

Does the ‘pay now, argue later’ approach in the Tax Administration Act 28 of 2011 infringe on a taxpayer’s right not to be deprived of property arbitrarily?

Carika Fritz^{a,*} and Reghard Brits^b

^a School of Law, University of the Witwatersrand, Johannesburg, South Africa

^b Department of Mercantile Law, University of Pretoria, Pretoria, South Africa

*Contact Carika Fritz. School of Law, University of the Witwatersrand, PoBox 73409 Lynnwood Ridge 4081, Johannesburg, 2001 South Africa. Email: carika.fritz@wits.ac.za

Abstract

The Davis Tax Committee declared that the ‘pay now, argue later’ approach in the Tax Administration Act 28 of 2011, which applies when a taxpayer disputes an assessed tax liability, infringes on a person’s right not to be deprived of property arbitrarily as entrenched in s 25(1) of the Constitution of the Republic of South Africa, 1996 (the property clause). In this article we set out to analyse whether this is indeed the case by first outlining the legislative provisions pertaining to the ‘pay now, argue later’ approach and the jurisprudence surrounding the right not to be deprived of property arbitrarily. Thereafter, we evaluate whether the ‘pay now, argue later’ approach complies with the requirements for a valid deprivation of property and conclude that this approach does not infringe upon the rights of taxpayers in terms of the property clause. We show that the statutory provisions surrounding the ‘pay now, argue later’ approach impose a deprivation of property, but that the deprivation is neither procedurally nor substantively arbitrary.

Keywords: ‘pay now argue later’ approach; constitutional property law; substantive arbitrariness; procedural arbitrariness; constitutionality of SARS’ powers; tax administration

In South Africa a taxpayer’s obligation to pay outstanding taxes is not suspended while the taxpayer objects to or appeals her tax liability. The law instead requires her to ‘pay now’ and ‘argue later’.¹ One’s immediate reaction might be to question whether this ‘pay now, argue later’ approach is fair and reasonable towards taxpayers, and as a result it is not surprising that it has been criticised, such as in the following statement: ‘[T]he notion that a person should be obliged to pay a debt that he disputes, and which has not been adjudicated by a court, is fundamentally offensive to ordinary conceptions of justice’.² Then again, the ‘pay now, argue later’ approach has also been defended as being in the public interest because it ensures the speedy collection of outstanding taxes and helps to avoid frivolous objections and appeals aimed simply at deferring the payment of taxes.³

In *Metcash Trading Ltd v Commissioner of the South African Revenue Service (SARS)*,⁴ the Constitutional Court considered the constitutional validity of the ‘pay now, argue later’ approach in relation to the right of access to courts guaranteed in s 34 of the Constitution of the Republic of South Africa, 1996. The court *a quo* held that this approach unjustifiably infringes on the right of access to courts, since SARS is substituted as the court by being made responsible for determining the tax liability and enforcing payment thereof. Moreover, the taxpayer is barred from any interlocutory relief while the matter is subject to objection or appeal.⁵ Contrary to the court *a quo*’s judgment, the Constitutional Court found that the ‘pay now, argue later’ approach was constitutionally sound as it did not oust the courts completely,⁶ also because necessary refunds could be made at a later stage.⁷ Despite the Constitutional Court pronouncing on the constitutional validity of the ‘pay now, argue later’ approach for purposes of the right of access to courts, the debate regarding the constitutionality of this approach – and thus the accuracy of the judgment in *Metcash Trading* – has continued.⁸

Interestingly, the Davis Tax Committee’s criticism of the ‘pay now, argue later’ approach is centred on the allegation that it infringes on a person’s right not to be deprived of property arbitrarily as entrenched in s 25(1) of the Constitution (the property clause).⁹ However, the committee did not substantiate its opinion in this regard.

The prospect that the ‘pay now, argue later’ approach has an impact on the s 25(1) right is not new. In *Metcash Trading*, the taxpayer also initially challenged the ‘pay now, argue later’ approach on the ground that it violated the taxpayer’s right not to be deprived of property arbitrarily, but did not pursue any arguments in this respect.¹⁰ Consequently, neither the court *a quo* nor the Constitutional Court considered the possible limitation of rights in s 25(1) of the Constitution, except that the court *a quo* assumed, without deciding or providing reasons, that a challenge under s 25(1) would fail because the ‘pay now, argue later’ approach is implemented in terms of law of general application and is not arbitrary.¹¹ Without analysing the matter in detail, both Croome and Fritz share the court *a quo*’s assumption regarding the non-arbitrariness of the ‘pay now, argue later’ approach.¹²

In light of the Davis Tax Committee’s opinion on the impact of the ‘pay now, argue later’ approach on a taxpayer’s property rights, it has therefore become necessary to investigate whether this approach indeed infringes on a person’s fundamental right not to be deprived of property arbitrarily. In this article, we set out to do so by first outlining the legislative provisions pertaining to the ‘pay now, argue later’ approach and the jurisprudence surrounding the right not to be deprived of property arbitrarily. Thereafter, we evaluate whether the ‘pay now, argue later’ approach complies with the requirements for a valid deprivation of property and conclude that this approach does not unjustifiably infringe upon taxpayers’ rights in terms of the property clause.

1. The legislative framework of the ‘pay now, argue later’ approach

Section 164(1) of the Tax Administration Act 28 of 2011 (TAA) provides for the ‘pay now, argue later’ approach by stipulating as follows:

Unless a senior SARS official otherwise directs in terms of subsection (3) –

1. the obligation to pay tax; and

2. the right of SARS to receive and recover tax; will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.¹³

The main implication of this subsection is that, once the liability to pay tax is quantified by way of an assessment, the taxpayer may object to or appeal the assessment but she may not withhold payment until the dispute regarding her tax liability has been settled. The ‘pay now, argue later’ approach effectively separates the duty to pay the assessed taxes from the adjudication of the merits of the case.¹⁴

A further implication of s 164(1) is that, despite any objections or appeals, SARS can continue with enforcement action to recover the assessed taxes should the taxpayer refrain from paying voluntarily as per the assessment. Enforcement of a tax debt could entail SARS filing a statement with the clerk or registrar of a competent court, which statement should indicate the outstanding tax and any interest and/or penalty payable.¹⁵ The filing of the statement has the effect of a civil judgment,¹⁶ and as such the taxpayer must receive at least ten business days’ notice before this statement is filed,¹⁷ unless SARS is satisfied that such a notice would negatively influence the recovery of the tax.¹⁸ Once the statement is filed, SARS may obtain a writ to have the taxpayer’s property attached and sold to satisfy the judgment.¹⁹ SARS is also empowered to issue a third-party appointment notice²⁰ in terms of which the appointed third party must pay a taxpayer’s tax debt from money it holds on behalf of or owes to the taxpayer presently or in future. Failure to comply with this notice, without a just cause for this failure, could result in the third party being held personally liable for the amount indicated in the notice²¹ and being found guilty of an offence.²² Thus, in order to prevent SARS from enforcing payment of the disputed taxes in one of the abovementioned manners, taxpayers should pay the outstanding tax debt as per the assessment, even if they dispute the amount claimed.

