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A Constitutional analysis of a differentiated tax treatment of residents and non-residents in respect of income deriving from immovable property in South Africa

by

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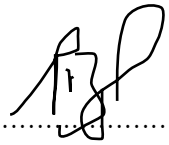
Signature of Supervisor…… 

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SUMMARY

As South African law stands, a resident taxpayer pays a higher rate of effective tax on the same amount of taxable income earned from rental property and on the proceeds from the disposal of a South African fixed property in comparison with a non-resident taxpayer.

This thesis explains the reasons for these different effective tax rates, and calculations illustrate how marked the differences are. Included are calculations that show how Botswana, Australia and the United Kingdom tax residents in comparison with non-residents on the same amount of taxable income. It is apparent that these countries have a much smaller gap between the amount of tax paid by residents in comparison with non-residents.

This thesis then considers the effect of the different effective tax rates in the light of an individual's right to equality, property and economic freedom in terms of the South African Constitution. This entails an in-depth constitutional analysis that considers South African case law, academic commentary as well as possible governmental arguments in favour of maintaining the status *quo*, such as the need to encourage foreign investment in the country. This thesis illustrates that a resident's constitutional rights have been infringed, and that the current law should be changed to ensure that resident's constitutional rights are no longer violated.

Recommendations are made as to how the law should be changed so that the gap between the amount of tax paid by residents and non-residents is reduced and resident's constitutional rights are no longer violated. These recommendations are made with a view to ensure there is no large administrative burden placed on the South African Revenue Service in implementing the changes and that there are no unintended tax consequences that may result from the proposed changes.

KEYWORDS

Income Tax, Capital Gains Tax, effective tax rate, tax-resident, tax non-resident, right to equality, right to property, deprivation of property, expropriation, economic freedom, immovable property, double taxation agreements, rental income, tax policy, tax design, foreign investment

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LIST OF ACRONYMS

BEPS:	*Base erosion and profit shifting*
GDP:	*Gross Domestic Product*
HM Revenue and Customs:	*Her Majesty's Revenue and Customs*
OECD:	*Organisation for Economic Co-operation and Development*
SADC:	*Southern African Development Community*
SARS:	*South African Revenue Service*

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Chapter 1 – Introduction

1.1 Background

South Africa currently taxes its tax residents at the same statutory rates as non-tax residents.[1] There are many other countries that tax non-residents at higher statutory rates than they tax residents. This takes place in countries such as the United Kingdom,[2] Australia[3] and Botswana.[4]

This thesis aims to determine whether South African law, which taxes residents and non-residents at different effective tax rates (as a result of taxing them in terms of the same statutory rates),[5] is constitutionally justifiable. This study will examine section 9, the equality clause, section 25, the property clause, and section 22, the choice of trade clause, of the South African Constitution in order to determine whether the differentiated tax rates pass constitutional muster.

This thesis proposes to ascertain whether or not South Africa is justified in taxing South African tax residents at higher rates of taxation than non-residents on the same amount of taxable income from the letting of or the disposal of South African fixed property.[6] In this regard, I

[1] Taxpayers in South Africa are taxed on their first Rand of taxable income under the individual tax table; the tax table does not differentiate between residents and non-residents. However, it is the rebate that ensures that it is only people who have a taxable income of R83 100 or higher that are subject to tax in the country. A rebate is a set amount to which every individual taxpayer is entitled; it reduces that person's annual tax liability by the set amount. This figure is in terms of the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2020. In terms of section 6 of the Income Tax Act no. 58 of 1962, 'any natural person' is entitled to a rebate from tax. This consists of a primary rebate, secondary rebate and tertiary rebate. No differentiation is made between residents and non-residents. The fact that the individual tax table and the rebates do not differentiate between residents and non-residents means that residents are taxed the same as non-residents. See Chapter 3 for an example of how this results in differing tax rates for residents and non-residents.

[2] The United Kingdom does not provide a personal allowance to non-residents (aside from a couple of exceptions). This results in tax residents of the United Kingdom being taxed at a lower rate than non-residents. HM Revenue and Customs 'Tax on your UK income if you live abroad – personal allowance' available at https://bit.ly/2JoehCa, accessed 15 July 2020.

[3] Australia has different tax tables for residents and non-residents. The result is that residents are taxed at a lower rate than non-residents. Australian Taxation Office 'Tax rates - foreign residents' available at https://bit.ly/2kSxJfx, accessed 15 July 2020.

[4] Like Australia, Botswana taxes residents and non-residents on different tax tables. This result is that non-residents are taxed at a higher rate than residents. Botswana Unified Revenue Service 'Rates of Tax for 2011\2012 and Subsequent Years' available at https://bit.ly/2sMZ4DE, accessed 6 June 2018.

[5] An explanation of this is given under 1.1.1.

[6] There may be a view that as this thesis uses a comparison between taxpayers as the basis for its findings that a 'ceteris paribus' comparison needs to be made. A 'ceteris paribus' comparison is a comparison that is made between two things on a certain issue when all other things are equal. In other words, the only thing that is different between the two things under comparison is that which is being compared; their situations are exactly the same in all other ways (see Investopedia 'Ceteris Paribus' available at https://bit.ly/3tcQNan, accessed 31 January 2021). This method may be preferable in a lot of cases where a comparison is made as it would ensure that other factors (that are not part of the comparison) do not influence the result. The application of this view point to this thesis is that if both a resident and a non-resident earn R100,000 (this is the amount that is used in the calculations

discuss relevant concerns such as the practical effect of taxing residents and non-residents at the same statutory rates, economic justifications for taxing residents at higher rates than non-residents, the practical effect of taxing residents and non-residents at different tax rates in the countries of comparison and most importantly, a consideration of the constitutionality of taxing tax residents at a higher effective tax rate than non-residents in terms of the equality clause as well as the property clause of the South African Constitution. This analysis will also include an exploration of how the countries of comparison may, in terms of their laws, consider the different effective tax rates for residents and non-residents.

It is important to consider the practical effects of the taxation of residents in comparison to non-residents as the law currently stands in South Africa as this will provide a basis to illustrate the implications of these different effective tax rates on individual taxpayers. The thesis uses concrete examples to illustrate the abstract argument.

Once it has been shown, by means of extensive calculations, how marked the differences are in the effective tax rates, it will then be illustrated why the taxation of residents and non-residents at different effective tax rates cannot be said to be constitutionally justifiable. While the South African government could make a reasonable case in favour of maintaining the tax rates as they are, the stronger argument is in favour of protecting the constitutional rights of individuals whose rights are being breached by the application of current South African law.

1.1.1 *The research problem*

The research hypothesis for this thesis is as follows: due to the non-differentiation in tax rates for residents and non-residents, the practical effect is that South African tax residents pay more tax on the same income from immovable property than a non-resident. As an example, if a South African resident taxpayer has a full-time job in South Africa and lets a property they have purchased as an investment, any taxable income that is received by the South African tax resident from the letting of the property will be taxed at the marginal rate that the taxpayer is

contained in Chapter 3 of the thesis) taxable rental income in South Africa-and no other income is earned in South Africa- that they will be taxed equally. However, a comparison in tax can never ignore the other income that a person receives as the amount of tax that a person pays on the rental income is dependent on all of the income combined; tax is calculated on the cumulative total of income received. One cannot attempt to work out the tax paid on rental income only (if there is other income) as this will give an incorrect answer. In any event, it is not the aim of this thesis to consider two people whose only income is an equal amount of rental income with all other conditions being equal and there is no requirement that all conditions need to be the same in order for a comparison to be made. The comparison is made between one taxpayer living and working in South Africa and one living and working outside of South Africa. The circumstances that these individuals have and the amount of income that these individuals earn will always differ. A 'ceteris paribus' comparison is, therefore, not applicable to this thesis.

assigned (after including his or her other South African income). In contrast, if a non-resident who lives and works in another country has purchased an investment property in South Africa in order to obtain rental income, he or she may have no other taxable income in South Africa and the amount of tax that they pay will be less on the rental income in comparison with a South African tax resident. This is so because the total taxable income in the hands of the non-resident is likely to fall in a lower tax bracket than that of the resident who is taxed on all his income. Of course, this hypothesis holds true in cases where the combined total income of the resident indeed falls in a higher tax bracket than the rental income of the non-resident. This thesis discusses whether it is constitutionally justifiable to tax South African tax residents at higher effective rates than non-residents on the same taxable income.

1.1.2 *The types of income to be considered*

The thesis deals specifically with the taxation of income that derives from owning immovable property. This thesis, therefore, considers the following types of income: rental income and income from the proceeds of disposal of immovable property. This thesis only considers income from passive investments and will not consider income from business ventures. The purpose of this thesis is not to determine how a non-resident opening a fully-fledged business in South Africa is taxed in comparison with residents, but rather to determine how a non-resident who lives and works in another country is taxed on passive investments[7] in South Africa.

The reason for dealing with income from fixed property only is that South Africa has taxing rights to income received from fixed property by a non-resident in terms of South African law and in terms of all its Double Taxation Agreements. This incorporates rental income as well as capital gains from the disposal of fixed property. This taxation in terms of Double Taxation Agreements is in line with the Article of the Model Convention with Respect to Taxes on Income and Capital[8] and the Commentary on the Articles of the Model Tax Convention.[9] In terms of South African domestic law, South Africa has taxing rights to income received from immovable property situated in South Africa as it is deemed to be from a South African

[7] Types of passive income considered include rental income, interest, capital gains and dividends. It is explained under 2.4 why interest, dividends and capital gains from the sale of shares are not considered in this thesis.
[8] The Organisation for Economic Co-operation and Development 'Articles of the Model Convention with Respect to Taxes on income and Capital – as they read on 21 November 2017' available at https://bit.ly/3iDrKra, accessed 13 September 2020.
[9] Organisation for Economic Development and Co-operation 'Commentary on the Article of the Model Tax Convention'.

source.[10] Non-resident taxpayers are only subject to possible taxation in South Africa on South African sourced income.[11]

Other types of income that a non-resident taxpayer may receive in South Africa, such as interest or pension annuities have differing taxing rights per different taxation agreements. For example, the South Africa and United Kingdom Double Taxation Agreement[12] gives the United Kingdom taxing rights over interest earned by its tax residents even if the interest was earned in South Africa. It is the same with pension annuities received by a resident of the United Kingdom; even if the pension is in relation to work done in South Africa, the United Kingdom has full taxing rights over this income; South Africa does not, therefore, have taxing rights to this type of interest or pension income.[13] I discuss other types of passive income, such as dividends or a capital gain from the sale of shares, which a non-resident investor in South Africa may earn in order to illustrate why only rental income and income from the disposal of fixed property is applicable for the purpose of this thesis; South Africa often does not tax non-residents on the other types of income

In addition, there is little point in dealing with types of income that may not be taxed in South Africa in terms of Double Taxation Agreements as the Double Taxation Agreement overrides South African domestic law.[14] Changing domestic law would, therefore, have no effect.

It must be noted at this point, and as will be illustrated in depth below,[15] that the primary reason for considering rental income and capital gains from the sale of property and not considering other types of passive income (such as interest, dividends, capital gains from the sale of shares) is not because of taxing rights contained in terms of double taxation agreements. Rather, rental

[10] Income received from the sale of fixed or immovable property is deemed to be from a South African source in terms of section 9(2)(j) of the Income Tax Act. There is no specific section that deals with the source of rental income, but it is clear in terms of the case law that if a property is situate in South Africa that rental income earned from letting that property will be from a South African source. See *COT v British United Shoe Machinery (SA) (Pty) Ltd 1964 FC.*

[11] See the definition of 'Gross income' as defined in s 1 of the Income Tax Act. See also *Krok v Commissioner of the South Africa Revenue Service* [2015] ZASCA 107 at para 13.

[12] See South African Revenue Service 'Convention between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland for the avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains' 2002. In terms of Article 11 of the Double Taxation Agreement.

[13] In terms of Article 17 of the Double Taxation Agreement. While it is worth mentioning that South Africa does not have taxing rights in terms of this double taxation agreement, discussing pension income any further would not fall within the scope of this thesis as the purpose is to deal with passive investment income. Income from a pension would be income as a result of work done and cannot be considered passive investment income.

[14] *Commissioner for the South African Revenue Service v Tradehold Ltd* (132/11) [2012] ZASCA 61. See also, Costa and Stack 'The Relationship between Double Tax Agreements and the provisions of the South African Income Tax Act' (2014) 7(2) *Journal of Economic and Financial Sciences* at 271.

[15] Primarily under 2.4

income and capital gains from the disposal of fixed property have been chosen because South African domestic legislation taxes non-residents on these types of income but has restricted taxing rights[16] on other types of passive income.[17]

In addition, while South Africa does not have a double taxation agreement with every country, this is not an issue. Whether or not South Africa has a double taxation agreement with a country does not alter the consideration of whether the current tax rates on rental income and capital gains from the disposal of fixed property are constitutional. In terms of South Africa domestic legislation, a non-resident from a country that has no tax treaty with South Africa will be subject to taxon these types of income in the same manner as a non-resident from a country with a tax treaty.[18] The matter under consideration is whether South African domestic tax laws should be altered, not whether the double taxation agreements should be altered.

