter of private funding and it must indeed improve if the nation is find suitable solutions to the issues that have been discussed here.

Bibliography:

- S. Aboobaker, "Exposed: DA-Agang mystery funder", *http://www.iol.co.za/news/politics/exposed-da-agang-mystery-funder-1.1644076#.U9mhsPmSzux*, (2014), accessed on 30 July, 2014.
- African National Congress, "The Rise and Fall of Bantu Holomisa", official website, http://www.anc.org.za/show.php?id=2660, (1997).
- D. Austen-Smith, "Campaign contributions and access", in *The American Political Science Review*, Vol. 89, No. 3 (1995), pp. 566-581.
- N. Baqwa, My Vote Counts Press Release: MVC launches application at the Constitutional Court, *http://www.myvotecounts.org.za/2014/07/my-vote-counts-press-release/*, (2014), Accessed on 30 July, 2014.
- A. Basson, "How Kebble bought ANC favour", *http://www.news24.com/SouthAfrica/News/How-Kebble-bought-ANC-favour-20120429*, (2012), Accessed on September 20, 2014
- S. Booyson & G. Masterson "Chapter 11: South Africa" in D. Kadima and S. Booysen (eds) *Compendium of Elections in Southern Africa 1989-2009: 20 Years of Multiparty Democracy*, Johannesburg: EISA, (2009).
- S. Bosch, "IDASA v ANC – An opportunity lost for truly promoting access to information", in *South African Law Journal*, Vol. 123, Issue 4 (2006), pp. 615-626.
- S. Brummer and V. Robinson, "SA Democracy Incorporated: Corporate Fronts and Political Party Funding", ISS Papers, Issue 129, (2006).
- P.J. Burnell and A. Ware (eds.), *Funding Democratisation*, Transaction Publishing,(2007).
- Butler, "How Democratic is the African National Congress?", *Journal of South African Studies*, Vol. 31, No. 4, (2005), pp. 719-736.
- A. Butler, *Paying for Politics*, Johannesburg: Jacana Media, (2010).
- Corruption Watch, "The arms deal – what you need to know", *http://www.corruptionwatch.org.za/content/arms-deal-what-you-need-know*, Accessed on December 22, 2014.
- Electoral Commission of South Africa, "Party Funding", in Parties and Candidates, *http://www.elections.org.za/content/Parties/Party-funding/*, Accessed on December 5.
- S. Evans, "Lekota rejects claim that ANC benefited from arms deal", *http://mg.co.za/article/2014-06-11-lekota-has-no-knowledge-of-anc-benefiting-from-arms-deal*, (2014), Accessed on October 14, 2014.
- R. Davis, "Who funds our political parties? We deserve to know", *http://www.dailymaverick.co.za/article/2014-07-28-who-funds-our-political-parties-we-deserve-to-know./#.U9lsEPmSzuw*, (2014), Accessed on 30 June, 2014
- P. De Vos, "Kebble got value for donation says ANC", *http://constitutionallyspeaking.co.za/2007/06/*, (2007), Accessed on November 2, 2014.
- P. De Wet, "ANC to pay to make Kebble dirt go away", http://mg.co.za/article/2014-12-11-anc-to-pay-to-make-kebble-dirt-go-away, (2014), Accessed on December 13, 2014.