If the taxpayer pays the outstanding tax debt but the assessment is subsequently reduced,²³ the TAA provides that an adjustment should be made and that SARS should then refund any amounts paid in excess, with interest.²⁴ The prescribed rate of interest is currently 9.75 per cent per annum.²⁵

Despite the general operation of the ‘pay now, argue later’ approach, the Act allows for an exception in terms of which a taxpayer may request a suspension of her payment obligation (either in full or in part) if she intends to lodge an objection or an appeal against the relevant assessment.²⁶ Although this possibility could soften the impact on a taxpayer’s rights, interest will continue to accrue on the outstanding tax from the date stipulated in the assessment and not from the date on which the dispute is resolved.²⁷ As such, a taxpayer would need to weigh the merits of her case carefully, because if the dispute is resolved in favour of SARS, she would be liable for the original outstanding tax debt plus interest from the date of assessment.

Upon requesting a suspension, a senior SARS official²⁸ may suspend the duty to pay the outstanding disputed tax or a portion thereof after considering relevant factors. Currently,²⁹ the non-exhaustive list of factors, which the senior SARS official should consider when exercising this discretion, are:

1. whether recovery of the disputed tax will be in jeopardy or whether there will be a risk of dissipation of assets;
2. the compliance history of the taxpayer with SARS;

3. whether fraud is prima facie involved in the origin of the dispute;
4. whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or
5. whether the taxpayer has tendered adequate security for the payment of the disputed tax and whether accepting it is in the interest of SARS or the fiscus.³⁰

The request for a suspension may be denied or a suspension may be revoked with immediate effect if:

1. after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;
2. the taxpayer is employing dilatory tactics in conducting the objection or appeal;
3. on further consideration of the factors referred to in subsection (3), the suspension should not have been given; or
4. there is a material change in any of the factors referred to in subsection (3), upon which the decision to suspend payment of the amount involved was based.³¹

It is beneficial for taxpayers that the Act contains factors that the senior SARS official should consider when deciding whether to suspend the duty to pay. It fosters legal certainty because taxpayers would have an idea of what will be considered, while it also ensures that this exception to the ‘pay now, argue later’ approach is not applied selectively without any clear criteria. Furthermore, listing the factors ensures that SARS’ discretion is curbed, which is essential for adherence to the rule of law.³² Certainty regarding the factors to be considered also makes it easier for taxpayers to determine whether it is worthwhile to take a decision (the refusal by the senior SARS official to suspend the payment obligation or the decision to revoke a suspension) on review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) on the grounds that SARS failed to take relevant considerations into account or took irrelevant considerations into account.³³

From the day on which SARS receives a taxpayer’s request for the suspension of her payment obligation (or the day on which a suspension is revoked) until ten business days after the senior SARS official has informed the taxpayer of his decision pertaining to the suspension, SARS may not proceed with any collection proceedings for that outstanding tax.³⁴ Therefore, if SARS fails to make a decision and/or to inform the taxpayer of such decision, the taxpayer will receive an automatic indefinite suspension until such time as the decision is made and the taxpayer is informed.³⁵ Nevertheless, SARS may proceed with the collection of outstanding taxes during this period if it reasonably believes that the taxpayer might dispose of her assets.³⁶ This ‘grace period’ during which there is a moratorium on debt collection, provides taxpayers with some certainty because the taxpayer will know that SARS will proceed with collection of the outstanding taxes only if it believes that the taxpayer may dispose of her assets. Therefore, this moratorium should motivate SARS to make a speedy decision regarding the request to suspend the payment obligation so that it can collect the outstanding taxes as soon as possible.³⁷

In the rest of the article we evaluate whether the ‘pay now, argue later’ approach, as embodied in the above-explained legal provisions, lives up to the constitutional standards in terms of the property clause. We first explain how the effects of the ‘pay now, argue later’ approach can qualify as a ‘deprivation of property’, after which we investigate the procedural and substantive justification for the deprivation of property caused by the provisions in the TAA regarding the ‘pay now, argue later’ approach.

2. Deprivation of property

The general aim of s 25 of the Constitution,³⁸ the property clause, is to maintain a balance between, on the one hand, the protection of private property rights and, on the other hand, the state regulation (and reform) of property in the public interest.³⁹ To this end, the clause sets out the requirements for valid state interferences with property rights – distinguishing between two categories of interferences: deprivation and expropriation. For present purposes, the most relevant category is deprivation, since it encompasses all state measures that have a legally relevant impact on property rights. As pointed out below, expropriation is a narrower category that, in all likelihood, is not relevant for purposes of the analysis conducted in this article.

The deprivation provision is contained in s 25(1) and provides as follows: ‘No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’.

The question posed in this article is whether the ‘pay now, argue later’ approach to tax collection, as set out in the TAA, complies with the requirements of s 25(1). This question is based on the premise that the Constitution, which contains the Bill of Rights and thus the property clause, is the supreme law of South Africa and that all law or conduct inconsistent with it is invalid.⁴⁰ It is also settled that tax legislation as well as the actions of SARS (a state entity) in terms of tax legislation must comply with, and can thus be challenged against, the rights of taxpayers as per the Bill of Rights and thus the property clause.⁴¹ In order to investigate whether the ‘pay now, argue later’ approach conforms to the property clause, it is necessary to summarise the principles surrounding and requirements of a valid deprivation of property.

According to the general methodology for adjudicating property disputes,⁴² one must first determine whether the interest at stake is ‘property’ as contemplated in s 25(1). If so, one must subsequently determine whether there has been a ‘deprivation’ of such property and then, if so, whether the requirements for a valid deprivation of property have been met. The two requirements set out in s 25(1) are that the deprivation should take place ‘in terms of law of general application’ and, most importantly, that the relevant law may not permit ‘arbitrary deprivation of property’. If both requirements are met, the deprivation will be valid, but if either of the requirements are not met, the result would be a limitation (infringement) of the right in s 25(1). In the latter case, the next step is to test whether the limitation satisfies the justification analysis in s 36(1) of the Constitution.⁴³ If the deprivation is valid or if the limitation is justifiable, one must consider whether the deprivation also qualifies as an ‘expropriation’ and, if so, whether it complies with the requirements for a valid expropriation. Although the exact line between deprivation and expropriation is controversial, expropriation typically involves state acquisition of private property.⁴⁴ For it to be valid, the expropriation must be for a public purpose or in the public interest and the property owner must receive just compensation.⁴⁵ As mentioned above, expropriation will not be considered in this article because the effect of the ‘pay now, argue later’ approach on a taxpayer’s property cannot conceivably fall within the definition of expropriation.⁴⁶

As mentioned, it is necessary to investigate whether the ‘pay now, argue later’ approach implicates a taxpayer’s ‘property’ and, if so, whether it results in a ‘deprivation’ of such property. Further, and most importantly, one must determine whether, if there is such a

deprivation of property, the requirements of s 25(1) are met, the most significant of which is the arbitrariness test.