[16] South Africa imposes a 15% withholding tax on interest income earned from a South African source paid to non-residents in terms of Section 50B of the Income Tax Act. However, section 50D exempts the withholding of this tax if the interest is paid by the South African government (i.e. government bonds), a South African bank or in terms of a listed debt. As the purpose of this thesis is to deal with non-resident investors who do not live in South Africa nor hold active business interests (i.e. if a non-resident held shares in a private company and earned interest from that company) in South Africa, this exclusion would include the vast majority of these types of investors earning South African sourced interest income. In terms of section 64E of the Income Tax Act, the dividends withholding tax is the same at a rate of 20% for residents and non-residents alike. As such, the dividend tax regime does not create a differentiation as envisaged in this study. As per para 2 of the Eighth Schedule to the Income Tax Act, non-residents are only subject to possible capital gains tax in South Africa on the disposal of immovable property. Included in the definition of immovable property are equity shares where more than eighty per cent of the market value of such shares is attributable to immovable property in South Africa. In other words, unless a non-resident disposes of shares the value of which is highly dependent on immovable property in South Africa, any disposal will not be subject to tax in South Africa. While there will be instances where a non-resident disposes of these types of property-rich shares, and where it is subject to capital gains tax in South Africa, it is submitted that for the purpose of this thesis that this would be the exception. In any event, if it were the case that a non-resident sold property-rich shares, the tax implications of this disposal would still fall within the scope of this thesis; as the thesis deals with the capital gains on the disposal of immovable property (while the thesis deals with fixed property, the sale of property-rich shares would be taxed in the same manner as fixed property as they both constitute immovable property).

[17] The purpose of this thesis is to illustrate that the current difference in tax rates between residents and non-residents on certain types of income is unconstitutional. It is not to determine whether non-residents should be taxed on income that they are not currently taxed on (in most cases), such as interest or capital gains on the disposal of shares..

[18] If a non-resident from a country with no double taxation agreement with South Africa is taxed in South Africa, they may end up being subject to double taxation (i.e. they are also taxed on that same income in their home country). This possible double taxation does not affect the issues considered in this thesis. While the countries of comparison all have a double taxation agreement with South Africa, the analysis is equally applicable to a non-resident from a country without a double taxation agreement. All of South Africa's double taxation agreements gives South Africa taxing rights to rental income earned from fixed property as well as taxing rights to capital gains on the disposal of South African based immovable property. Thus, even if a non-resident is tax resident in a country which does have a tax treaty with South Africa, South Africa would still have taxing rights and the taxation would be the same as with a non-resident from a country with no tax treaty.

1.1.3 *Is there a justification for the effective higher rate of taxation?*

I now discuss the economic and legal considerations of taxing residents and non-residents at different effective tax rates, with particular reference to Australia and the United Kingdom.[19] One of the most relevant considerations is that:

> 'Non-resident taxpayers are typically not entitled in the source country to either personal expense deductions or person-related tax reductions. Traditionally, the reason for the source country not to grant these reliefs to non-resident taxpayers is that the taxpayers are supposed to enjoy such relief in their residence country. An extension of these benefits to them by the source country is assumed to give them double benefits and thereby an advantage over the source country's resident taxpayers.'[20]

In South Africa, non-residents have the same tax benefits as resident taxpayers. This includes the rebates, capital gains exclusion and capital gains inclusion rate.

In the light of the above, it is prudent to consider whether South African tax residents are at a disadvantage when investing in fixed property in South Africa in terms of the tax that they pay on the taxable income from their investment in comparison to non-resident investors. In the event that they are at a disadvantage, I must determine whether there is a justification for such a disadvantage.

Goldswain states that 'the ambit of the fundamental right of the taxpayer to equality in tax matters as provided for in Section 9 of the Constitution has, as yet, still to be determined by the judiciary.'[21] While there is little to no case law detailing this right,[22] there has been some

[19] See Goldswain 'Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law' (2011) Vol. 15 Issue 2 Southern African Business Review 1. And Mason & Knoll 'What is Tax Discrimination?' (2012) Vol. 121 Issue The Yale Law Journal 1014; Van Raad 'Non-Residents – Personal Allowances, Deductions of Personal Expenses and Tax Rates (2010) World Tax Journal Vol. 2 Issue 154; Graetz & Warren 'Income Tax Discrimination and the Political and Economic Integration of Europe' (2006) Vol. 115 No. 6 The Yale Law Journal 1186; Van Raad 'Non-Discriminatory Income Taxation of Non-Resident Taxpayers by Member States of the European union: A Proposal' (2001) Vol. 26 Issue 4 Brooklyn Journal of International Law 1481.

[20] Van Raad 'Non-Residents – Personal Allowances, Deductions of Personal Expenses and Tax Rates (2010) World Tax Journal Vol. 2 Issue 154 at 155.

[21] Goldswain 'Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law' (2011) Vol. 15 Issue 2 Southern African Business Review 1 at 22.

[22] The case of *The City Council of Pretoria v Walker* CCT 8/97 deals with the levying of municipal service bills in a different manner depending on where the person lives. While this is not dealing with the equality of rights for taxpayers, it will serve as a useful comparison.

academic writing on the subject.[23] Croome provides many examples of instances where an individual's constitutional right to equality may have been infringed, but these examples only provide a very brief overview of the potential infringements of the right to equality. This thesis is distinguishable from Croome's work as the type of infringement dealt with in this thesis is not dealt with by Croome and this thesis provides an in-depth analysis of whether an individual's right to equality has been infringed. However, Croome's work has been invaluable in providing a foundation for the analysis made in this thesis of whether a taxpayer's right to equality has been infringed. This thesis is the only work that deals specifically with the taxation of residents at higher effective rates than non-residents on taxable income from letting fixed property and the disposal of fixed property in South Africa. This thesis considers the implications of the right to equality in terms of the Constitution and the effective higher tax rate that South African residents pay in comparison to non-residents in detail.

The Constitutional Court judgment of *Harksen v Lane*[24] is considered as an integral part of an in-depth analysis of whether this discrimination between the taxation of residents and non-tax residents is justifiable in terms of section 9 of the Constitution as this case is seen as the seminal case on the equality clause.

This thesis examines the constitutionality or otherwise of the different tax rates in terms of section 36 of the Constitution if the tax rates are found to be in breach of section 9, section 25 or section 22 of the Constitution. This thesis also considers the South African government's potential argument that decreased tax rates for non-residents encourages investment in the country.

If it is found that there is unfair discrimination against resident taxpayers or that the higher effective tax rate infringes their right to property or right to choice of trade, profession or occupation, I consider possible changes to South African law. These are as follows:

a) Removal of the tax rebates for non-residents;
b) Taxing non-residents according to a different tax table than tax residents;
c) Removing the annual capital gain exclusion for non-residents; and
d) Increasing the capital gain inclusion rate for non-residents.

[23] Croome 'Taxpayers' Rights in South Africa' (2010) Juta Cape Town.
[24] 1997 (11) BCLR 1489 (CC),

I consider these particular aspects of the South African tax system as the beneficial tax rates received by non-residents who invest in immovable property in South Africa are as a result of these four factors.

This thesis only considers individuals as it is only individuals who are entitled to the rebates, the capital gain inclusion rate and the annual capital gain exclusion.[25] This thesis is also only concerned with non-resident individual investors who receive income from a passive South African source and not a fully-fledged business.

This thesis compares the rates of taxation in South Africa with the rates of taxation for residents and non-residents with the three countries of comparison which are detailed below.

1.2 Reasons for Countries of Comparison

The reasons why these countries have been chosen is as follows:

i. Australia

Australia has a similar method of determining whether a person is tax resident or not to South Africa. In South Africa, a person is considered tax resident if they are 'ordinarily resident' in South Africa.[26] To determine whether a person is 'ordinarily resident' in South Africa entails a determination of which country that person considers their home and takes into consideration factors such as: intention to be resident in South Africa, the person's most fixed place of residence, their place of business and personal interest, economic and employment factors, family and social relations and the location of their belongings, amongst other factors.[27] If a person is considered 'ordinarily resident' in South Africa they are then tax resident in South Africa and no other test needs to be under taken to determine their South African tax residency status.[28]

This test for residency is very similar to the test for residency in Australia. In Australia, the primary test for tax residency is the 'resides test'. If a person is tax resident in Australia in terms of this test, there is no need to consider any other tests as they will be considered a tax resident of Australia. Some of the legal requirements that will be considered by the Australia

[25] These tax breaks are not available to juristic persons.
[26] As per the definition of 'resident' in section 1 of the Income Tax Act.
[27] South African Revenue Service Interpretation Note 3 (Issue 2) 'Resident: Definition in relation to a natural person – ordinarily resident' (2018) at pg 5.
[28] South African Revenue Service Interpretation Note 3 (Issue 2) 'Resident: Definition in relation to a natural person – ordinarily resident' (2018) at pg 2.

Taxation Office when considering whether someone is a tax resident in terms of the 'resides test' are: physical presence, intention and purpose, family, business or economic ties, maintenance and location of assets and social and living arrangements.[29] It is prudent to use Australia as a country of comparison as it has a similar tax system to South Africa, particularly in relation to determining whether a person is tax resident. As this thesis revolves around the taxation of residents in comparison with non-residents, it is logical to make this comparison with a country which has a very similar method of determining whether someone is a tax resident of that country.

In addition, Australia has the same basis for taxation as South Africa; residents are taxed on worldwide income and non-residents are taxed on Australian sourced income.[30] As the taxation of non-residents in South Africa on South African sourced rental income and capital gains is the basis for this thesis, it is sensible to use a country of comparison that taxes individuals in a very similar manner.

Australia also has a completely different tax table for residents and non-residents. This offers a productive manner in which South Africa can consider changing its taxation of non-residents. Australia has the same maximum marginal tax rate, at 45 per cent,[31] as South Africa for the 2020 year of assessment. By using a country with the same maximum marginal tax rate, and thus comparable individual tax rates, a comparison can be made with a country that taxes its individuals at a similar rate. As one of this thesis' aims is to determine whether South Africa should change its tax laws, it is practical to compare with countries that have similar tax rates. To compare with countries that have much lower or higher tax rates would not provide an instructive example. This is because the analysis will include determining at what rate Australian tax residents are taxed at in comparison with non-residents. A comparison will be made with South Africa.

[29] Australian Taxation Office 'Work out your tax residency' available at https://bit.ly/3fGxnDj, accessed 19 June 2020.
[30] Australian Taxation Office 'International tax for individuals' available at https://bit.ly/2AO0x4L, accessed 22 June 2020. Chapter 2 deals with the South African domestic law in terms of taxing non-residents.
[31] Australian Taxation Office 'Individual Income Tax Rates' available at http://bit.ly/1k3746C, accessed 15 July 2020.'

ii. The United Kingdom

The United Kingdom has invested the largest amount of money into South Africa in comparison with all other countries in the world.[32] As this thesis deals with individuals who live in other countries and invest in fixed property in South Africa, it is practical to consider a country that invests a lot of money into South Africa as a country of comparison as it is likely that some of this money being invested from the United Kingdom is in fixed property in South Africa.[33]

In addition, the United Kingdom taxes non-residents on rental income earned in the United Kingdom and capital gains on disposal of fixed property based in the United Kingdom;[34] this is the same as in South Africa where non-residents are taxed on South African rental income in terms of South African domestic legislation.[35]

The United Kingdom also has the same tax tables for residents and non-residents, but most non-residents are not entitled to the personal allowance that tax residents are.[36] This is a different way of taxing non-residents than Australia and will be useful to consider this method of taxing non-residents.

iii. Botswana

Botswana, like South Africa, is part of the Southern African Development Community (SADC)[37] and a neighbouring country of South Africa. It is more comparable in terms of its economy than the United Kingdom or Australia. Botswana is considered, along with South Africa, as a developing nation by the United Nations.[38] This is in contrast to the United Kingdom and Australia who are both considered developed economies by the United Nations.

[32] South African Reserve Bank 'Quarterly Bulletin – March 2020' (2020) at S-94 to S-101. Or Business Tech 'Here's how much Germany, the UK and USA invest in South Africa' available at https://bit.ly/2YgeDER, accessed 19 June 2020 where the data in the South African Reserve Bank bulletin is succinctly put into a graph.
[33] South Africa is a popular destination for people from the United Kingdom to purchase homes. See International Monetary Fund 'Real Estate Indicators and Financial Stability' Bank for International Settlements Paper No. 21 (2005) at para 7.5.
[34] HM Revenue and Customs 'Tax on your UK income if you live abroad' available at https://bit.ly/315WsU6, accessed 22 June 2020.
[35] Chapter 2 deals with this in detail.
[36] HM Revenue and Customs 'Tax on your UK income if you live abroad – personal allowance' available at https://bit.ly/2JoehCa, accessed 15 July 2020.
[37] Southern African Development Community 'Member States' available at https://bit.ly/2HCf3tp, accessed 10 June 2018.
[38] United Nations 'World Economic Situation and Prospects – 2018' available at https://bit.ly/2iSY4cB, accessed 6 June 2018.

In addition, Botswana also taxes residents at a different rate to non-residents which results in a more equal taxation of residents and non-residents, particularly with regard to capital gains tax.[39] If the South African government were to increase the tax rates for non-residents, they could use Botswana as an example of a neighbouring, also developing country who taxes non-residents at different tax rates to residents with the result that the difference in effective tax rates between residents and non-residents is not so wide.

1.3 Research Aims/Questions

The thesis determines whether it is constitutionally justifiable to tax residents and non-residents at different effective tax rates. The taxation of residents and non-residents at different tax rates may result in the infringement of an individual's right to equality as well as their right to property and economic freedom. This thesis considers all three of these rights in detail.