- K Dlanga, “Chaos in Parliament: ANC should have walked out”, *http://mg.co.za/article/2015-02-13-chaos-in-parliament-anc-should-have-walked-out*, (2015), Accessed on February 14, 2015.
- Electoral Institute for Sustainable Democracy in Africa, “South Africa: Political party funding”, *http://www.content.eisa.org.za/old-page/south-africa-political-party-funding*, (2011), Accessed on December 12, 2014.
- T. Farber, “Mystery still shrouds Kebble killing”, *http://www.iol.co.za/news/south-africa/mystery-still-shrouds-kebble-killing-1.295422?ot=inmsa.ArticlePrintPageLayout.ot*, (2006), Accessed on October 17, 2014.
- K. Ferree, *Framing the Race in South Africa: The Political Origins of Racial Census Elections*, New York: Cambridge University Press, (2011).
- KF. Greene, “Party finance and single-party dominance in Mexico and beyond”, p20 in A. Butler*, Paying for Politics*, Johannesburg: Jacana Media, (2010).
- P. Heywood, “Political Corruption: Problems and Perspectives”, *Political Studies*, Vol. 45, Issue. 3, (1997), pp. 417-435.
- S. Hlongwane, “Major international news agencies warn Zuma over media freedom”, *http://www.dailymaverick.co.za/article/2010-09-06-major-international-news-agencies-warn-zuma-over-media-freedom#.VRg6HPmUdK1*, (2010), Accessed on November 22, 2014.
- Q. Hunter & M. Letsoalo, “The ANC is broke”, *http://mg.co.za/article/2014-10-30-broke-anc-may-have-to-cut-jobs-for-comrades*, (2014) Accessed on November 14, 2014.
- *Judge for Yourself*, Season 11, Episode 10, eNCA, (2013).
- P. Kirk & M. Soggot, “Evidence of ANC arms deal link”, *http://mg.co.za/article/2001-01-19-evidence-of-anc-arms-deal-link*, (2001), Accessed on December 22, 2014.
- S. Lakmidas, “Eskom build programme 'economy's biggest stimulus'”, *http://mg.co.za/article/2011-06-27-eskom-build-programme-economys-biggest-stimulus*, (2011), Accessed on December 22 2014.
- RJ. La Raja, *Small Change: Money, Political Parties, and Campaign Finance Reform*, (University of Michigan Press: 2008).
- L. Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It*, (Grand Central Publishing: 2011).
- M. Lobban, *White Man’s Justice*, Oxford: Oxford University Press, (1996).
- T. Lodge & U. Scheideggar, “South Africa: Country Report based on Research and Dialogue with Political Parties”, International IDEA/EISA, Accessed from *http://www.idea.int/parties/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=15063*.
- M. Maimane, Address by Democratic Alliance Parliamentary Leader, on the electricity crisis, Chancellor House, Johannesburg, September 2, 2015, Accessed from *http://archive-za.com/za/p/polity.org.za/2015-02-11_5417674_15/DA_Mmusi_Maimane_Address_by_Democratic_Alliance_Parliamentary_Leader_on_the_electricity_crisis_Chancellor_House_Johannesburg_09_02_2015/*
- K. Matlosa, *The Politics of State Resources: party Funding in South Africa*, Konrad-Adenauer-Stiftung, (2004).
- K. Maughan, “'Shaik did bribe Zuma'”, *http://www.iol.co.za/news/south-africa/shaik-did-bribe-zuma-1.391024#.VRc-ufmUdK0*, (2008), Accessed on October 6, 2014.