The first question is whether the interest involved qualifies as 'property'. The 'pay now, argue later' approach involves the compulsory payment by a taxpayer towards settlement of a disputed tax liability. In view of this, the question is whether the taxpayer's money is a form of 'property' for constitutional purposes? Section 25 of the Constitution does not define 'property' except to state that it is not limited to 'land'.⁴⁷ In addition to land, which is obviously included, it is undisputed that the 'property' concept includes interests that would normally qualify as property or things in private law, such as tangible movable objects,⁴⁸ as well as limited real rights in land or movables.⁴⁹

However, the courts have been generous with the definition of 'property' and have acknowledged that 'property' includes intangible assets like intellectual property⁵⁰ as well as personal rights with a monetary value, such as enrichment claims,⁵¹ trading licences⁵² and money in hand.⁵³ In our view, therefore, it is safe to conclude that money in the possession of a taxpayer (either cash or funds held in a bank account) qualifies as 'property' for constitutional purposes. Money is an asset with a patrimonial value, is transferable like any other asset and will form part of the owner's estate in the case of sequestration or liquidation.⁵⁴

The next question is whether, when a taxpayer is compelled to pay a disputed tax debt in terms of the 'pay now, argue later' approach, the resultant decrease in the taxpayer's patrimony can be categorised as a 'deprivation of property'. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance (FNB)*,⁵⁵ which is the *locus classicus* on the interpretation of the property clause, the Constitutional Court defined a deprivation of property very broadly as 'any interference with the use, enjoyment or exploitation of private property'. This definition was narrowed slightly in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng*,⁵⁶ where the Constitutional Court explained, somewhat vaguely, that the existence of a deprivation depends on the extent of the interference and that there must be a substantial limitation that goes beyond the normal restrictions on property in an open and democratic society. The apparent conflict between the broad definition in *FNB* and the narrower definition in *Mkontwana* was largely resolved in *National Credit Regulator v Opperman*,⁵⁷ where the Constitutional Court found that, for the interference to qualify as a deprivation, it must at least be 'significant enough to have a legally relevant impact' on the affected interest.

In light of the wide definition of 'deprivation', the question is whether the provisions in the TAA compelling the taxpayer to pay an assessed, albeit disputed, tax debt before the dispute has been resolved, has a legally relevant impact on the taxpayer's property. None of the judgments on the property clause provide direct authority for this question, but the Constitutional Court in *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport*⁵⁸ regarded it as a deprivation of property if a creditor is compelled by a statutory provision to hand over to the state money that had been paid to the creditor in terms of an unlawful credit agreement.

Being compelled, in terms of a judgment granted during normal debt enforcement proceedings, to pay a valid debt that has been proven, can hardly be regarded a state intervention in (deprivation of) the debtor's property rights, also because no reduction in

patrimony takes place if a due and payable debt is enforced. And even if it were to be regarded as a deprivation of property, it is certainly not arbitrary to enforce a valid debt. However, if a legislative regime compels a person (a taxpayer in this case) to pay a debt that is disputed – and therefore without a court having yet decided that the debt is indeed payable – the reduction in patrimony could be seen as a state intervention in (deprivation of) the taxpayer’s rights to her own money (property). This prospect is strengthened by the fact that the state is the creditor in whose favour the compulsory payment of the disputed debt operates.

A voluntary transfer of property (such as paying a sum of money) is not a deprivation of property because it is not the result of state regulation and not done under the compulsion of law. However, the payment of a disputed debt under the ‘pay now, argue later’ approach cannot realistically be regarded as a voluntary transfer of property because the payment is made under the threat of SARS taking certain enforcement steps if payment is not made. In effect, therefore, payment is forced upon the taxpayer and is only notionally voluntary in the sense that the taxpayer chooses to make the payment to avoid the consequences of non-payment. If SARS compels a third party (like the taxpayer’s bank) to transfer funds to SARS or if SARS executes against the taxpayer’s property, it similarly results in an involuntary transfer of the taxpayer’s property (money) to SARS – hence a deprivation of property.

Consequently, there is little doubt to our mind that the provisions in the Act regarding the ‘pay now, argue later’ approach impose a deprivation of property as contemplated in the property clause, because being compelled to pay a disputed debt certainly represents a legally relevant impact on one’s property. Nevertheless, it should be stressed that, just because one identifies a ‘deprivation of property’, this does not mean that the law in question is unconstitutional or even that it limits the right in s 25(1). The right in s 25(1) will only be limited if the deprivation does not comply with the requirements set out in the subsection – namely if the deprivation was not authorised by ‘law of general application’ or if the law in question permits ‘arbitrary’ deprivation of property.

The first requirement is not problematic for present purposes because the TAA clearly qualifies as a law of general application. The second requirement, however, is the crux of s 25(1), namely that the deprivation of property may not be ‘arbitrary’. In *FNB* the Constitutional Court laid down the principle that a deprivation will be arbitrary either if it is effected in a procedurally unfair way (procedural arbitrariness) or where the law in question does not provide sufficient reason for the deprivation (substantive arbitrariness).⁵⁹

These two elements of the arbitrariness test, as well as their application to the ‘pay now, argue later’ approach, are discussed in the next two parts of this article. As explained below, it is our contention that the ‘pay now, argue later’ approach is neither procedurally unfair nor substantively arbitrary.

3. Procedural arbitrariness

As stated above, in *FNB* the Constitutional Court held that a deprivation will be arbitrary if it is procedurally unfair, being the first element of the arbitrariness test. In the present context, the deprivation of property occurs when the taxpayer is compelled, via the provisions of the TAA, to ‘pay now’ despite disputing her liability and despite a court not having granted a judgment ordering her to pay. The question is whether this deprivation of property is imposed in a procedurally fair manner as contemplated by the arbitrariness test in property clause.

There is no fixed definition for procedural fairness, since it is a flexible concept that will depend on the context of each case.⁶⁰ Relevant considerations include whether there are enough safeguards imbedded in the process, whether the affected party has a reasonable opportunity to be heard, whether timelines are fair, and so forth. One guideline laid down relatively firmly by the courts is that it would be procedurally arbitrary for a law to oust the court's oversight role and discretionary powers regarding the imposition of a deprivation.⁶¹

In the context of the 'pay now, argue later' approach, the procedural fairness of the deprivation should not be considered only with reference to the moment when the deprivation occurs, but instead the whole scheme of the law surrounding the 'pay now, argue later' approach must be viewed holistically. For instance, the recourse and dispute resolution procedure available subsequent to payment should also be scrutinised to determine whether, all things considered, the 'pay now, argue later' approach operates fairly towards the taxpayer on a procedural level. Furthermore, procedural fairness as contemplated by the property clause should not be considered in isolation because it can be linked to at least two other constitutional rights, namely the right of access to courts⁶² and the right to just administrative action.⁶³

To investigate the fairness of the procedure surrounding the 'pay now, argue later' approach, one could roughly divide the sequence of events into three stages: (1) before and until an assessment is made (which confirms the obligation to 'pay now'); (2) after an assessment is made but before the taxpayer makes the payment, and during which time the taxpayer can object to the assessment and request to have the payment obligation suspended pending resolution of the dispute; and (3) after the taxpayer has paid the disputed debt (assuming that the taxpayer did not request a suspension or that she did request a suspension but it was rejected), and during which time the dispute resolution process is commenced and concluded.

Although the taxpayer can dispute, during stage (3), the amount claimed in terms of the tax assessment and ask, in stage (2), for a suspension of the duty to pay, there effectively is no procedural safeguard in stage (1), that is before the demand is made to 'pay now'. For instance, the tax becomes payable when the assessment is issued (or shortly thereafter) and for this SARS requires no court order to confirm the taxpayer's liability to pay, even if it is disputed. SARS can even file a statement with the clerk or registrar of the court, which has the effect of a civil judgment, although no court considered the matter or made an order regarding liability. This civil judgment, which comes into existence without a hearing and without judicial sanction (the clerk and registrar are not judicial officers), can even be executed against the taxpayer's property and/or payment of the judgment can be demanded from certain third parties holding funds belonging to the taxpayer.⁶⁴

The fact that court oversight is ousted in the process leading up to determining the payment obligation (assessment), could be procedurally problematic because it might infringe on the right of access to courts, which, in turn, might also indicate a lack of procedural fairness for purposes of the property clause. However, the Constitutional Court has already affirmed in *Metcash Trading* that the 'pay now, argue later' approach does not unjustifiably limit the right of access to courts because the involvement of courts is not completely ousted. For purposes of this article, we do not necessarily accept, as the court in *Metcash Trading* did, that the 'pay now, argue later' approach entails a justifiable limitation of the right of access to courts as contained in s 34 of the Constitution.⁶⁵ However, to the degree that judicial oversight can be an element of procedural arbitrariness in terms of the property clause, we

argue that there is probably sufficient access to judicial relief for taxpayers who wish to dispute the impact of the ‘pay now, argue later’ approach on their property rights.