In this regard the following questions are asked:

a) What is the current South African position in respect of the taxation of non-residents and residents in respect of income derived from immovable property?
b) What are the economic justifications for differentiated tax regimes for residents and non-residents in respect of income from immovable property?
c) What are the economic outcomes of such differentiation?
d) How is income derived from immovable property taxed in the hands of non-residents and residents in the chosen foreign jurisdictions?
e) Can a differentiation in tax regime between residents and non-residents in respect of income deriving from immovable property pass constitutional muster in South Africa in terms of the right to equality?
f) Can a differentiation in tax regime between residents and non-residents in respect of income deriving from immovable property pass constitutional muster in South Africa in terms of the right to property and economic freedom?

This thesis contributes to the current body of knowledge regarding the constitutionality of taxing residents at a higher effective rate than non-resident taxpayers both in terms of the right

[39] Botswana Unified Revenue Service 'Rates of Tax for 2011\2012 and Subsequent Years' available at https://bit.ly/2sMZ4DE, accessed on 15 July 2020.

to equality and the right to property. While there is academic work that briefly deals with the relationship between tax and the right to equality and property,[40] there is no work that deals with these rights and their relationship to taxing residents and non-residents at different rates of taxation on the same amount of taxable income. Croome's work on the relationship between taxpayers and the right to equality has provided an invaluable foundation for this thesis. In addition, I discuss tax changes that should be considered by the South African government to ensure that if unfair discrimination is found, it can be rectified.

1.4 Limitations

This thesis only deals with income from fixed property situated in South Africa. This thesis does not consider other types of income as this thesis aims to deal with the taxation of non-residents on their income from immovable property. Non-residents may invest in various asset classes in South Africa that would produce other types of income, such as interest and dividends, but this thesis does not consider this in detail as they do not add value to the thesis.[41] In addition, I do not consider business income that may be earned by a non-resident in South Africa as this thesis aims to deal with income earned from passive rental property investments in South Africa. The reason for this is that it must be clear that the person is a non-resident and not spending a lot of time in South Africa which may result in them becoming a resident in terms of the physical presence test.[42]

This thesis does not deal with juristic persons. The possible tax changes that will be proposed are only applicable to individuals and thus I only consider individuals.

[40] Croome *Taxpayers' Rights in South Africa* (2010) Juta Cape Town.
[41] The reasons for these types of income not adding value are dealt with under para 2.4.
[42] This term is explained under footnote 428 below.

1.5 Methodology

The methodology that is used in this thesis comprises many different elements. Firstly, a comparative study between South Africa, Australia, the United Kingdom and Botswana is made. This comparison includes calculations to illustrate the different effective tax rates that occur in South Africa between residents and non-residents as opposed to the comparative effective tax rates in the countries of comparison. An in-depth analysis of the South African Constitution, legislation, academic articles, books and case law is also undertaken to determine whether the different effective statutory tax rates infringe a resident's constitutional rights.

1.6 Chapter Exposition

The thesis comprises five parts. The first part, comprising Chapter 1 and 2 provides the context of the thesis. Chapter 1 provides the research aims and the background. Chapter 2 deals with the right to tax income from immovable property in South Africa as well as the economic justifications for treating residents and non-residents differently.

Part 2 examines how non-resident taxpayers are taxed on rental property income and capital gains tax on the sale of fixed property in South Africa and the countries of comparison. This part comprises Chapter 3. Chapter 3 sets out the economic outcomes of such differentiation by means of practical examples of the taxation of residents and non-residents on the same amount of taxable income in South Africa. It also illustrates how residents are taxed in comparison with non-residents on income from immovable property in the United Kingdom, Australia and Botswana.

Part 3 analyses whether it is constitutionally justifiable to tax residents and non-residents at different effective tax rates. Chapter 4 discusses in detail whether section 9 of the South African Constitution, the right to equality, has been violated by the different effective tax rates. Chapter 5 discusses in detail whether section 25 of the South African Constitution, the property clause,

has been violated by the different effective tax rates. Chapter 5 also deals with section 22, the right to freedom of trade, occupation and profession.

Part 4, the final section, is the concluding section. It comprises chapter 6 which sets out the findings made in the thesis as well as recommendations to bring the current law in line with the Constitution. Finally, concluding remarks are made detailing the contribution that this thesis has made to the current body of knowledge as well as indicating further research which could be undertaken.

1.7 Conclusion

This chapter sets out what will be discussed in the thesis. Included in this is the establishment of the research problem which forms the basis of this thesis, namely whether the different effective statutory tax rates that a resident is subject to in comparison with a non-resident infringes on a resident's constitutional right to equality. It was set out that this thesis will only consider rental income and capital gains from the disposal of fixed property in South Africa.

This chapter then provides the foundation for the enquiry into whether there are justifications for the effective higher tax rates. This enquiry considers both potential economic and legal justifications that may exist. The chapter proceeds to set out why Australia, the United Kingdom and Botswana have been chosen as appropriate countries of comparison for the thesis.

Finally, the chapter sets out the research aims and questions which this thesis answers and the contribution of knowledge which this thesis makes to the current body of research available.

Chapter 2 discusses in detail why only rental income and capital gains from South African fixed property are considered in this thesis.

CHAPTER 2 –

The Right to Tax Income from Immovable Property

2.1 *Introduction*

This chapter considers the right to tax residents and non-residents in South Africa in order to establish the constitutionality of the taxation of residents and non-residents at different effective tax rates. I must first determine which types of income non-residents are taxable in South Africa as there are many types of income that a non-resident may receive from a South African source, but which are not subject to taxation in South Africa. This is either in terms of South African domestic legislation or the applicable double taxation agreement.

If a non-resident is not taxable in South Africa on a certain type of income there is no point in considering this type of income; the purpose of this thesis is not to determine the constitutionality of tax on types of income that are not taxable in South Africa,[43] but rather to determine the constitutionality of different effective tax rates between residents and non-residents on types of income that non-residents are subject to taxation on in South Africa.

I also consider economic factors in order to assist in the determination of whether South Africa should increase its tax rates applicable to non-residents. While these considerations are ancillary to the core of this thesis, whether it is constitutionally justifiable to tax residents and non-residents at different effective tax rates, it is worthwhile considering these factors as they add to a holistic consideration of this issue. The two main issues are the state of South Africa's finances[44] and the fact that the individual tax rates are the highest they have been since the 2000 year of assessment.[45] It is, accordingly, prudent to determine whether there are other avenues that the South African government can pursue that will increase tax revenues. The reasoning behind the taxation of residents in comparison with non-residents in Australia and the United Kingdom provides compelling economic reasons why South Africa should increase its tax rates on non-residents.

[43] For example, capital gains tax on the disposal of shares by a non-resident are not taxable in terms of South African domestic legislation.

[44] National Treasury states that there will be a gross debt to gross domestic product (GDP) of 81.8 per cent in the current year. This is up from 48.9 per cent in the 2016 tax year. There is an obvious need for the government to increase taxes and reduce spending so that this can decrease. National Treasury 'Supplementary Budget Review 2020' 24 June 2020.

[45] South African Reserve Bank 'Tax Chronology of South Africa: 1979 – 2017' (2017).

The purpose of this chapter is to determine which types of South African sourced income must be considered in terms of the constitutionality of the different effective tax rates between residents and non-residents. Chapters 4 and 5 deal with this constitutional analysis. In addition, the purpose of this chapter is to establish economic justifications for differentiated tax rates. This chapter considers whether there are types of income that South Africa currently taxes non-residents on that may have the potential for an increase in tax rates and, therefore, an increase in tax revenue for South Africa. Therefore, I deal with the following types of income: rental income from letting immovable property and proceeds from the sale of immovable property.

It is judicious to determine the reasons behind only considering rental income and proceeds from the sale of immovable property and why other types of income should not be considered. The purpose of this thesis is to determine whether it is constitutionally allowable that South African residents should be taxed at different tax rates to non-residents on their South African sourced rental income and proceeds from the disposal of immovable property. Other types of income, such as interest earned by non-residents, are often not subject to tax in South Africa; there is no point in considering a type of income which non-residents are often not subject to tax in South Africa as this will have no bearing on this thesis.[46]

The reasons for considering income from immovable property are detailed below, taking into account the following aspects: South African law, the basis for the articles in a double taxation agreement, the wording of double taxation agreements, and double taxation agreements in South African law. It will be shown that South Africa will always have taxing rights on income earned from non-residents from the two sources relating to immovable property taking into account the applicable internal tax laws and double taxation agreements.

[46] While the taxation of residents and non-residents at different rates (such as with interest where non-residents are entitled to an exemption) may have a bearing on whether a resident taxpayer's constitutional rights have been infringed, the purpose of this thesis is not to cover every instance where a resident taxpayer's may be infringed. However, this thesis covers the potential infringement of a resident's constitutional rights by the decreased dividends withholding tax allowed by certain double taxation agreements. This is covered under para 4.5 below.

2.2 *South African Law – 'Gross Income'*

Stratford CJ stated the following with regard to the underlying principles relating to whether a country chooses a residence basis of taxation or a source basis of taxation:

> 'In some countries residence (or domicile) is made the test of liability, for the reason, presumably, that a resident, for the privilege and protection of residence, can justly be called upon to contribute towards the cost of good order and government of the country that shelters him. In others (as in ours) the principle of liability adopted is a 'source of income', again, presumably, the equity of the levy rests on the assumption that a country that produces wealth by reason of its natural resources or the activities of its inhabitants is entitled to a share of that wealth, wherever the recipient of it may live.'[47]

It is important to consider the underlying rationale for taxing persons on their residency as opposed to the source of the income as it gives an understanding as to why non-residents are still taxed on South African sourced income.

There are two possible basis for taxation of individuals. First, is the source-based system, which South Africa used to follow; and second is the residence base system which South Africa now follows.

Prior to 1 January 2001, the South African tax system was centred on the 'source' based system. This meant that South African residents were only subject to tax on their income which originated from or was deemed to originate from a South African source.[48]

The bases of taxation in South Africa was altered from 1 January 2001 to a residence-based system of taxation. This change meant that South African residents were from then on taxable on their world-wide income.[49]

In order to effect this change, the definition of 'gross income' was amended by deleting the references to source for residents so that residents are no longer only taxed on their South African sourced income.[50]

[47] *Kergeulen Sealing and Whaling Co. Ltd. v Commissioner for Inland Revenue* 10 SATC 363 at 380.
[48] National Treasury 'Explanatory Memorandum on the Revenue Laws Amendment Bill, 2000'.
[49] National Treasury 'Explanatory Memorandum on the Revenue Laws Amendment Bill, 2000'.
[50] National Treasury 'Explanatory Memorandum on the Revenue Laws Amendment Bill, 2000'.

Prior to the Revenue Laws Amendment Bill of 2000,[51] the definition of 'gross income' read as follows:

> ''gross income' in relation to any year of period of assessment, means –
>
> In the case of any person, the total amount, in cash or otherwise received by or accrued to or in favour of such person during such year or period of assessment from a source within or deemed to be within the Republic, excluding receipts or accruals of a capital nature…'

'Gross income' is now defined as follows:

> ''gross income', in relation to any year or period of assessment, means—
>
> (i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or
>
> (ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic,
>
> during such period of year of assessment, excluding receipts or accruals of a capital nature.'[52]

This amendment was limited to residents. As such, non-residents are only taxable on their South African sourced income and residents are taxable on worldwide income in South Africa.

[51] 59 of 2000.

[52] Section 1 of the Income Tax Act 58 of 1962.It is important to draw the distinction between income that is capital in nature and income that is revenue as it is only revenue amounts that are included in a taxpayer's 'gross income'. In this regard, the case of *Commissioner for Inland Revenue v George Forest Timber* 1924 AD 516 is pivotal. This case dealt with a taxpayer who purchased a piece of land with timber on the land. It was held that the land purchased was capital as it was acquired with the view to producing income. The sale of the timber situate on the land was what was in issue for the court. The taxpayer subsequently sold the timber that was on the land and the court had to decide whether the proceeds from the sale were capital or revenue in nature. Innes CJ distinguished between fixed and floating capital. Floating capital was consumed in the process of the production whereas fixed capital did not. Monies received as a result of the disposal of floating capital is to be included in the ordinary revenue of the business whereas the proceeds of fixed capital do not. The court held that the sale of the timber located on the land was a revenue receipt and to be included in the taxpayer's gross income. Relating this case to this thesis, the taxpayer who holds fixed property as a long-term investment will form part of the taxpayer's fixed capital – proceeds from the sale of this property would therefore be capital in nature. However, a taxpayer who has purchased property for the purpose of reselling the property at a profit will have a revenue receipt upon disposal of that property as the property will be floating capital in his or her hands.

As per section 5 of the Income Tax Act (The Act), normal tax is levied in respect of a person's taxable income. The definition of 'taxable income' refers to the amount of 'income' of a person and the definition of 'income' states that 'income' is the amount remaining after deducting exempt amounts from the person's 'gross income'.[53] A person's 'gross income' is, therefore, the starting point in determining the amount upon which a person may be taxed.

Not all South African income received by non-residents is taxable in South Africa even though it is from a South African source. South African law provides some reprieve from taxation to non-residents on certain types of income.[54] In order to determine which types of income are taxable for non-residents, I must consider South African law dealing with specific types of income.