- M. Misra-Dexter and Judith February (eds.), *Testing Democracy: Which way is South Africa going?*, IDASA Publishing, (2010).
- O. Mooki, "Judgment reserved in party funding case", *http://www.iol.co.za/news/crime-courts/judgment-reserved-in-party-funding-case-1.1816554*, (2015), Accessed on February 14, 2015
- My Vote Counts, Website frontpage, *http://www.myvotecounts.org.za/*.
- Phakathi, "Secret party funding fuels electorate's suspicion", *http://www.bdlive.co.za/national/politics/2014/03/18/secret-party-funding-fuels-electorates-suspicion*, (2014), Accessed on 25 June, 2014.
- C. Phalani, "Did ANC gain in arms deal?", *The Cape Times*, (August 27, 2003).
- R. Philip, "ANC's Chancellor House in secret R170m Eskom supplier deal", *http://www.citypress.co.za/business/ancs-chancellor-house-secret-r170m-eskom-supplier-deal/*, (2014), Accessed on January 20, 2015.
- For example see V. Pillay, "Is an eccentric billionaire funding the EFF? We'll never know", *http://mg.co.za/article/2015-03-24-is-a-jewish-billionaire-funding-the-eff-well-never-know, (2015)*, Accessed on March 25, 2015.
- R. Poplak, "Sh*t the EFF will do: Stop Israel from funding South African political parties", *http://www.dailymaverick.co.za/article/2014-07-29-sht-the-eff-will-do-stop-israel-from-funding-south-african-political-parties/#.U9m-JfmSzux*, (2014), Accessed on 29 June, 2014.
- Right2Know, Party funding panel discussion, Wits University, Senate Room, (April 12, 2014).
- Sarakinsky, "Political party finance in South Africa: Disclosure versus secrecy", *Democratisation*, Vol. 14, No. 1, (2007), pp. 111-128.
- J. Sikhakhane, "Chancellor House lesser evil than party donors", *http://www.bdlive.co.za/articles/2010/04/12/jabulani-sikhakhane-chancellor-house-lesser-evil-than-party-donors;jsessionid=0E4913B53A8D4684C2EFBCE3AAC104FD.present2.bdfm?service=print*, (2010), Accessed on November 5, 2014.
- M. Shefter, *Political Parties and the State: The American Historical Experience*, (Princeton University Press: 1993).
- A. Sokomani, "Party financing in democratic South Africa: harbinger of doom?", p170-187 in A. Butler*, Paying for Politics*, Johannesburg: Jacana Media, (2010)
- S. Sole, "Money Politics in South Africa: from covert party funding to the problem of black economic empowerment", pp187-200 in A. Butler, *Paying for Politics*, Johannesburg: Jacana Media, (2010).
- S. Sole, "Madonsela scents something rotten", *http://mg.co.za/article/2013-12-12-thuli-scents-something-rotten*, (2013), accessed on 30 July, 2014.
- R. Southall, "The Centralisation and Fragmentation of South Africa's Dominant Party System", *African Affairs*, Vol. 97, issue 389, (1998), pp. 443-469.
- T. Timse, "ANC's Chancellor House lands new deal", *http://mg.co.za/article/2012-07-27-00-ancs-chancellor-house-lands-new-deal*, (2012), Accessed on November 15, 2014.
- Transparency International, Global Corruption Report, (Pluto Press: 2004).
- Tshitereke, "Securing Democracy: Party Finance and Party Donations – The South African Challenge", ISS Papers, Issue 63.

- F. Wild, “Hitachi Buys ANC Stake in S. Africa Unit After Criticism”, *http://www.bloomberg.com/news/articles/2014-02-27/hitachi-buys-anc-stake-in-s-africa-unit-amid-conflict-criticism*, (2014), Accessed on November 28, 2014.
- R. Williams, *Aspects of Party Finance and Political Corruption*, (Palgrave Macmillan: 2000).

Court References:

- Institute for Democracy in South Africa and Others v African National Congress and Others, Case No: 9828/03 [2005] ZAWCHC 30; 2005 (5) SA 39 (C) [2005] 3 All SA 45 (C) (20 April 2005).
- Judge H. Squires, Judgment in the case of Schabir Shaik, In the High Court of South Africa (Durban and Coastal Local Division) Case No: CC27/04, (2005).

Legislation

- Electoral Act (No. 73 of 1998), Accessed from *www.elections.org.za*.
- Insolvency Act (No. 24 of 1936), Accessed from *http://www.justice.gov.za*.
- The Promotion of Access to Information Act (No. 2 of 2000), Accessed from *http://www.dfa.gov.za/*.
- Public Funding of Represented Political Parties Act (No. 103 of 1997), Accessed from *www.elections.org.za*.

Reports

- 2013/2014 Represented Political Parties' Fund Annual Report, Accessed from *www.elections.org.za*.