Even though no court authorisation is required before SARS may require a taxpayer to ‘pay now’, we accept that the taxpayer’s opportunities to seek judicial intervention after she has paid the disputed debt – hence to ‘argue later’ during stages (2) and (3) – are sufficient to satisfy the procedural fairness requirement for purposes of the property clause. Whether these opportunities to seek judicial intervention after the fact are enough to give effect to the right of access to court might be a different matter, but for present purposes it is not necessary to express a view in this regard.

To summarise, the ousting of judicial oversight or judicial discretion is a strong factor indicating procedural arbitrariness for purposes of the property clause. However, the TAA neither ousts a court’s ability to provide relief if the taxpayer seeks it, nor removes a court’s discretion to consider the facts of the case when adjudicating any disputes. Therefore, these factors contribute towards procedural fairness for purposes of the property clause. Furthermore, although there is no formal judicial or other procedure *before* SARS may require payment of the assessed (disputed) tax debt, this lack of a procedure *before* is compensated by the fact that there are two procedures *after* the taxpayer is required to pay, as explained below, both of which could provide the taxpayer with adequate procedural protection.

Administrative justice, another constitutional concept related to procedural fairness, is relevant when an administrative action, which would impact a person’s rights, is required to be made. In fact, to the degree that an administrative action could impact on the protection (or lack thereof) of a person’s property, it could play a part in determining whether a deprivation of property is procedurally arbitrary. In the context of the ‘pay now, argue later’ approach, it should be considered that the deprivation of property does not take place via an administrative action as such, since it is instead imposed by the relevant provisions of TAA that compel the taxpayer to ‘pay now’ or face enforcement action. However, the opportunities for the taxpayer to ‘argue later’, hence after payment, involve administrative actions by virtue of the decisions that SARS is required to make – such as when it decides on the suspension request and/or the objection to the assessment. If these administrative decisions are taken in a procedurally fair manner as understood in administrative law, it arguably supports the procedural fairness of the deprivation of property as well.⁶⁶

Section 3(2)(b) of PAJA provides that administrative action is considered procedurally fair if adequate notice is given relating to the nature and purpose of the proposed administrative action; the person affected by the possible administrative action has a reasonable opportunity to make representations; a clear statement of the administrative action is given; where applicable, adequate notice regarding the right to review or internal appeal is given; and adequate notice pertaining to the right to request reasons is given.

Administrative actions could occur during two processes that pertain to the ‘pay now, argue later’ approach – those taking place in stages (2) and (3) of the sequence of events. The first process during which administrative law is applicable is in stage (2), when the taxpayer requests to have the payment obligation suspended. SARS’ decision in relation to the suspension would constitute administrative action and accordingly this decision not only needs to comply with the provisions in the TAA but must also satisfy the standard of procedural fairness contained in PAJA. The same is true when SARS proceeds with

enforcement action against a taxpayer whose payment obligation was not suspended pending dispute resolution.

Due to the fact that SARS would usually not be able to proceed with enforcement of outstanding (disputed) taxes before 10 business days have expired after informing the taxpayer of its decision regarding suspending the payment obligation, SARS would most probably pay special attention to inform the taxpayer of its decision. Accordingly, the taxpayer should receive adequate notice of the administrative action. Also, when the taxpayer requests a suspension, she will typically provide facts and evidence that speak to the factors that the senior SARS official must consider when making the decision. In other words, one can conclude that the current law probably gives the taxpayer sufficient opportunity to make representations pertaining to the administrative action. Also, the cost and time associated with submitting this suspension request are minimal as this request can be submitted via e-filing or at a SARS branch office. This points towards procedural fairness.

The second process where administrative law is relevant is during stage (3) when the taxpayer disputes the assessed tax, which process formally commences when the taxpayer objects to the assessment⁶⁷ at least 30 days after receiving reasons for the assessment (if such reasons were requested by the taxpayer) or, in the absence of a request for reasons, at least 30 days after the date of assessment.⁶⁸ SARS then has 60 days after receiving the objection to notify the taxpayer whether the objection is allowed or disallowed.⁶⁹ This notice of SARS' decision must provide the basis for SARS' decision as well as a summary of the procedure to appeal if the objection is disallowed.⁷⁰

If SARS disallows the objection, the taxpayer may lodge an appeal with the Tax Board⁷¹ or Tax Court.⁷² When a taxpayer lodges an appeal with the Tax Board, the appeal must be set down 30 days after receiving the notice from the taxpayer.⁷³ In turn, if the taxpayer appeals the decision of the Tax Board to the Tax Court, or if the matter is heard directly by the Tax Court, SARS has 45 days after receiving notice that the matter is referred to the Tax Court to provide a statement of the grounds of assessment and opposing appeal.⁷⁴ The taxpayer is then required to provide a statement of grounds of appeal within 45 days after receiving the statement from SARS.⁷⁵ SARS then has twenty days to reply to this statement of grounds of appeal.⁷⁶

From the above explanation of the procedures surrounding the 'pay now, argue later' approach, it can, in our view, probably not be asserted that the deprivation of property caused by the implementation of this approach is procedurally unfair – at least for purposes of the property clause. Taxpayers are given ample opportunity to protect their rights by challenging the tax assessment and/or applying for a suspension of the payment obligation pending the resolution of the dispute. Not only must the principles of administrative justice be adhered to when SARS makes decisions regarding the dispute and/or the suspension, but taxpayers also have recourse to the courts should they be dissatisfied with the decisions by SARS. Assuming that SARS complies with the rules of administrative law and that the courts exercise their oversight role correctly, the procedural protection afforded by the existing law arguably also ensures that procedural arbitrariness is avoided in as far as the deprivation of property is concerned.