2.3 *The source of income in South African law*

The Income Tax Act does not define the term 'source', which is integral in determining what income non-residents are taxed on in South Africa. De Koker and Williams state that the reason for the legislature not defining the term is that it would be impossible to formulate a comprehensive definition.[55] As a result, court decisions must be considered to determine the meaning of the term.

An important case on determining the source of income is *CIR v Lever Brothers and Unilever Ltd*.[56] This case set a precedent in South African income tax law that established the basis on which the source of interest income should be determined as well as a two-step test to determine the source of other types of income.[57]

In this case, the court had to decide whether interest paid as a result of a loan made to a company incorporated in South Africa from a company incorporated in the United Kingdom was from a South African source. The question for the court was whether South African Inland Revenue had the right to tax the interest that was received by the United Kingdom company.

[53] Section 1 of the Income Tax Act.
[54] For example, paragraph 2 of the Eighth Schedule to the Income Tax Act states that non-residents are only taxable in South Africa on the disposal of immovable property or an interest in immovable property. As such, assets that may be held by a non-resident, such as South African shares, would not be taxable in South Africa. This is discussed in further detail below. Remember to insert the para nr where it is discussed.
[55] De Koker & Williams 'Silke on South African Income Tax' Lexis Nexis Online at 5.3.
[56] 1946 AD.
[57] Stack, Grenville, Poole, Harnett & Horn 'Commissioner for Inland Revenue v Lever Brothers and Unilever Ltd: A practical problem of source' (2015) 19 (1) *Southern African Business Review* at 162.

This case stated the following when referring to the problem with defining source:

> 'The source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income and that this originating cause is the work which the taxpayer does to earn them, the quid pro quo which he gives in return for which he receives them.' [58]

This case provides the authority for the principle that the word 'source' means the 'originating cause' and that determining source involves establishing the originating cause of the income and further determining whether that originating cause is in South Africa.[59] This is the two-step test in determining source that is still used today.[60]

The common law definition of source, as set out in *Commissioner for Inland Revenue v Lever Brothers*, is not applicable to all situations dealing with source. As there is no clear definition of source in The Act and the applicability of the definition of source in the case law is dependent on the facts of a particular matter,[61] the legislature enacted provisions that would assist in determining the source of certain types of income. In the event that a statutory definition of source conflicts with the common law position, the statutory position will take precedence.[62]

2.4 *Types of income a non-resident owner of immovable property in South Africa may receive*

An owner of immovable property in South Africa who lets his or her property will receive rental income in South Africa. A pivotal case in determining the source of this type of income is *COT v British United Shoe Machinery (SA) Pty Ltd.* [63]

In this case, the taxpayer let manufacturing equipment to a customer in Zimbabwe. The court had to decide whether the source of rental income was in South Africa, where the taxpayer was located and where the contracts for lease were entered into, or whether the source was Zimbabwe, where the machines were used. It was held that:

[58] *Commissioner for Inland Revenue v Lever Brothers and Unilever* 1946 AD at 8-9.
[59] De Koker & Williams 'Silke on South African Income Tax' Lexis Nexis Online at 5.3.
[60] Stack, Grenville, Poole, Harnett & Horn 'Commissioner for Inland Revenue v Lever Brothers and Unilever Ltd: A practical problem of source' (2015) 19 (1) *Southern African Business Review* at 166.
[61] De Koker & Williams 'Silke on South African Income Tax' Lexis Nexis Online at 5.3.
[62] De Koker & Williams 'Silke on South African Income Tax' Lexis Nexis Online at 5.3.
[63] 26 SATC 163.

> 'I consider that it is clear that with property of this nature, and leases of so long duration so that the emphasis is on the property and not on the business of the lessor, the source of income derived from the property is where the property is used.' [64]

It was stated further that 'the source of the income is because someone is using the machines'.[65]

This principle is also applicable to the case of rental received from immovable property. The common law definition of source as established in *Lever Brothers* can be applied to income received from immovable property; the originating cause of the income must be determined.

The income from letting property must be said to be derived from the place where the property is situated i.e. if the taxpayer (who is not resident of South Africa) owns and lets property situated in South Africa, the rental income is from a South African source. As per the *Lever Brothers* case the originating cause of the rental income must be said to be in South Africa as this is where the money is earned as a direct result of the letting activity. Section 9(2) of the Act does not deal specifically with rental income and as such I now discuss the common law position regarding source.[66]

South Africa does, therefore, have taxing rights to income that is derived from the letting of immovable property in South Africa, even if the property is owned by a non-resident, as it is from a South African source. It will, therefore, fall within the definition of 'gross income' and be subject to taxation for non-residents.

Section 9(2)(j) deals specifically with proceeds from the disposal of immovable property.[67] The section states that an amount is received by or accrues to a person from a source within South Africa if it:

> 'constitutes an amount received or accrued in respect of the disposal of an asset that constitutes immovable property held by that person or any interest or right of whatever nature of that person to or in immovable property contemplated in paragraph 2 of the Eighth Schedule and that property is situated in the Republic;'

[64] *COT v British United Shoe Manufacturer* 26 SATC 163 at 168.
[65] *COT v British United Shoe Manufacturer* 26 SATC 163 at 167.
[66] Haupt 'Notes on South African Income Tax' (2017) Hedron at 36.
[67] Proceeds from the disposal of immovable property is more commonly referred to as a capital gain i.e. an asset that has been held as a long-term investment has increased in value and the taxpayer has made a gain upon disposal of the asset.

The specific source rules, therefore, deal with proceeds from the disposal of immovable property in South Africa and a non-resident may be taxed in South African on gains made from this disposal.[68]

Paragraph 2 of the Eighth Schedule to the Act, which deals with capital gains tax, states that the schedule is applicable to any non-resident who holds immovable property situated in South Africa.[69] In other words, if a non-resident holds immovable property in South Africa and disposes of it, he or she may be subject to potential capital gains tax in South Africa.

In my view, it is correct that South Africa taxes capital gains on the disposal of immovable property that is situated in South Africa. The reason for the immovable property increasing in value is partly as a result of the conditions in the country; in other words, the economic conditions and trends of the country in which the property is located has allowed the property to increase in value.[70] The capital gain is as a result of the conditions in the country in which the property is located; South Africa is entitled to tax this type of gain which results from conditions within its markets. It is, consequently, important to consider proceeds from the disposal of immovable property as one of the types of income which a non-resident may be subject to taxation on in South Africa in this thesis.

The purpose of this thesis is to consider the tax on certain types of income that a non-resident may earn in South Africa. This thesis does not aim to deal with income that a person may receive from active business activities in South Africa, but rather from passive rental income activities. The reason for this is that it must be clear that the person earning the income in South Africa is a non-resident and is not spending significant amounts of time in South Africa or considers South Africa as their home. The purpose of the thesis is to illustrate how a non-

[68] Section 9(2)(j) also deals with a right in immovable property. De Koker & Williams 'Silke on South African Income Tax' Lexis Nexis Online 5.9 states that a right 'to' immovable property means a personal right such as a contractual right to transfer of such property. A right 'in' immovable property means a real right such as the rights of a mortgagee. While this is unlikely to be a common type of disposal of immovable property by non-residents it is worthwhile to consider the entire meaning of the term which I discuss in detail in this thesis.

[69] Capital gains tax is the tax that is levied on a capital gain that is made by a taxpayer. It is not a separate type of tax to income tax as a capital gain is included in a person's taxable income in terms of section 26A of the Income Tax Act (although it was previously excluded by the definition of 'gross income'); however, in order to establish the amount of capital gain that a person has received the difference between the proceeds and the purchase price is the capital gain (simplistically) that a person has made. Once the capital gain has been established, 40 per cent of that amount is included in the person's taxable income in terms of section 10 of the Eighth Schedule to the Income Tax Act.

[70] ABSA 'Housing Review' (2015) available at https://bit.ly/2C3a6dt, accessed 3 March 2019. This review states that other factors, such as location will also play a part on house prices.

resident is being taxed on income in South Africa from passive income; there must never be any risk that this person may become a tax resident in South Africa at some point which might happen if they had substantial business interests in South Africa, spent significant amounts of time in South Africa or consider South Africa to be their home. At this point the person may become a South African tax resident which would defeat the purpose of the thesis.

It is foreseeable that a non-resident earning passive investment income in South Africa may earn the following types of income: capital gains from the sale of shares or the sale of a fixed property, rental income from a fixed property, dividends[71] from South African shares held or interest from a South African bank or the South African government. I am of the view that there would not be any other common types of income that a non-resident may earn from a passive investment in South Africa. I discuss these types of income below.

Dividends may be received by a non-resident who invests in shares in South Africa; this type of income constitutes passive income. Chapter 4 at 4.5 deals with the taxation of dividends and its potential constitutionality but it is worth mentioning briefly here.

The twenty per cent dividends withholding tax that is levied upon a dividend declared is the same for residents and non-residents; there is no differentiation.[72] However, a non-resident who is paid a dividend from a South African company may be taxed at a reduced rate under the applicable double taxation agreement.

For example, the double taxation agreement between South Africa and Australia states that a non-resident may not be taxed more than fifteen per cent dividends withholding tax in the source country.[73] In other words, if an Australian resident receives a dividend as a result of owning a South African share, the withholding tax levied on that Australian resident in South Africa cannot exceed fifteen per cent. This is obviously five per cent lower than the twenty per cent dividends withholding tax that a South African resident would pay on the same dividend.

[71] It is worth noting that a dividend withholding tax is a final tax in South Africa. South African Revenue Service 'Comprehensive Guide to Dividends Tax (Issue 4)' 2021.

[72] Section 64E of the Income Tax Act. As residents and non-residents are subject to the same rate of tax in terms of South African law, an in-depth consideration of dividends as a potential income earned by a non-resident falls outside the scope of this thesis. The purpose of this thesis is to consider types of income where a resident is subject to a higher rate of effective taxation than a non-resident in terms of South African domestic law, with the view to changing South African domestic law; if South African tax laws impose the same tax rates there can be no prejudice to the resident.

[73] South African Revenue Service 'Protocol Amending the Agreement between the Government of the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.' 2008.

In Chapter 4 I argue that the South African government would find it difficult to justify that the reasons for this reduced withholding tax trump a resident's right to equality. As Chapter 4 deals with this issue, I do not discuss it further at this point.

Non-resident taxpayers are only subject to capital gains tax on the disposal of immovable property, an asset effectively connected with a permanent establishment in South Africa or any equity shares if 80 per cent or more of the market value of those shares is directly or indirectly attributable to immovable property (and that person holds twenty per cent of all shares in that company).[74]

For example, if a taxpayer is a tax resident of Australia, any capital gains earned from the sale of assets, other than immovable property, an asset effectively connected with a permanent establishment in South Africa or a property rich share, is not taxable in South Africa.[75] In other words, if an Australian tax resident holds shares in a South African company, any capital gain made on the sale of those shares would not be taxable in South Africa in terms of South African domestic legislation; unless the share is a property rich share.

Considering such a possible type of income that may be received by a non-resident investor is not relevant to this thesis as there are no tax implications for non-residents and the tax rates paid by residents in comparison to non-residents cannot be compared.[76]

[74] Paragraph 2 of the Eighth Schedule to the Income Tax Act no. 58 of 1962.
[75] South African Revenue Service 'Protocol Amending the Agreement between the Government of the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.' 2008. In terms of Article 13. This is in line with Article 13 of the OECD Model Tax Convention. The Commentary on the OECD Model Tax Convention provides no further explanation as to why capital gains on assets such as shares are only taxable in the country where the taxpayer is resident other than to say that Article 13 of the Model Tax Convention does not contain any special rules pertaining to the disposal of shares and that as such the gains from disposals are only taxable in the state in which the disposer of the shares is a resident. The Commentary on the OECD Model Tax Convention at 247.
[76] In Botswana capital gains made on the disposal of shares on the Botswana Stock Exchange are exempt from taxation in terms of the Tenth Schedule to the Botswana Income Tax Act Chp 52:01. A non-resident investing in listed shares in Botswana would not be subject to capital gains tax on the disposal of those shares. In Australia, non-residents are only subject to capital gains tax on taxable Australian property; this does not include the sale of shares other than property rich shares. In other words, if a non-resident of Australia disposed of Australian shares that are not property rich, he or she will not be taxed on the disposal in Australia. Australian Taxation Office 'Taxable Australian Property' available at https://bit.ly/2UGUZAD, accessed 6 February 2020. This is the same situation as in South Africa. In the United Kingdom, non-residents also do not pay capital gains tax on United Kingdom shares held. HM Revenue and Customs available at https://bit.ly/3bbQVOx, accessed 6 February 2020. As the countries of comparison also do not tax non-residents on the sale of shares in their country it can be said that it is fair that South Africa does the same and there is, accordingly, no point in discussing this aspect any further.

This section will show why interest income cannot be used as one of the types of income for consideration for the purpose of this thesis. It is important to explain why certain types of income may not be considered in this thesis as it illustrates that not all types of income earned by a non-resident in South Africa are taxable in South Africa.