4. Substantive arbitrariness

Regarding the second leg of the arbitrariness test, the Constitutional Court in *FNB* set out, in quite some detail, the particulars of the substantive arbitrariness test, which asks whether the law in question provides *sufficient reason* for the deprivation.⁷⁷ Essentially, to determine whether there is sufficient reason, a means-ends analysis must be conducted. One must evaluate the relationship between the means employed (the deprivation) and the ends sought to be achieved (the purpose of the law).⁷⁸ In fact, a complexity of relationships should be considered,⁷⁹ namely (1) between the purpose of the deprivation and the person whose property is affected;⁸⁰ (2) between the purpose of the deprivation and the nature of the property; and (3) between the purpose of the deprivation and the extent thereof.⁸¹

The nature of the property and the extent of the deprivation will indicate how compelling the purpose for the deprivation must be to satisfy the test. For instance, if ownership of land or tangible movables is involved, a more compelling reason for the deprivation would be required than in cases where the object is something else or the right is something less than ownership.⁸² Similarly, if the deprivation extends to all the incidents of ownership, the purpose for the deprivation would have to be more compelling than in cases where only some incidents of ownership are impacted.⁸³ However, these are general guidelines only, as is evidenced by case law subsequent to *FNB*, such as *Opperman*, where the court required a compelling reason for the deprivation of intangible assets (an enrichment claim, not ownership of a tangible asset).⁸⁴

Depending on the interplay between the means and ends, and the different relationships involved, the strictness of the test for determining sufficient reason will fluctuate between two ends on a continuum. In some cases a mere rational connection between the means and ends will be enough to satisfy the arbitrariness test (a less strict test), while other cases would demand a proportionality evaluation closer, although not equal, to the test required by section 36(1) of the Constitution (a more strict test).⁸⁵ In the end, the question whether there is sufficient reason for the deprivation will depend on the facts and context of each case.⁸⁶

Although a rational connection between the deprivation and its purpose is obviously the minimum threshold, one should carefully consider the context in order to determine whether a degree of proportionality between the means and ends is also required. A rationality test only requires that the chosen means ('pay now, argue later') should be capable of achieving the desired ends. On the other hand, a strict proportionality standard would, for instance, require that the chosen means ('pay now, argue later') is the only or least invasive way to achieve the ends. Put another way, the chosen means is indispensable because, without it, it will be impossible to achieve the desired ends. In other words, if there are less restrictive means available, the measure in question is probably not proportional.⁸⁷

It is apparent from the above that the purpose of the deprivation is central to the application of the arbitrariness test (since there must be *sufficient reason*), including in determining how strict the test should be. It is therefore necessary to identify the exact purpose behind (and importance of) the 'pay now, argue later' approach and to ask whether the purpose is sufficient considering all relevant aspects (such as the impact) of the 'pay now, argue later' approach.

As indicated above,⁸⁸ the purpose of the 'pay now, argue later' approach is to ensure the speedy collection of outstanding taxes and to avoid frivolous objections and appeals simply

to defer the payment of taxes. The importance of collecting taxes is obvious, since government requires the funds collected via taxation to fulfil its constitutional and statutory obligations towards the public, including to realise socio-economic rights.⁸⁹ In addition, it must be considered that South Africa has a relatively small tax base, and as such it is crucial that persons liable to pay tax should do so speedily.⁹⁰ The Constitutional Court has also confirmed that the enforcement of tax debts is a legitimate government purpose.⁹¹ It is clear that the ‘pay now, argue later’ approach, together with SARS’ enforcement powers, aids in effective tax collection. The question however arises whether the ‘pay now, argue later’ approach (means) is an appropriate measure to achieve the purpose of effective tax collection (ends), also considering the effect that it might have on taxpayers in individual cases.

The purpose behind the ‘pay now, argue later’ approach is also supported by the unique nature of the debtor-creditor relationship that exists between a taxpayer and SARS. Unlike the situation with other normal creditors, SARS cannot select its debtors based on things like risk and affordability assessments and factors such as the taxpayer’s credit repayment history. There is also no contractual consensus between SARS and taxpayers, and as such their relationship is not based on either party’s voluntary volition. In effect, SARS is forced into a debtor-creditor relationship with all persons who become liable to pay tax in terms of the levying provisions of fiscal legislation. The unique ‘forced’ nature of the SARS-taxpayer relationship, along with the importance of effective tax collection for society as a whole, points towards a lower threshold for the justification of certain exceptional debt enforcement powers that normal creditors do not enjoy. A standard closer to rationality (and therefore not strict proportionality) will probably be sufficient, provided that there are adequate safeguards in place to prevent SARS’ collection powers from being draconian, abused and/or have unreasonable consequences for taxpayers.

The TAA contains certain safeguards that protect a taxpayer against the consequences of the ‘pay now argue later’ approach. Firstly, the taxpayer’s payment obligation may be suspended if the relevant requirements are met. Clearly, if SARS grants this suspension, the taxpayer’s money (property) remains intact and thus no ‘deprivation of property’ occurs. In the event that SARS denies the suspension request, a taxpayer can take this decision on review, since it constitutes administrative action. Secondly, if the dispute is adjudicated in favour of the taxpayer, by way of objection or appeal, the taxpayer will be reimbursed. Consequently, the deprivation is not permanent; it only subsists for as long as the debt is disputed. Thirdly, the reimbursement will include interest of nine per cent per annum,⁹² which compensates the taxpayer for the time that she was divested of the relevant funds.

In our assessment, the safeguards mentioned above, combined with the importance of tax collection and the unique nature of the SARS-taxpayer relationship, point towards the conclusion that a rational connection between the deprivation and its purpose will be sufficient to satisfy the non-arbitrariness test in this context. The fact that the deprivation is not meant to be permanent but only temporary until the dispute is resolved, also points away from the proportionality and towards the rationality standard. It is arguable, therefore, that it is enough to prove that the ‘pay now, argue later’ approach is rational because it clearly supports the legitimate purpose of tax collections. It is not necessary to illustrate strict proportionality between the means and ends by proving that the ‘pay now, argue later’ approach is indispensable or the last resort. For instance, Fritz asserts that the ‘pay now, argue later’ approach is not arbitrary due to the fact that there is a rational link between the reason for this approach and the deprivation caused by it.⁹³ Another factor that supports the

rationality of the ‘pay now, argue later’ approach, as pointed out by Croome, is that it is not unique to South Africa but is employed by other democratic jurisdictions as well.⁹⁴

Although it is reasonably clear that the ‘pay now, argue later’ approach satisfies the rationality test, it might be harder for it to pass a proportionality standard. For instance, it may be difficult to prove that effective tax collection is absolutely dependent on the ‘pay now, argue later’ approach or that there are no other ways to achieve an effective tax collection system. Notwithstanding, one could reason that the ‘pay now, argue later’ approach is so important and necessary to achieve effective tax collection and overcome frivolous objections, that it could indeed satisfy a stricter proportionality test as well. Without the ‘pay now, argue later’ approach, the chances are that very high numbers of taxpayers would lodge disputes and refuse to pay until such disputes are resolved – just because they can. SARS could end up spending such exorbitant amounts of time and money on disputes surrounding tax liability, that the effective enforcement of tax could become seriously compromised.

In light of the abovementioned considerations, an argument could be made that the ‘pay now, argue later’ approach will satisfy a proportionality test, but we nevertheless maintain that it only needs to meet a lower rationality standard in order to not be arbitrary for purposes of the property clause. This assertion can be illustrated with a brief discussion of two prominent cases – *FNB* and *Mkontwana* – in which the powers of tax authorities were challenged for constitutional validity based on the property clause. We also briefly discuss the *Harksen* case, which involved a comparable temporary transfer of property to fulfil an important purpose in the insolvency law context.

In the *FNB* matter the Constitutional Court grappled with the means-ends analysis to determine whether s 114 of the Customs and Excise Act 91 of 1964 is unconstitutional. In short, s 114 permitted the Commissioner of SARS to collect customs debts by selling goods belonging to the debtor or a third party whose property was present on the debtor’s premises, without any prior judgment or court authorisation. In relation to the ‘means’ (deprivation) the court held that there was an insufficient nexus between the customs debt and the person who is deprived of property (because it could be a third party) as well as between the property and the customs debt.⁹⁵ Accordingly, the Constitutional Court held s 114 to be unconstitutional to the extent that it applied to property belonging to third parties.