Section 9(2)(b) of the Act deals with the source of interest income. It states that interest, as defined in section 24J, is from a South African source if: 'it is paid by a South African resident or is earned on funds invested or used in South Africa.'[77]

Interest is defined in section 24J as follows:

> ''interest' includes the—
>
> *(a)* gross amount of any interest or similar finance charges, discount or premium payable or receivable in terms of or in respect of a financial arrangement;
>
> (b) amount (or portion thereof) payable by a borrower to the lender in terms of any lending arrangement as represents compensation for any amount to which the lender would, but for such lending arrangement, have been entitled; and
>
> (c) absolute value of the difference between all amounts receivable and payable by a person in terms of a sale and leaseback arrangement as contemplated in section 23G throughout the full term of such arrangement, to which such person is a party, irrespective of whether such amount is—
>
> (i) calculated with reference to a fixed rate of interest or a variable rate of interest; or
>
> (ii) payable or receivable as a lump sum or in unequal instalments during the term of the financial arrangement;'

The definition of interest is, therefore, wide and encompasses practically any kind of lending arrangement where a finance charge is payable by one party to the other.

[77] Section 9(2)(b) of the Income Tax Act; Haupt 'Notes on South African Income Tax' (2017) Hedron at 33. It must be noted that the term 'resident' as referred to here includes both natural and juristic persons as referred to in section 1 of the Income Tax Act.

There is a withholding tax on interest paid to non-residents in terms of section 50B of the Act.[78] This section states that there must be a withholding tax of fifteen per cent on interest paid to any foreign person to the extent that the amount is regarded as being from a South African source. This withholding tax is a final tax;[79] the non-resident is liable for payment of the tax,[80] but it must be withheld by the person making the interest payment.[81]

There are, however, several exemptions to the withholding tax on interest that are relevant to non-resident investors.[82] The three exemptions that are applicable for the purposes of an individual non-resident investing in South Africa are: interest that is paid to a foreign person from the government of South Africa (e.g. a government bond), interest paid by any South African bank and interest paid in connection with a listed instrument on the Johannesburg Stock Exchange.

In addition to the withholding tax and its exemptions, section 10(1)(h) of the Act exempts from taxation any amount of interest that is received by a non-resident if that person was not physically present in South Africa for a period exceeding 183 days in aggregate during the 12-

[78] The reason behind the introduction of this withholding tax in, which came into force on 1 March 2015, was the need for the South African government to increase tax revenues. The South African government also realised that other countries taxed non-residents on interest earned in their country and that there was no need for the South African government to be overly generous. Ger 'The new interest withholding tax: what attorneys need to know' (2015) May 48 *De Rebus* 48.

[79] Section 50B(3) of the Income Tax Act; De Koker & Williams 'Silke on South African Income Tax' Lexis Nexis Online at 14.6. This means no other tax may be levied on this amount; it does not form part of a person's taxable income as it is a separate tax to normal income tax.

[80] The ultimate liability to pay the withholding tax rests with the non-resident. If the resident payor does not withhold the tax, the non-resident needs to ensure that the tax is paid.

[81] Section 50E of the Income Tax Act. The person paying the withholding tax needs to submit a Withholding Tax on Interest - WT002 form to SARS. This payment and WT002 must be paid and submitted to SARS before the month after the month in which the interest is paid; as per the South African Revenue Service website - Withholding tax on interest https://bit.ly/2Bfnltx, accessed 20 January 2019. The non-resident recipient of the interest does not have to declare this income to SARS if it is the only income received by that person. De Koker & Williams 'Silke on South African Income Tax' Lexis Nexis Online 14.6.

[82] Section 50D of the Act.

month period preceding the date on which the interest is received.[83] The *rationale* for this interest exemption is to encourage capital flows into the country.[84]

While not all non-residents will qualify for this exemption, any non-resident who lives in another country and merely invests in South Africa, without spending too much time in South Africa, will qualify.[85] It is, consequently, of limited use to consider interest earned by non-residents as it will not be taxable in South Africa in instances where a non-resident who lives elsewhere invests money in South Africa. This is in contrast to a person who lives in another country and invests in immovable property in South Africa as the rental income and proceeds from the disposal are subject to possible taxation in South Africa.

2.5 *Double Taxation Agreements*

It is now imperative to discuss the double taxation agreements that exist between South Africa and the countries of comparison as double taxation agreements form part of South African law and they affect the way that non-residents are taxed in South Africa. The starting point for this discussion is to consider the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention.

[83] SARS Interpretation Note 16 (Issue 2) 'Exemption from income tax: foreign employment income' (2017) provides a discussion on the meaning of a period exceeding 183 full days in aggregate during any 12-month period. It is submitted that this Note is equally applicable to this scenario as it sets out the principle for the concept of 183 full days which can be applied to other situations where the same period in or out the country is in issue. The only difference is that section 10(1)(o) which this Note deals with states that the period of 183 full days in aggregate is during any 12-month period, whereas for the non-resident interest exemption in section 10(1)(h) the period of 183 days in aggregate is for the 12 month period preceding the date on which the interest is received. The Note states that a 'full day' means 24 hours (0h00 to 24h00); it states further that the 183 days do not have to be consecutive but that a total of 183 full days in any 12-month period must be exceeded. It is submitted that in the case of the non-resident interest exemption that the 183 days need not be consecutive, but they must be in the 12 month period prior to receiving the interest. It is not necessary that this period is exceeded by a full day, any amount of time in excess of 183 days will trigger this provision. The Note states further that calendar days must be looked at and not only working days. In addition, section 10(1)(h)(ii) of the Income Tax Act states that interest received by a non-resident is exempt unless 'the debt from which the interest arises is effectively connected to a permanent establishment of that person in the Republic.' In other words, if a juristic person that is non-resident of South Africa has a permanent establishment in South Africa and receives interest from that South African permanent establishment it will not be exempt. Section 1 of the Income Tax Act defines a permanent establishment as having the meaning as set out under article 5 of the OECD Model Tax Convention. Article 5 of the OECD Model Tax Convention defines a permanent establishment as 'a fixed place of business through which the business of an enterprise is wholly or partly carried on'. It is clear from this definition that an individual cannot be a permanent establishment. As such section 10(1)(h)(ii) of the is only applicable to juristic persons.

[84] Ger 'The new interest withholding tax: what attorneys need to know' (2015) May 48 *De Rebus* at 48.

[85] It must be noted that if a non-resident qualifies for the interest exemption they are still subject to the interest withholding tax. This is due to the fact that the exemption relates to 'normal tax' as per section 10(1) of the Income Tax Act. This differs from the withholding tax which is defined in section 50B of the Income Tax Act as 'the withholding tax on interest'; this means that the withholding tax does not fall within the exemption from interest as contained in section 10(1)(h) of the Income Tax Act.

The OECD is a global organisation whose mission is to promote policies that improve the economic and social well-being of people around the world.[86] One of the documents published by this institution that assists in this regard is the OECD Model Tax Convention and Commentary. The OCED Model Tax Convention is a model convention that countries may utilise to guide the drafting and implementation of their own bilateral tax agreements. The model convention provides a basis for determining a solution to the most common problems that arise when two countries wish to conclude an agreement on the avoidance of double taxation and tax evasion.[87]

The OECD Model Tax Convention and Commentary are considered soft law and are not meant to bind member and non-member states;[88] however it is possible for the convention and commentary to become part of a country's law. A country may choose to implement these OECD guidelines into their own legislation.[89]

The model tax convention is broken down into articles in the same way that South African double taxation agreements are. Some of these articles are important to consider as they relate to the type of incomes that are being considered in this thesis.

Article 6 of the Model Tax Convention deals with rental income from immovable property. The article states the following:

> 'Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.'

As an example, a resident of Ghana ('a Contracting State') who owns and lets immovable property in South Africa ('the other Contracting State') may be taxed on that rental income in South Africa ('the other Contracting State'). This article reads the same for the double taxation

[86] The Organisation for Economic Co-operation and Development 'About the OECD' available at www.oecd.org/about, accessed 20 January 2019.
[87] The Organisation for Economic Co-operation and Development 'Articles of the Model Convention with Respect to Taxes on income and Capital – as they read on 21 November 2017' available at https://bit.ly/3iDrKra, accessed 13 September 2020.
[88] Salehifar 'The Role of the OECD in the current International Tax Law: Voluntary or Obligatory' (2015) 10 J *Australasian Tax Teachers Association* 155-156. Salehifar refers to Article 5 of the Convention on the OECD which states that the OECD may take decisions which are binding on its members, make recommendations to its members and enter into agreements with members, non-members and international organisations. Salehifar states that on the basis of Article 5 if the OECD wishes members to be bound it must resort to a formal decision. Salehifar goes on to state that the OECD Model Tax Convention and Commentaries are not obligatory documents that members are required to follow.
[89] Salehifar 'The Role of the OECD in the current International Tax Law: Voluntary or Obligatory' (2015) 10 J *Australasian Tax Teachers Association* at 165.

agreements that South Africa has with all other countries. Taxing rights are given to the country in which the immovable property is situated.

The Commentary on the OECD Model Tax Convention explains why the country in which the property is located always obtains taxing rights. The commentary on Article 6 states that the *rationale* for this is due to the very close economic connection between the source of this type of income and the country of source.

The Commentary on Article 13, relating to the taxation of Capital Gains, states that the country in which the immovable property is situated may have the right to tax both the income from the disposal of the property and the income derived therefrom.

On the other hand, interest income is not always taxable in the state in which the interest is earned. Article 11 of the Model Tax Convention states that interest arising in one state and paid to a resident of the other state may be taxed in that other state. For example, if a resident of Namibia earns interest from a South African source, that interest may be taxed in Namibia. The article goes on to state that the interest may also be taxed in the state in which it arises, but to a maximum of ten per cent. A Namibian resident that earns interest in South Africa may be taxed at a maximum rate of ten per cent on interest earned in South Africa. In such circumstances Namibia would have the ability to tax the interest received by the Namibian resident on the full amount of interest received but would be obliged to give a credit[90] for the tax paid in South Africa.[91]

The OECD Commentary states that while the article gives the country of source taxing rights, this right is not absolute. The wording of the article is that the interest 'may' be taxed in the source country; it does not have to be. The Commentary on Article 11 states that the source country is implicitly entitled to give up all taxation on interest paid to non-residents. In other words, the country of source is not obliged in terms of the OECD Model Tax Convention, if this model is followed by the countries, to tax interest income.[92] This is the case with the South

[90] A credit entails the country giving a reduction in tax in the amount of tax that was paid by the taxpayer to the other country.
[91] This is in terms of article 23 which provides for an elimination of double taxation in the form of a deduction from tax in the state of residence of tax paid in the other country.
[92] The process of adopting a double taxation agreement involves a long process spanning three to ten years that involves rounds of negotiations between the states to the agreement. The countries will provide the other country with the model double taxation agreements and the countries will then negotiate until they come to an agreement that both parties are satisfied with. It is, therefore, up to the states of a double taxation agreement to determine what clauses are put into the double taxation agreement. Mvovo 'Striking the right (a) cord' (2017) *Tax Talk* No. 64 at 35-37.

Africa and United Kingdom double taxation agreement where the country of source has no taxing rights to interest. Therefore, even if South Africa did have taxing rights to the interest in terms of its domestic legislation, the double taxation agreement would ensure that South Africa is not able to tax that interest in any event.

This lends further weight to why interest income is not being considered for this thesis and why rental income and proceeds from the disposal of immovable property are; the double taxation agreements give taxing rights for the latter types of income.[93]

As the South African double taxation agreements are primarily based on the OECD Model Tax Convention,[94] the double taxation agreements that South Africa has with other countries give taxing rights on income from rental on immovable property as well as on the proceeds from the disposal of immovable property to the country where the immovable property is situated.

Any future double taxation agreements that South Africa signs, or amendments made to current agreements, are in all likelihood going to be on the basis that the country where the immovable property is situated has taxing rights to income from the rental of that property as well as income from this disposal of that property.

South Africa follows the OCED Model Tax Convention for almost all of its double taxation agreement even though South Africa is not a member of the OECD.[95] It does so because the OCED Model Tax Convention is regarded as being important and influential.[96]

It is not only the OECD Model Tax Convention that is important in determining the basis for South Africa's double taxation agreement; *ITC 1503*[97] dealt with the OECD Commentary in South African law. The taxpayer in this case was an international airline operator that conducted the business of transporting passengers by air to and from South Africa. The taxpayer had a branch in South Africa and the branch had funds in a South African bank

[93] As discussed in this thesis, South Africa provides an exemption for non-residents on interest earned in South Africa. As per section 10(1)(h) of the Income Tax Act, while this exemption does not provide a full exemption, it exempts interest earned by a non-resident unless they were physically present in South Africa for more than 183 days in the 12-month period preceding the date on which the interest was received. As has been discussed above, this thesis deals with non-residents who do not live in South Africa but rather invest in South Africa whilst living in another country. This is the primary reason for not considering interest income as part of the comparison in this thesis. The fact that this double taxation agreement does not provide taxing rights on interest to South Africa adds to the argument that interest income falls outside of the scope and purpose of this study.
[94] Discussed below in 2.5.1.2.
[95] Organisation for Economic Co-operation and Development 'List of OECD Member Countries – Ratification of the Convention on the OECD' available at https://bit.ly/2P9ssPx, accessed 3 December 2019.
[96] Steenkamp 'An analysis of the applicability of the OECD Model Tax Convention to non-OECD member countries: The South African case' (2017) 10 (1) *Journal of Economic and Financial Sciences* at 90.
[97] 53 SATC 342 (T).

account that earned interest. The issue for the court to decide was whether this interest was taxable in South Africa.