In *Mkontwana* the Constitutional Court also considered whether there were appropriate links between the deprivation of property, the debt and the person. In this matter, s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 was challenged in terms of s 25(1) of the Constitution, as an owner of immovable property could not obtain a certificate to effect a transfer of the property if there were any consumption charges outstanding for the preceding two years. This means that an owner would be prevented from transferring property even if non-owner occupiers incurred electricity and consumption charges and failed to pay such.⁹⁶ Section 118(1) embodies a deprivation of property because it places a restriction on an owner’s entitlement to dispose of his property freely, which restriction is temporary until the relevant charges are paid.

The court held, on the one hand, that there was a close nexus between the property and the outstanding debt because the water and electricity were supplied and consumed at the property.⁹⁷ On the other hand, the court found the nexus between the owner and the consumption charge ‘somewhat attenuated’ when it relates to occupants who did not pay for

the water and electricity they consumed.⁹⁸ Nevertheless, the court held that the strong relationship between the property and debt outweighed the weaker relationship between the owner and the debt.⁹⁹ Consequently, s 118(1) was found not to constitute an arbitrary deprivation of property.

The ‘pay now, argue later’ approach is distinguishable from *FNB* and the s-114-deprivation. Unlike the *FNB* case, the ‘pay now, argue later’ approach is not concerned with the sale of unrelated goods. Rather, it requires the payment of money to extinguish the tax debt. Moreover, the person who is obliged to pay the money is also the person who owes the (disputed) tax debt. Hence, there are clear and strong links between the tax debt, the property (money) and the taxpayer, which points towards a non-arbitrary deprivation.

Apart from considering the relationships at play, the extent of the deprivation should also be considered.¹⁰⁰ Similar to *Mkontwana*,¹⁰¹ the deprivation caused by the ‘pay now, argue later’ approach is only temporary until the dispute is adjudicated in favour of the taxpayer, when she would be reimbursed with interest. In the event that the objection or appeal is disallowed, meaning that the taxpayer indeed owes the money, the deprivation cannot be contrary to s 25(1) of the Constitution because it is not arbitrary to expect payment of a valid and payable debt.

The ‘pay now, argue later’ approach is also roughly comparable to s 21 of the Insolvency Act 24 of 1936. According to s 21, if an insolvent debtor is sequestrated, assets belonging to his solvent spouse (with whom he is married out of community of property) also vests in the trustee of the insolvent estate, unless and until the solvent spouse can prove that the assets truly belong to her and was not acquired with her husband’s funds. The purpose of this rule is to counter collusion between spouses and to ensure that the creditors of the insolvent estate are not defrauded of assets due to simulated transactions between the insolvent and his spouse. The constitutionality of this rule was challenged in *Harksen v Lane*¹⁰² on the allegation that it amounted to an invalid expropriation of property in terms of property clause in the Interim Constitution.¹⁰³ The Constitutional Court rejected this allegation and found that the effect of s 21 did not qualify as an expropriation.¹⁰⁴ Although the effect of s 21 is a transfer of ownership of the solvent spouse’s assets to the estate of her husband, this is not an expropriation because the purpose is not to divest her of her assets permanently. It is only a temporary measure until true ownership of the assets can be established so as to ensure that creditors are not defrauded of assets that should be available to them. Ultimately, the solvent spouse’s true assets will be returned to her and only those assets that actually belonged to her husband will be lost to her. In *Harksen* the court was only called upon to determine if the effect of s 21 fell within the definition of ‘expropriation’, which it answered in the negative. It was not called upon to, nor did it, investigate whether s 21 entailed a valid ‘deprivation’ of property.¹⁰⁵ However, the reasoning of the court regarding the expropriation question was very similar to the kind of reasoning one could expect from an application of the arbitrariness test in terms of the deprivation clause in s 25(1) of the Constitution.¹⁰⁶

One can arguably apply the reasoning in *Harksen* to the ‘pay now, argue later’ approach, since the latter has a very similar purpose and effect to that of s 21 of the Insolvency Act, albeit in different contexts, namely a temporary transfer of property effected before disputes regarding the affected property are resolved. The purpose of the ‘pay now, argue later’ approach is not to permanently deprive a taxpayer of money that is *not* owed to SARS (which probably would be an arbitrary deprivation or even an invalid expropriation). To the degree that an overpayment is required, such payment only involves a temporary deprivation of

property in order to support the goal of efficient tax collection and of avoiding frivolous objections. This may be a serious inconvenience for the taxpayer who is overcharged, but if it is ultimately proven that the amount was not owed, it will be returned to the taxpayer with interest, which will hopefully compensate the taxpayer for the inconvenience experienced.

From the discussion regarding substantive arbitrariness, it is clear that the ‘pay now, argue later’ approach (means) is an appropriate measure to achieve the purpose of effective tax collection (ends), since there are strong links between the tax debt, the taxpayer and the property (money) that is deprived. Furthermore, the taxpayer is only deprived of money that is not owed to SARS until the dispute has been resolved in favour of the taxpayer. Consequently, in light of the relevant case law discussed above, we argue that the ‘pay now, argue later’ approach does not constitute a substantive arbitrarily deprivation of property.

Notwithstanding the above general conclusion regarding the non-arbitrariness of the ‘pay now, argue later’ approach, one further matter could be relevant, namely the negative consequences that may arise for some taxpayers. For example, it may happen that a certain taxpayer who is required to ‘pay now’ is not in the financial position to do so. In fact, the available safeguards (namely, applying for a suspension and objecting to the assessment) might not always be effective to prevent a cash-strapped taxpayer from suffering financially. Such a taxpayer would possibly also not have the necessary means to take SARS’ decision not to suspend the payment obligation on review. The taxpayer may similarly not be able to afford the subsequent objection and/or appeal, as these proceedings could require considerable expertise and time. Furthermore, reimbursing a taxpayer with interest when the matter is resolved in favour of the taxpayer, may in some instances not be enough to prevent the taxpayer from experiencing financial ruin when paying the assessed amount pending an objection or appeal.¹⁰⁷ In addition, when a taxpayer, who employs other people, pays disputed taxes in terms of the ‘pay now, argue later’ approach, it could have a ripple-effect on the taxpayer’s employees if the taxpayer is, as a result of the over-payment, unable to keep her business afloat until the dispute is resolved in her favour.¹⁰⁸

The fact that certain negative consequences like those mentioned above could occur when the ‘pay now, argue later’ approach is applied, does not necessarily render the deprivation of property arbitrary. Firstly, the fact that it costs money to go through dispute resolution proceedings is not unique to the ‘pay now, argue later’ context. To the extent that a lack of funding to pursue administrative and/or judicial recourse is a problem, this speaks to a broader issue of access to justice and is consequently not directly relevant when it comes to testing the ‘pay now, argue later’ approach for compliance with the property clause as such. Secondly, the fact that a taxpayer is unable to ‘pay now’ or is likely to experience financial ruin as a result of paying the disputed tax bill, should ideally be considered by SARS when it decides whether to grant the taxpayer’s request to have her payment obligation suspended. Assuming that SARS will make a reasonable and fair decision based on all the facts placed before it, such prejudice should in most instances be kept to a minimum. In other words, the existing law already contains a mechanism whereby the taxpayer’s financial situation can be taken into account, which mechanism serves as a safeguard against excessive, and thus arbitrary, consequences for taxpayers in certain individual cases where such problems may arise.