In order to determine this, the court had to consider the double taxation agreement that existed between South Africa and the country where the airline was resident.[98] The double taxation agreement states that South Africa had no taxing rights to income derived from the business of sea or air transport between South Africa and the other country. The court had to decide whether the interest earned as a result of the funds earned in South Africa and placed in a South African bank were part of the business of air transport and, therefore, not taxable in South Africa.

The court had regard to the OECD Commentary in deciding this question. Melamet J stated the following:

> 'If regard is had to the OECD Commentary on the convention in relation to profits from the operation of ships or aircraft in international traffic it is said that these cover income arising directly from the carriage of passenger and cargo and also other classes of income that are closely connected with such income. The 'close connection' may be based on the similar nature of the income arising from ancillary supplementary or incidental activities to the operation of the ship or aircraft.'[99]

Melamet J concluded that the principle laid down in the OECD Commentary that the interest earned in the present case is from an ancillary activity to the air transport business and was not taxable in South Africa. The important principle to take from this case is that the OECD Commentary was seriously considered by the court and affected the outcome of the case.

In *Oceanic Trust Co Ltd NO v Commissioner for South African Revenue Service*[100] the court referred with approval to a United Kingdom Court of Appeal judgment which dealt with the meaning of the term 'place of effective management'. It was in this Court of Appeal judgment that the court utilised the OECD Commentary in coming to an interpretation of the meaning of the term 'place of effective management'. This South African judgment citing, with approval, a judgment that uses the OECD Commentary to aid in its interpretation adds further weight to *ITC 1503* where the OECD Commentary was used in interpreting an aspect of a double taxation

[98] The case does not specify the other country which this matter dealt with.
[99] *ITC 1503* 53 SATC 342 (T) 348.
[100] 74 SATC 127 144-145.

agreement. This is another case which illustrates the importance of the OECD Commentary in our law.

Steenkamp states that the Commentary on the OCED Model Tax Convention is not legally binding but is a highly influential tool[101] that can be used by the courts in interpreting the double taxation agreements that follow the OCED Model.[102]

The case of *Secretary for Inland Revenue v Downing*[103] is the main authority for the use of the OECD Commentary in the tax treaty interpretation process in South Africa.[104] Burt states that the OECD Commentary is not legally binding in international law but is useful to illustrate the terms of the OECD Model Tax Convention in case of uncertainty.[105]

In Australia,[106] the OECD Commentary carries significant weight in the interpretation of double tax conventions.[107] If a double taxation agreement is based on the OECD Model Tax Convention, then the Commentary on the OECD Model Tax Convention can assist in interpreting the meaning of the OECD Model Tax Convention terms.

The OECD Commentary may be used as a means to interpret the OECD Model Tax Convention and any double taxation agreements that South Africa has entered into. Consequently, the purpose of the OCED Commentary is to assist in the interpretation of the OECD Model Tax Convention; it should be used in South Africa as an aid where uncertainty arises in the interpretation of any double taxation agreements that South Africa has entered into.

[101] Steenkamp 'The use of the OECD Model Tax Convention as an aid: the static v ambulatory approach debate considers from a South African perspective' (2017) 10 (2) *Journal of Economic and Financial Sciences* at 198.
[102] As per Du Plessis 'Some Thoughts on the Interpretation of Tax Treaties in South Africa' (2012) 24 South African Mercantile Law Journal 31 at 52, South African courts have not explicitly pronounced on the status of the OECD commentaries but refer to the commentaries in interpreting tax treaties without giving reasons for doing so.
[103] Natal Income Tax Special Court (Case No. 6737 dated 27 October 1972) (Unreported).
[104] Burt also considers this the primary authority for this principle. Burt 'The OECD Commentaries: on what legal basis and to what extent are they relevant to tax treaty interpretation' (2017) 8 (2) Business Tax & Company Law Quarterly 5 at 6.
[105] Burt 'The OECD Commentaries: on what legal basis and to what extent are they relevant to tax treaty interpretation' 8 (2) Business Tax & Company Law Quarterly 5 at 15. This is on the basis that articles 31 and 32 of the Vienna Convention on the Law of Treaties, which forms part of international customary law and is, therefore, binding on South Africa, provide a legal basis for the use of the OECD Commentaries in the interpretive process in South Africa.
[106] A country of comparison for the purposes of this thesis.
[107] Lang 'The Role of the OECD Commentary in tax treaty interpretation' (2008) 107. However, the court in the case of *Australia of Commissioner of Taxation v SNF (Australia) Pty Ltd [2011] FCAFC74*, at para 118, stated that 'the guidelines then are not a legitimate aid to the construction of the double taxation treaties'. As such, while the guidelines may be of assistance in interpreting the OECD guidelines in Australia, they do not carry significant weight.

The Constitutional Court has dealt with the incorporation of double taxation agreements into South African law. In the case of *Glenister v President of the Republic of South Africa*[108] the Constitutional Court was tasked with deciding whether the decision to disband the Directorate of Special Operations was done in an unconstitutional manner. One of the primary arguments was that South Africa has an international obligation to establish an independent anti-corruption agency.

The judgment refers to section 231 of the Constitution of the Republic of South Africa, 1996 which governs the states of international agreements in South African law. Section 231(4) of the Constitution states that an international agreement becomes law in South Africa when it is enacted by national legislation.

The judgment states that an international agreement that has been ratified by resolution in Parliament is binding on South Africa on the international plane but does not become part of our law until and unless it is incorporated by way of national legislation.[109] A double taxation agreement must, therefore, be incorporated into national legislation before it is binding in the country.

This view was also held to be correct by the Supreme Court of Appeal;[110] it was held that once a double taxation agreement has been brought into operation that it has the effect of law in South Africa as if it was enacted in terms of the Income Tax Act.

This is in line with section 108 of the Income Tax Act which ensures that any international agreement that has been promulgated as law will be binding in South Africa.

Davis J held as follows:

> 'The effect of s 108 is thus to ensure that domestic statutory obligations are created.'[111]

Davis J held further that the provisions of a double taxation agreement become part of domestic income tax laws when they have been promulgated.[112]

[108] 2011 (3) SA 347 (CC).
[109] *Glenister v President of the Republic of South Africa* 2011 (3) SA 346 CC at para 91.
[110] *Commissioner for the South African Revenue Service v Tradehold Ltd* (132/11) [2012] ZASCA 61 (8 May 2012) at 9.
[111] *Commissioner for the South African Revenue Service v Van Kets* 2012 (3) SA 399 (WCC) at 403.
[112] *Commissioner for the South African Revenue Service v Van Kets* 2012 (3) SA 399 (WCC) at 406.

It is evident that double taxation agreements that have been promulgated form part of South African law and must be considered alongside domestic law. The importance of the provisions of double taxation agreements are therefore paramount.

There may be instances where there is a conflict between South African law and the provisions of a double taxation agreement. Various cases have been considered in order to determine how such a conflict should be resolved.

In terms of the conflict between domestic legislation and a double taxation agreement, I must consider the rulings in cases by the Supreme Court Appeal.

One such case was *Commissioner for the South African Revenue Service v Tradehold.*[113] The taxpayer, Tradehold, was a company incorporated in South Africa. However, at a meeting of the taxpayer's board of directors in Luxembourg, it was decided that all future board meetings would take place in Luxembourg. The taxpayer at this point became effectively managed in Luxembourg and ceased to be a South African tax resident in 2003 when the definition of resident was amended.[114]

SARS contended that the taxpayer had a deemed capital gains event when they ceased to be resident of South Africa.[115] However, article 13(4) of the double taxation agreement between South Africa and Luxembourg gives full taxing rights on a gain from the alienation of property to the country of residence.

SARS' submissions were based on the premise that the deemed disposal as contained in paragraph 12 of the Eighth Schedule is not the same as an 'alienation' as per the double taxation agreement and that SARS still maintained taxing rights to the deemed disposal upon breaking tax residency.

[113] (132/11) [2012] ZASCA 61 (8 May 2012).
[114] As per section 33 of the Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003, the amendment added the following words to the definition of resident: 'but does not include any person who is deemed to be exclusively a resident of another country for purposes of the application of any agreement entered into between the Governments of the Republic and that other country for the avoidance of double taxation'.
[115] In terms of paragraph 12 of the Eighth Schedule to the Income Tax Act. It must be noted that the deemed capital gains event that occurs upon breaking tax residency is now dealt with in terms of section 9H of the Income Tax Act. This *Tradehold* judgment had to be decided in terms of the Eighth Schedule as the breaking of residency occurred before this section was promulgated.

The ruling in this case hinged on the status of a double taxation agreement in South African law. Boruchowitz AJA stated that 'once brought into operation a double tax agreement has the effect of law'.[116] The judgment stated that a double taxation agreement modifies domestic law and will apply in preference to the extent that there is a conflict.

The court had to decide whether the term 'alienation' as used in the double taxation agreement included a deemed disposal. The court held that this term's meaning should not be restricted and that the broad meaning of the term should be allowed. The court, accordingly, held that the double taxation agreement applies to capital gains that arise from actual and deemed alienations of property; when the taxpayer broke tax residency with South Africa and took up tax residency in Luxembourg, Luxembourg had exclusive taxing rights to all capital gains made by the taxpayer as per article 13(4) of the double taxation agreement.

SARS also takes the view that a tax treaty will take preference over domestic legislation in the event of conflict. See Interpretation Note 3 (Issue 2)[117] at 4.4 which states that if there is a conflict between a general definition in the Income Tax Act and a more specific definition in a tax treaty, the more specific definition in the tax treaty takes precedence.[118]

Costa & Stack are also of the view that a tax treaty must take preference over domestic legislation in the event of conflict.[119] Their reasoning behind this is that a double taxation agreement and section 108 of the Income Tax Act aims to prevent tax being levied twice and that this legislation would be rendered meaningless if the provisions of the Income Tax Act were to override a double taxation agreement. Further, that in the event of a conflict that the provision should be construed in favour of the subject. In other words, the court would interpret

[116] *Commissioner for the South African Revenue Service v Tradehold Ltd* (132/11) [2012] ZASCA 61 (8 May 2012) at para 16.

[117] An interpretation note is a guideline for the interpretation and application of tax legislation. South African Revenue Service 'Interpretation Notes' available at https://bit.ly/2OmYgkc, accessed 13 July 2020.

[118] SARS states the following in this regard: 'Firstly, once approved by Parliament and published in the Government Gazette, tax treaties have effect as if enacted in the Act. The tax treaty's provisions and those of the Act should therefore, if at all possible, be reconciled and read as one coherent whole. In the context of the definition of 'resident', if there is conflict between the general definition of that term in section 1(1) and a more specific definition in a tax treaty, the *maxim generalia specialibus non proderogant* applies and the more specific definition in the tax treaty takes precedence. Secondly, the precedence of a more specific tax treaty definition has been included in the definition of 'resident' in section 1(1), which excludes a person deemed to be exclusively a resident of another country for purposes of applying any tax treaty. Therefore, if a natural person is held to be a resident of another country and not to be a resident of South Africa for purposes of any tax treaty, such person is excluded from the definition of 'resident' in section 1(1).' South African Revenue Service Interpretation Note 3 (Issue 2) 'Resident: Definition in relation to a natural person – ordinarily resident' (2018) at 4.4.

[119] Costa & Stack 'The Relationship between Double Taxation Agreement and the provisions of the South African Income Tax Act' (2014) 7(2) Journal of Economic and Financial Sciences 271.

conflicting provisions in a manner least burdensome to the taxpayer. Such an interpretation would be in line with the objectives of a double taxation agreement which aims to prevent double taxation.

Du Plessis disagrees with *Tradehold* and prefers the stance taken by the minority in the *Glenister* case that the domestic legislation and tax treaties rank equally.[120] In the case of conflict, normal statutory principles of interpretation should be followed. However, Du Plessis admits that South African courts would probably follow what was stated in *Tradehold* as the decision was made by unanimous judgment in the Supreme Court of Appeal.[121]

The minority in the *Glenister* judgment stated that once an international agreement has been incorporated into our law, as discussed above, that it enjoys the same status as other domestic legislation.[122] It was held further that international law can only be elevated to a status superior to national legislation if Parliament expressly indicates that this should be the case.

Gutuza holds the view that in the event of a conflict between a tax treaty and the Income Tax Act that a reconciliatory approach should be adopted.[123] Gutuza states that this type of approach is in line with the South African approach to conflicting legislation. The primary reason for Gutuza's view is that the tax treaty becomes part of the Income Tax Act through section 108(2) of that Act.

In my view, the *Tradehold* judgment is correct that a double taxation agreement will take precedence over domestic law in the case of conflict. It is submitted that there would be no certainty as to what would occur if this were not to be the case. If both countries to a double taxation agreement have domestic legislation that conflicts with the double taxation agreement and the domestic legislation takes precedence in both countries, it would be extremely difficult to determine which country would have taxing rights. For example, article 11 of the double taxation agreement between South Africa and the United Kingdom states that only the country of residence has taxing rights to interest earned in the country of source. If South Africa's domestic legislation gave South Africa full taxing rights to this income, there would then be an issue as to who could tax this income i.e. South African legislation gives South Africa taxing rights, but the double taxation agreement gives the United Kingdom sole taxing rights. If the

[120] Du Plessis 'Some Thoughts on the Interpretation of Tax Treaties in South Africa' (2012) 24 South African Mercantile Law Journal 31 at 40-41.
[121] The writer does not expand on her basis for stating this.
[122] *Glenister v President of the Republic of South Africa* 2011 (3) SA 346 CC at para 100.
[123] Gutuza 'Tax Treaties, the Income Tax Act and the Constitution – Trump or Reconcile?' (2016) 3 South African Mercantile Law Journal 480

double taxation agreement did not get preference in such a scenario, it may result in a double taxation. It is, therefore, correct that a double taxation agreement must override domestic legislation.