5. Concluding remark

In this article we have shown that the Davis Tax Committee was perhaps overhasty when it declared, without substantiation, that the ‘pay now, argue later’ approach is contrary to a taxpayer’s right not to be deprived of property arbitrarily as per section 25(1) of the Constitution. It is true that the ‘pay now, argue later’ approach may cause significant inconvenience and even financial distress for taxpayers who receive tax assessments that they dispute, but inconvenience and negative financial consequences are not enough to conclude that a statutory principle is constitutionally problematic. A more in-depth investigation into the means and ends of the particular measure is necessary in order to reach conclusions regarding its constitutional validity. We have attempted to provide such an analysis in this article and in our assessment, therefore, the ‘pay now, argue later’ rule does not fall foul of s 25(1) of the Constitution. To the extent that the relevant provisions in the TAA cause a deprivation of property on the part of the taxpayer, our conclusion is that the deprivation is not arbitrary as contemplated by the property clause. The reason for this is that the deprivation is imposed in a procedurally fair manner, while there is also sufficient reason for the deprivation. Accordingly, the important purpose served by the ‘pay now, argue later’ approach, along with the safeguards imbedded in the TAA, provides enough justification for the effect of this approach on taxpayers’ property rights.

Disclosure statement

No conflict of interest was reported by the authors.

Notes on contributors

Carika Fritz, associate professor, School of Law, University of the Witwatersrand, Johannesburg, South Africa

Reghard Brits, associate professor, Department of Mercantile Law, University of Pretoria, Pretoria, South Africa

Notes

1 See the discussion in para 2 below regarding s 164 of the TAA, which currently provides for the ‘pay now, argue later’ approach.

2 RC Williams ‘The pay-now-argue-later rule festers in our income tax system (Mobibane case)’ SA Tax Guide <<http://bit.ly/1O5PQ8a>>.

3 *Capstone 556 (Pty) Ltd v Commissioner for SARS* 2011 (6) SA 65 (WCC) para 9.

4 *Metcash Trading Ltd v Commissioner of the South African Revenue Service* 2001 (1) SA 1109 (CC).

5 *Metcash Trading v Commissioner for SARS* 62 SATC 84 WLD.

6 *Metcash Trading* (note 4 above) 1132.

7 Ibid 1130.

8 Williams (note 2 above); Editorial ‘Metcash Constitutional Court judgement’ (Dec 2000) *Taxgram* 1, 1–2; Editorial ‘The Metcash judgment and the delicate balance between state and taxpayer’ (Feb 2001) *Taxgram* 1, 1–4; BJ Croome *Taxpayers’ Rights* (2010) 40; BJ Croome *Taxpayers’ Rights in South Africa: an Analysis and Evaluation of the Extent to which the Powers of the South African Revenue Service Comply with the Constitutional Rights to Property, Privacy, Administrative Justice, Access to Information and Access to Courts* (2008) 173; BJ Croome ‘Paying up or arguing first’ (2001) *Business Day Professional* 6, 6; RC Williams ‘Unresolved aspects of the “pay now, argue later” rule’ (Jan 2012) *Synopsis* 4, 4; BJ Croome & L Olivier *Tax Administration* (2015) 372; L Olivier ‘Tax collection and the Bill of Rights’ (2001) *Journal of South African Law* 193, 196; C Keulder ‘Pay now, argue later rule – before and after the Tax Administration Act’ (2013) 16 *Potchefstroom Electronic Law Journal* 125; C Fritz *An Appraisal of Selected Tax-Enforcement Powers of The South African Revenue Service in The South African Constitutional Context* (2017) 162–166; C Fritz ‘Payment obligations of taxpayers pending dispute resolution: approaches of South Africa and Nigeria’ (2018) 18 *African Human Right Law Journal* 171.

9 Davis Tax Committee ‘Report on Tax Administration’ (2017) 75.

10 *Metcash Trading (HC)* (note 5 above) 89–90.

11 Ibid 90.

12 Croome 2008 (note 8 above) 39; Fritz 2017 (note 8 above) 160.

13 Section 133 of the TAA relates to an appeal against a decision of the Tax Court.

14 Standing Committee on Finance (SCOF) ‘Report-back hearings: Draft Taxation Laws Amendment Bill, 2014 and Tax Administration Laws Amendment Bill, 2014 – Draft Response Document’ (15 October 2014) 41.

15 Section 172(1) of the TAA.

16 Section 174 of the TAA.

17 Section 172(1) of the TAA.

18 Section 172(3) of the TAA.

19 See for example *Capstone 556 (Pty) Ltd v Commissioner for SARS* (note 3 above).

20 Section 179(1) of the TAA.

21 Section 179(3) of the TAA.

22 Section 234(n) of the TAA; see also J van der Walt & D le Roux ‘Third party appointments by SARS under the Tax Administration Act’ (2013) 38 *Taxtalk* 16, 16.

23 The amount may be altered in accordance with an objection or an appeal, a decision of a court or a concession made by SARS.

24 Section 164(7) of the TAA. Section 164(7) provides that the interest should be calculated in terms of s 187(1) of the Act. Section 187(1), in turn, refers to s 188 and 189 with regard to the calculation of the interest. Section 188(1) states that interest 'is imposed for the period from the effective date of the tax to the date the tax is paid', unless a 'tax Act' provides otherwise. The term 'tax Act' is defined in s 1 of the TAA and includes the TAA itself. Therefore, the period over which interest accrues in terms of s 164(7) would enjoy preference. As such, the period during which interest on this refund will accrue is from the date on which the excess payment was received until the refund is made (s 164(7) of the TAA). Section 189 of the Act stipulates that the rate of interest is the prescribed rate of interest as announced under s 80(1)(b) of the Public Finance Management Act 1 of 1999.

25 General Notice 119 *Government Gazette* 43050 (28 February 2020).

26 Section 164(2) of the TAA.

27 Croome & Olivier (note 8 above) 433.

28 In terms of s 1 of the TAA, a 'senior SARS official' is defined as 'the Commissioner, a SARS official who has specific written authority from the Commissioner to do so or a SARS official occupying a post designated by the Commissioner for this purpose'.

29 See Fritz 2017 (note 8 above) 171–174 for a discussion on the development of these relevant factors.

30 Section 164(3) of the TAA.

31 Section 164(5) of the TAA.

32 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) 842; Fritz 2017 (note 8 above) 37.

33 Section 6(2)(e) of PAJA.

34 Section 164(6) of the TAA.

35 Fritz 2017 (note 8 above) 175.

36 Section 164(6)(b) of the TAA.

37 Fritz 2017 (note 8 above) 175.

38 On the property clause in general, see for example G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The Law of Property* 6 ed (2019) ch 21; AJ van der Walt *Constitutional Property Law* 3 ed (2011); T Roux 'Property' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* Vol 3 2 ed OS (2003) ch 46.

39 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 49–50; Van der Walt (note 38 above) 29–31.

40 Section 2 of the Constitution.

41 See s 7(2) and 8(1) of the Constitution. The best example of a successful constitutionality challenge against a provision in a taxation statute is *FNB* (note 39 above), which concerned a challenge against s 114 of the Customs and Excise Act 91 of 1964 based on s 25(1) of the Constitution.

42 The general methodology for adjudicating property disputes was developed by the Constitutional Court in *FNB* (note 39 above) para 46.

43 It is unlikely that a deprivation that fails to satisfy either of the requirements in s 25(1) will ever satisfy the requirements of s 36(1). The ‘law of general application’ requirement is the same in both sections and the proportionality test in s 36(1) is either as strict as or stricter than the arbitrariness test in s 25(1). See *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) 73–79; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC) para 87; Muller et al. (note 38 above) 613–615.