Another example is the withholding tax on interest. South Africa has the right to levy a fifteen per cent withholding tax on interest paid to non-residents. However, the South Africa and Australia double taxation agreement provides for a maximum withholding tax of ten per cent. If an Australian tax resident earns interest in South Africa and is subject to the withholding tax, the South African institution paying the withholding tax would have to levy tax at ten per cent and not fifteen per cent. If the double taxation agreement did not take preference over South African law there would be no point in there being a double taxation agreement.

It must be kept in mind that a double taxation agreement does not create taxing rights but merely allocates taxing rights to the two countries that are party to the treaty.[124] In other words, if a double taxation agreement allocates taxing rights to a country in terms of a certain type of income, but the domestic law of that country does not allow taxation of that income, the country of source will not be allowed to tax that income. In such a situation the double taxation agreement would be of no effect as the country of source would not have taxing rights in terms of domestic legislation; there would be no conflict between the countries as to who would have taxing rights so the double taxation agreement would not be applicable. The country of residence would, therefore, have the ability to tax their resident on that particular type of income.[125]

[124] Costa & Stack 'The Relationship between Double Taxation Agreement and the provisions of the South African Income Tax Act' (2014) 7(2) Journal of Economic and Financial Sciences at 272.
[125] Article 6 of the double taxation agreements between South Africa and Australia and South Africa and Botswana differs slightly from the South Africa and United Kingdom agreement that have no effect for the purposes of this thesis. They will, accordingly, not be stated *verbatim.*

It is important to consider the implications of a double taxation agreement in South African law as the provisions of a double taxation agreement allocate taxing rights[126] are important in establishing the reason why rental income and proceeds from the disposal of immovable property are taxable in South Africa.

2.6 *The United Kingdom, Australia and Botswana double taxation agreements*

I now consider the specific articles dealing with rental income to illustrate that South Africa has taxing rights in terms of the double taxation agreements for the countries of comparison.

Article 6 of the South Africa and United Kingdom double taxation agreement deals with 'Income from Immovable Property'.[127] This article reads as follows:

> '1. Income derived by a resident of a Contracting State from immovable property (including income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.
>
> 2. The term 'immovable property' shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include property accessory to immovable property, livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources. Ships and aircraft shall not be regarded as immovable property.
>
> 3. The provisions of paragraph 1 of this Article shall apply to income derived from the direct use, letting or use in any other form of immovable property.'

[126] It is worth noting that the rules of private international law do not allow one state to collect tax debts in another state as this encroaches a country's right to sovereignty. However, section 25A dealing with the 'Assistance in the Collection of Taxes' allows a country to enforce its tax debts in the other country where the individual owes tax to the first mentioned country but has assets in the other country. As per *Commissioner of Taxes, Federation of Rhodesia v McFarland* 1965 (1) SA 470 and confirmed by *Krok v Commissioner for the South African Revenue Service* [2015] 4 All SA 131 (SCA). Section 25A of the double taxation agreements in this regard abrogated this international law to give the other country rights to collect a tax debt in the country where the taxpayer has assets but does not owe the debt. This is further confirmation that the double taxation agreement will override South African domestic law.

[127] South African Revenue Service 'Convention between the Government of the Republic of South Africa and the Government of the United Kingdom and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains' 2002.

The practical implications of this article are as follows. If a tax resident of the United Kingdom purchases immovable property in South Africa and lets that property, South Africa will have taxing rights to the rental income from this property. The double taxation agreements between South Africa and Botswana[128] reads exactly the same as Article 6 in the United Kingdom agreement as above and the South Africa and Australia double taxation agreement is worded slightly differently but the effects for the purposes of this thesis are the same. In other words, the South African government may levy tax on the rental income earned in South Africa by non-residents situated in Botswana, the United Kingdom and Australia. This is in line with the OECD Model Tax Convention.

Article 13 of all three double taxation agreements allocates taxing rights to the country in which the immovable property is situated; the source country, therefore, has taxing rights.[129]

As an example, if a resident of Botswana owns immovable property in South Africa and proceeds to sell that property (presuming that the property was owned as a capital asset and not trading stock),[130] South Africa will have taxing rights on the proceeds from the sale of that property i.e. South Africa will be entitled to levy capital gains tax.[131]

As South Africa has taxing rights to rental income and proceeds from the disposal of fixed property in terms of the above double taxation agreements and South African domestic law, it is practical to consider whether non-residents should be taxed at higher rates on this type of income.

[128] South African Revenue Service 'Convention between the Government of the Republic of South Africa and the Government of the Republic of Botswana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains' 2004.
[129] These articles would encompass both capital gains from the sale of fixed property as well as revenue income if the taxpayer treated the property as trading stock in his or her hands. However, as any income received from the sale of trading stock would have the same tax effects as rental income for the non-resident it does not add to the thesis to deal with trading stock any further. The implications are the same as for the rental income.
[130] Trading stock refers to an asset that is held by a taxpayer with the purpose of buying and selling i.e. it is not held as an investment but is purchased with the intention of selling for a profit.
[131] The distinction between fixed and floating capital was made in footnote 17. I do not consider the proceeds from the disposal of floating capital in this thesis as this is a completely different area of the law dealing with business profits that do not form part of the aims of this thesis.

What follows adds further to the argument of why other types of income, such as interest,[132] should not be considered in this thesis as South Africa does not always have taxing rights, or has restricted taxing rights, to these amounts earned by non-residents.[133]

Article 11 of the South Africa and United Kingdom double taxation agreement deals with the taxing rights on interest income. It reads as follows:

> '1. Interest arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable only in that other State, if such resident is the beneficial owner[134] of the interest.
>
> 2. The term 'interest' as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures. The term 'interest' shall not include any item which is treated as a dividend under the provisions of Article 10 of this Convention.'[135]

If a resident of the United Kingdom earns interest from a South African source, that interest income will only be taxable in the United Kingdom.

[132] Chapter 4 deals with the other types of income that may be earned by a non-resident investor, such as dividends. In terms of the double taxation agreements between South Africa, Botswana, Australia and the United Kingdom, the country of source of a capital gain from the sale of a share, other than a property rich share, is only taxable in the country where the taxpayer is a resident. In other words, if a South African resident disposes of shares in Botswana, the United Kingdom or Australia, this share would only be subject to possible taxation in South Africa. As mentioned earlier, it is worthwhile considering the types of income that non-residents are not subject to taxation on in South Africa in order to illustrate why rental income and proceeds from the disposal of immovable property are the only two types of income that will add value to the purpose of this thesis.

[133] It must be noted, as was established earlier in the thesis, that South Africa does not have taxing rights to interest income earned in South Africa by non-residents who qualify for the section 10(1)(h) exemption (as this thesis considers non-resident investors who do not live in South Africa but merely invest in the country, these types of non-resident taxpayers would qualify for this interest exemption). In addition, there are certain double taxation agreements that give the country where the person is tax resident taxing rights (such as the UK-South Africa agreement discussed below) to all interest income. While one double taxation agreement is certainly not sufficient reason to exclude a discussion on interest income, it suggests that such a discussion on interest income falls outside the scope of this study. In other words, these types of income have not been excluded because of certain double taxation agreements which have been dealt with in this thesis (UK, Australia and Botswana) but because South African domestic legislation does not (in the circumstances that this thesis considers) give South Africa taxing rights to this income. This thesis would, therefore, be equally applicable to a non-resident who has the same types of South African sourced income but who lives in a country with which South Africa does not have a double taxation agreement.

[134] The term 'Beneficial Owner' is defined in section 64D of the Income Tax Act as the person who is entitled to the benefit of the dividend attaching to a share.

[135] South African Revenue Service 'Convention between the Government of the Republic of South Africa and the Government of the United Kingdom and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains' 2002.

Article 11 of double taxation agreement between South Africa and the United Kingdom deviates from the OECD Model Tax Convention. As mentioned above, this article gives exclusive taxing rights to the country where the taxpayer is a resident. When considering the Commentary on Article 11 of the OECD's Model Tax Convention,[136] the deviation from the normal wording of Article 11 in the South Africa and United Kingdom double taxation is in line with the Commentary, although not with the OECD Model Tax Convention.[137]

Even if a non-resident does not qualify for the exemption from the withholding tax and/or the interest exemption in terms of South African domestic law,[138] the provisions of this double taxation agreement will ensure that South Africa would not have taxing rights to interest that is from a South African source and is earned by a United Kingdom tax resident investing in South Africa.

This adds further to the argument why dealing with interest income would not, therefore, contribute to the purpose of this thesis – to determine whether non-residents should be taxed at different rates than residents as interest earned by non-residents is not taxable in South Africa. Even if South Africa were to change its legislation to tax non-residents on interest income earned in South Africa, this double taxation agreement would ensure that South Africa has no taxing rights to this type of income.[139]

[136] We have already established that the Commentary may be considered in interpreting a double taxation agreement.
[137] This deviation illustrates that the parties to a double taxation agreement are not bound by the specific wording of the OECD Model Tax Convention and that the Commentary is used as a guideline by parties who wish to deviate from the Model Tax Convention.
[138] As mentioned in 2.4.3.
[139] The point that the United Kingdom – South Africa tax treaty does not give taxing rights to South Africa on interest income earned by a resident of the United Kingdom is certainly not a conclusive reason to not consider interest income as part of this thesis. However, it just adds weight to the argument that considering interest income falls outside of the purpose of this thesis.

Article 11 of the South Africa and Australia double taxation agreement, dealing with the taxation of interest, reads as follows:

> 1. Interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed in that other State.
>
> 2. However, such interest may also be taxed in the Contracting State in which it arises and according to the law of that State, but the tax so charged shall not exceed ten per cent of the gross amount of the interest.'[140]

In other words, a resident of Australia who invests money in South Africa and earns interest in South Africa is taxable on that interest in South Africa, but to a maximum of ten per cent.[141] However, while the double taxation agreement gives South Africa taxing rights to this interest income, South African domestic law may exempt the amount from taxation in South Africa. In other words, even if the double taxation agreement gives South Africa taxing rights, the amount may not be taxable in South Africa in terms of South African domestic law. If a non-resident earns interest in South Africa and this income does not fall under one of the exemptions provided by South African domestic legislation, the interest will be subject to a ten per cent tax in South Africa.

For the purposes of determining the taxation of non-resident individuals, the South Africa and Botswana double taxation agreement has the same effect as the South Africa and Australia double taxation agreement; the wording is just slightly different. The second paragraph of the Botswana and South Africa double taxation agreement reads as follows:

> 'However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest.'

[140] South African Revenue Service 'Convention between the Government of the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Income Taxes' 1999.
[141] This over-rides the fifteen per cent withholding tax that is implemented in terms of section 50B of the Income Tax Act.

While South Africa is entitled to tax interest earned in South Africa by non-resident investors in terms of the Australia and Botswana double taxation agreements, South African law provides an exemption to non-residents. This will ensure that non-resident investors who are not spending more than the 183 days in South Africa are not taxed on that interest income in South Africa, [142] although they may still be subject to the ten per cent withholding tax on interest in terms of the double taxation agreement, depending on the source of the interest.[143]

Even if a double taxation agreement gives taxing rights to South Africa, South African law ensures that South Africa is not entitled to tax the three types of interest considered[144] in this thesis that may be earned by individual non-resident investors who qualify for the exemption – interest from a South African bank, interest from a South African government bond and interest paid in connection with a listed debt. It is therefore of very limited use to consider interest in any detail in this thesis.

2.7 *The economic justifications for differentiated tax regimes*

It has been determined why rental income and income from the disposal of fixed property will be considered in this thesis. I now discuss whether there are possible economic justifications for the differentiated tax regimes between residents and non-residents on income derived from immovable property. As mentioned in the introduction of this chapter, South African government finances are in need of additional tax revenues, but the current individual tax rates are extremely high[145] and it would be unwise to further increase the tax burden for resident taxpayers.[146]

[142] In terms of the exemption in terms of section 10(1)(h) as was discussed 2.4.3.
[143] It must be noted that if a non-resident is exempt from the fifteen per cent withholding tax on interest they will not be subject to the ten per cent withholding tax in terms of the double taxation agreement; this is because a double taxation agreement does not create taxing rights, but merely allocates taxing rights. If South Africa provides for an exemption from the withholding tax, a double taxation agreement that provides for taxing rights for South Africa has no effect.
[144] Interest earned from a South African bank, the South African government (for example in terms of a government bond) as well as interest paid in connection with a listed instrument on the Johannesburg Stock Exchange.
[145] South Africa has the 12th largest personal income tax burden in the world. Financial Mail 'Mike Schussler: The Burden of Truth' available at https://bit.ly/38UYYhI, accessed 14 July 2020.
[146] This was confirmed by National Treasury in the 2020 Budget Review where it states that in the current economic climate there are few opportunities to increase tax rates. National Treasury 'Budget Review 2020' 26 February 2020 at p 24. Also see Financial Mail 'Mike Schussler: The Burden of Truth' available at https://bit.ly/38UYYhI, accessed 14 July 2020 where it states that increasing tax rates in South Africa would just result in more money and highly skilled people leaving the country. In addition, when wealthy people are taxed at higher tax rates, they will take the following types of steps to reduce the tax they pay: work fewer hours, reduce

It is illustrated in Chapter 3 that the United Kingdom and Australia all have higher tax rates for non-residents in comparison to residents from income from immovable property than is the case in South Africa.[147]

I now discuss why these countries tax non-residents at higher effective tax rates than is the case in South Africa, but for the most part still tax their own residents at higher rates than non-residents. The starting point for this is to consider why these countries tax non-residents at different rates to residents, as opposed to what happens in South Africa where resident and non-residents are taxed according to the same tax rates. In other words, are there economic justifications for the different tax treatment between residents and non-residents in the countries of comparison.