44 *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 48.

45 Subsections 25(2)–(3) of the Constitution.

46 Compare the approach in the United States of America, where it is generally accepted that taxation cannot be classified as a ‘taking’ (the US term for expropriation) of property because it would make no sense to expect the state to compensate a taxpayer for taxes paid; see JL Sax ‘Takings and the police power’ (1964) 74 *The Yale Law Journal* 36, 75–76; E Kades ‘Drawing the line between taxes and takings: The continuous burdens principle, and its broader application’ (2002) 97 *Northwestern University Law Review* 189. See also Van der Walt (note 38 above) 347–349; EJ Marais ‘When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court’s state acquisition requirement (part I)’ (2015) 18 *Potchefstroom Electronic Law Journal* 2982, 2984.

47 Section 25(4)(b).

48 See for example *FNB* (note 38 above) para 54 (motor vehicles); *South African Diamond Producers Organisation v Minister of Minerals and Energy NO* 2017 (10) BCLR 1303 (CC) para 41 (diamonds).

49 See for example *Agri SA v Minister for Minerals and Energy* (note 42 above) (mineral rights); *Jordaan v Tshwane Metropolitan Municipality* 2017 (6) SA 287 (CC) paras 58, 61 (real security rights).

50 *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as amicus curiae)* 2005 (8) BCLR 743 (CC).

51 See for example *National Credit Regulator v Opperman* (note 43 above) paras 57–65; *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 38.

52 See for example *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* (note 43 above) paras 61, 68, 139, 143 (liquor trading licence); *South African Diamond Producers Organisation v Minister of Minerals and Energy* (note 48 above) para 57 (diamond trading licence).

53 *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 (10) BCLR 1158 (CC) para 16.

54 See the test set out in *Opperman v Boonzaaier* [2012] JOL 29470 (WCC) para 18 and endorsed by *National Credit Regulator v Opperman* (note 43 above) paras 57–65. For express authority that ‘money in hand’ qualifies as property for constitutional purposes, see especially *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* (note 53 above) para 16.

55 *FNB* (note 39 above) para 57.

56 2005 (1) SA 530 (CC) para 32. See also *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 (1) SA 293 (CC) paras 30, 39–43; *South African Diamond Producers Organisation v Minister of Minerals and Energy NO* (note 48 above) paras 42–48.

57 Note 43 above para 66. See also *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* (note 43 above) paras 73–76.

58 Note 53 above para 18.

59 *FNB* (note 39 above) para 100.

60 *Mkontwana* (note 56 above) para 65; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) para 40.

61 *National Credit Regulator v Opperman* (note 43 above) para 69; *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* (note 53 above) paras 21–24. See also AJ van der Walt ‘Procedurally arbitrary deprivation of property’ (2012) 23 *Stellenbosch Law Review* 88, 94.

62 Section 34 of the Constitution.

63 Section 33 of the Constitution. Compare *FNB* (note 39 above) para 67 and see further Van der Walt (note 61 above).

64 See the discussion under para 2 above where the filing of a statement is discussed.

65 See Keulder (note 8 above); Fritz 2017 (note 8 above); C Fritz ‘Reconsidering the “pay now, argue later” approach in South Africa in relation to disputed taxes – lessons from Canada and Australia’ (2019) 44 *Journal for Juridical Science* 29 regarding the constitutionality of the ‘pay now, argue later’ approach in relation to the right of access to courts.

66 See Van der Walt (note 61 above) on the relationship between procedural fairness under the property clause and procedural fairness in terms of administrative law.

67 Section 104 of the TAA.

68 Section 103 of the TAA read with rule 7(1) of the Rules promulgated under s 103 of the Tax Administration Act 28 of 2011 as contained in General Notice 550 in *Government Gazette* 37819 (11 July 2014) (the Rules).

69 Rule 9 of the Rules; s 106(4) of the TAA. This period may be extended, in terms of s 106(2) of the TAA, by a maximum of 45 days if a senior SARS official opines that due to exceptional circumstances, the amount involved, a specific principle or complexity, more time is needed to make the determination.

70 Section 106(4) of the TAA.

71 Section 107(1) of the TAA. Section 109(1) of the TAA provides that an appeal may be heard by the Tax Board if the amount of tax in dispute does not exceed the amount determined by the Minister of Finance. In terms of General Notice 1196 in *Government Gazette* 39490 (17 December 2015), from 1 January 2016 the amount is R1 million. Prior to 1 January 2016, the monetary jurisdiction of the Tax Board was R500,000, as indicated in General Notice 271 in *Government Gazette* 29742 (28 March 2007).

72 Section 116 of the TAA.

73 Rule 26 of the Rules.

74 Rule 31 of the Rules.

75 Rule 32 of the Rules.

76 Rule 33 of the Rules. Once the dispute has been adjudicated by the Tax Court, either party can appeal further to the High Court. Further litigation will proceed in terms of the Superior Courts Act 10 of 2013 and the Rules Regulating the Conduct of Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa.

77 See *FNB* (note 39 above) para 100.

78 *Ibid* 100(a).

79 *Ibid* 100(b).

80 *Ibid* 100(c).

81 *Ibid* 100(d).

82 *Ibid* 100(e).

83 *Ibid* 100(f).

84 *National Credit Regulator v Opperman* (note 43 above) paras 70–71.

85 *FNB* (note 39 above) para 100(g).

86 *Ibid* 100(h). See further Van der Walt 2011 (note 38 above) 237–270.

87 See for example s 36(1)(e) of the Constitution.

88 See para 1 above.

89 These rights include the rights to an environment that is not harmful to their health or well-being (s 24 of the Constitution), to adequate housing (s 26 of the Constitution), to health care, food, water and social security (s 27 of the Constitution) as well as to basic education (s 29 of the Constitution).

90 *Metcash Trading (HC)* (note 5 above) 94.

91 *FNB* (note 39 above) para 108.

92 See para 2 above.

93 Fritz 2017 (note 8 above) 160.

94 Croome 2010 (note 8 above) 39. For instance, in Australia s 14ZZM and 14ZZR of the Taxation Administration Act, 1953 also provides for a ‘pay now, argue later’ approach. On the approach in Australia, see K Wyatt and W Gumley ‘Are the Commissioner’s debt recovery powers excessive?’ (December 1995) Monash University Department of Banking and Finance Working paper 95/4.

95 Note 39 above paras 108–109.

96 Note 56 above para 2.

97 *Ibid* para 60.

98 *Ibid* 60.

99 *Ibid* 60.

100 *Mkontwana* (note 56 above) paras 44–45.

101 *Ibid* para 45.

102 *Harksen v Lane* 1998 (1) SA 300 (CC).

103 Section 28 of the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution). The Interim Constitution has been repealed.

104 *Harksen* (note 102 above) paras 36–38.

105 *Ibid* 40.

106 See R Brits ‘Section 21 of the Insolvency Act and the final Constitution’s property clause: revisiting *Harksen v Lane NO*’ in G Muller, R Brits, BV Slade & J van Wyk (eds) *Transformative Property Law: Festschrift in Honour of AJ van der Walt* (2018) 74–95.

107 'Taxpayers may be at risk with "pay now, argue later" rule' (2011) South African Institute of Chartered Accountants, 15 January. <<https://bit.ly/2tWs4NL>>.

108 Compare for example *Nondabula v C:SARS* 19 SATC 333 para 25.