This enquiry will form the economic basis as to why the three countries of comparison may treat residents differently to non-residents and can provide useful guidance for South Africa to consider when determining whether the South African tax rates should be changed.

As a background to the taxation of residents in comparison with non-residents, the writings of Kees Van Raad are helpful. Van Raad states that most countries will reduce the tax burden of individual taxpayers by taking their personal circumstances into account.[148] In cases where individuals are subject to taxation on their income in the source country (for example where they have invested in fixed property in a country other than where they live), the question is whether these non-resident investors should also be allowed the same reduction in tax due to their personal circumstances as are resident taxpayers.

Most countries allow individual taxpayers deductions for personal expenses such as medical expenses, benefits for couples, and in some cases for the care of minor children. Alternatively, they provide personal allowances and tax credits to individuals to reduce their tax liability. These types of reductions are based on tax policies that take into consideration an individual's ability to pay tax.[149]

work effort, retire earlier and emigrate. Steenekamp 'Taxing the rich at higher rates in South Africa' (2012) Southern African Business Review Vol. 16 No. 3 at 13.

[147] Other than capital gains tax payable in Australia in which case the non-resident pays more tax than the resident.

[148] Van Raad 'Non-Residents – Personal Allowances, Deduction of Personal Expenses and Tax Rates' (2010) World Tax Journal at 154.

[149] Van Raad 'Non-Residents – Personal Allowances, Deduction of Personal Expenses and Tax Rates' (2010) World Tax Journal at 155.

Non-resident taxpayers are not typically entitled to reductions in tax for personal expenses or differential tax rates in the source country. The reason why non-resident individuals who earn income in another country are not allowed these tax benefits is that they are entitled to such benefits in their country of tax residence.[150] By providing non-residents with the same benefits as individual residents, the non-residents are in effect receiving double benefits and therefore have an advantage over the residents of the country where they are earning the additional income i.e. the income from the source country.[151]

Van Raad is indeed correct.[152] As will be illustrated in Chapter 3, non-residents do not pay nearly as much tax in South Africa as residents do on the same amount of taxable income in relation to rental income or income from the disposal of fixed property. The same is true for the countries of comparison, except in Australia for capital gains tax where the non-resident pays more than the resident.[153] Residents are at a disadvantage to non-residents who receive the same income. While on the face of it this seems unfair, non-residents do not necessarily receive a double benefit.

It may be unfair from the point of view that a South African resident pays more tax in South Africa on the same income as a non-resident in South Africa; it may not be unfair in the sense that the non-resident's overall tax liability is not reduced by receiving a lower tax rate than residents in South Africa.

This is because in the United Kingdom and Australia, individuals are taxed on their worldwide income.[154] Therefore, even if a non-resident receives taxable income from fixed property in South Africa and the taxable income is below the tax threshold,[155] that person will still have to declare that taxable income in their country of tax residence and pay tax on it there. They would

[150] Van Raad 'Non-Residents – Personal Allowances, Deduction of Personal Expenses and Tax Rates' (2010) World Tax Journal at 155.
[151] Van Raad 'Non-Residents – Personal Allowances, Deduction of Personal Expenses and Tax Rates' (2010) World Tax Journal at 155.
[152] Van Raad 'Non-Residents – Personal Allowances, Deduction of Personal Expenses and Tax Rates' (2010) World Tax Journal at 155.
[153] These calculations are based on the rates of taxation in the applicable country. These references are fully laid out in Chapter 3. It does not add value to add these references at this point, but rather where the calculations are set out.
[154] HM Revenue and Customs 'Tax on Foreign Income' available at https://bit.ly/38grr06, accessed 15 July 2020. Australian Taxation Office 'Foreign income of Australian residents working overseas' available at https://bit.ly/2tCq7Wx, accessed 20 January 2020.
[155] Currently R79,000 per persons under 65 years of age i.e. they would not be subject to tax in South Africa. South African Revenue Service 'Rates of Tax for Individuals' available at https://bit.ly/37miQJn, accessed 15 July 2020.

obviously not have the ability to claim a credit in their home country for tax paid in South Africa as no tax was paid in South Africa.

This would be the same for a South African resident receiving income from fixed property in another country; if they were to not pay tax in the source country, they would still pay tax on that income in South Africa as South African residents are taxable on worldwide income.[156]

However, Botswana only taxes residents on income earned from a source within Botswana.[157] This means that if a Botswana tax resident were to receive rental income or a capital gain from a South African fixed property but their taxable income in South Africa for the year of assessment is below the tax threshold,[158] they would not pay tax on this income anywhere. Or, if they were above the tax threshold and paid tax, the amount of tax that they pay in comparison with South African residents is significantly less.[159] In such circumstances it can be said that it is unfair that South African residents are paying more tax on the same taxable income than a person resident in Botswana.

From a practical point of view, it would be very difficult for South Africa to attempt to differentiate between non-resident taxpayers based on the country where they are tax resident.

In my opinion, there are arguments both for and against whether or not the amount of tax paid by non-residents is fair in South Africa.[160] I must rather consider this matter from the perspective of South African law; Chapters 4 and 5 deal with this. If something is unlawful it is unlikely that it can be considered fair.

I must now consider the non-discrimination clauses that can be found in the double taxation agreements between South Africa, the United Kingdom, Botswana and Australia. It is prudent to consider this aspect of tax law as they deal with how countries must treat certain categories

[156] As per the definition of 'gross income' as contained in section 1 of the Income Tax Act No. 58 of 1962.
[157] As per section 9 of the Botswana Income Tax Act Chapter 52:01, the gross income of a person includes amount from a source within Botswana. As such, Botswana only taxes its residents on income from a source within Botswana.
[158] Currently R79,000 per persons under 65 years of age. South African Revenue Service 'Rates of Tax for Individuals' available at https://bit.ly/37miQJn, accessed 15 July 2020.
[159] As per 'Rental Example 1 – South Africa' under 3.2 where it was illustrated that a non-resident can pay as little as eight per cent of the tax paid by a non-resident.
[160] These arguments are discussed in more detail in Chapter 4 in consideration of whether the effective tax rates are justifiable in terms of section 36 of the Constitution. For example, there would be an argument that South Africa needs foreign investment to boost the economy and that tax incentives assist in this. However, it is argued in Chapter 4 that tax incentives do not necessarily increase the amount of foreign investment that flows into a country, but that other factors are more important.

of taxpayers when a national of one country earns income from the other country that is party to the agreement.

As this article of the double taxation agreement may affect the taxation of non-nationals in the other country and possibly override any domestic law it is an important aspect of our tax system to consider. The articles dealing with non-discrimination can be found in Article 23 of the South Africa – United Kingdom double taxation agreement, Article 23A of the South Africa – Australia double taxation agreement and Article 23 of the South Africa – Botswana double taxation agreement.

All three of these articles read the same for the purposes of this thesis. Article 23 of the South Africa – United Kingdom article reads as follows:

> 'Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.'

What is important in the wording of these articles is that the potential discrimination is based on an individual's nationality and not on their tax residence. These articles envisage a situation where two people are tax resident in that country, but only one of them is a national of that country. The person who is not a national of that country cannot be subject to more burdensome tax rates than nationals of that country even though they are both tax resident of that country.[161] In other words, the one individual is being discriminated against as a result of their nationality.

While these articles are not directly relevant to this thesis,[162] it is important to consider the implications of the non-discrimination articles, even if it is to illustrate that they do not apply. They are an important aspect of non-discrimination for tax purposes in terms of the double taxation agreements that South Africa has entered into with the countries of comparison.

In addition to the overall consideration of non-discrimination articles, Article 23 (5) of the South Africa – United Kingdom double taxation agreement is important.[163] This paragraph

[161] Organisation for Economic Co-Operation and Development 'Commentaries on the Articles of the Model Tax Convention' (2017) at 334.
[162] As per the calculations in Chapter 3, it has been established that the different tax rates levied by the four countries are based on a person's tax residency and not on their nationality.
[163] This article does not appear in the South Africa – Botswana double taxation agreement or the South Africa – United Kingdom double taxation agreement.

states that nothing in the article obliges either state to grant to non-resident individuals of that state any of the personal allowances, reliefs and reductions for tax which are granted to resident individuals.

This paragraph is important as it ensures that the United Kingdom's personal allowance, as will be discussed in Chapter 3 and is discussed further below, need not be extended to South African residents earning income in the United Kingdom.

Her Majesty's Revenue and Customs of the United Kingdom (HM Revenue and Customs) has released a document explaining why non-residents are not entitled to the personal allowance.[164] HM Revenue and Customs states that a primary purpose of their tax system is to ensure that everybody who benefits from the United Kingdom's economic and social environment pays a fair amount of tax in the United Kingdom. This is a solid argument that could certainly be held to be applicable in the case of a United Kingdom resident earning taxable income from rental property or receiving a capital gain from a property situated in South Africa. As the United Kingdom resident benefits from South African infrastructure which enables him or her to earn rental income or a capital gain, such as roads and electricity, such a person should be liable to pay tax in South Africa.

The HM Revenue and Customs also states that in a significant and growing number of countries, such as most of the European Union, Australia, Canada and the United States of America, the benefit of not being subject to tax until the individual has reached a certain level of income is restricted to tax residents of that country.[165]

As will be shown in Chapter 3, the personal allowance in the United Kingdom is extended to, amongst others, nationals of the European Economic Area, a resident in the Isle of Man or Channel Islands and people employed by the United Kingdom government.[166] As such, a South African resident investing in fixed property in the United Kingdom would not be entitled to the personal allowance.

[164] HM Revenue and Customs 'Restricting non-residents' entitlement to the UK personal allowance' (2014) available at https://bit.ly/2NbTaqN, accessed 15 July 2020.
[165] HM Revenue and Customs 'Restricting non-residents' entitlement to the UK personal allowance' (2014) available at https://bit.ly/2NbTaqN, accessed 15 July 2020 at 3.
[166] HM Revenue and Customs 'Restricting non-residents' entitlement to the UK personal allowance' (2014) available at https://bit.ly/2NbTaqN, accessed 15 July 2020 at 3.

The United Kingdom government states that most of the tax treaties between the United Kingdom extend the personal allowance to nationals of those states who are not entitled to claim the personal allowance under the above criteria.[167] However, as stated above, the South Africa – United Kingdom double taxation agreement does not extend the personal allowance to South African residents investing in the United Kingdom.

The United Kingdom government has realised that by extending the personal allowance to non-residents that the non-resident, who is in a similar tax position to the resident, may have a more generous tax outcome than they would if they received income from a country where they were not granted a personal allowance or its equivalent.[168] This will be illustrated in Chapter 3 where a non-resident can pay as little as 50 per cent of the amount of tax paid on rental income as would a resident taxpayer with the same taxable income and a non-resident can pay only 72 per cent of the capital gains tax that is payable by a resident with the same capital gain made.

The United Kingdom government has also realised that while the tax situation for the individual is not affected,[169] it is the United Kingdom who collects less tax in comparison to another jurisdiction which restricts personal allowances or its equivalent to residents only.[170]

I believe that the South African government has not realised that the effect of taxing residents and non-residents at the same statutory rates results in different effective tax rates. Factors that have been considered by the United Kingdom government should be considered by the South African government in determining whether they should alter the tax rates for non-residents so as to ensure that South Africa receives its fair share of tax on income earned by non-residents investing in South African real estate. The current South African laws result in the South African government collecting less taxes than they are entitled to.

The United Kingdom government has even mentioned South Africa as an example of a country which entitles all non-residents to the equivalents of a personal allowance. They state that the South African government understands that such a system could make visiting a country for work, investing or leaving the country temporarily significantly easier for individuals and may

[167] HM Revenue and Customs 'Restricting non-residents' entitlement to the UK personal allowance' (2014) available at https://bit.ly/2NbTaqN, accessed 15 July 2020 at 5.
[168] HM Revenue and Customs 'Restricting non-residents' entitlement to the UK personal allowance' (2014) available at https://bit.ly/2NbTaqN, accessed 15 July 2020 at 6.
[169] As the individual will most likely have to declare worldwide income in their place of tax residence and, therefore, if they pay less tax on their income from the United Kingdom in the United Kingdom, the tax on this income will be paid in their country of tax residency.
[170] HM Revenue and Customs 'Restricting non-residents' entitlement to the UK personal allowance' (2014) available at https://bit.ly/2NbTaqN, accessed 15 July 2020 at 6.

help promote the positive economic benefits of income and outgoing expatriates.[171] However, it states that the government of the United Kingdom would not consider implementing such an extension to all non-residents, but rather wishes to restrict the personal allowance.

Alternatively, countries such as Australia and the United States which do not allow any personal allowances for non-residents. This was stated as being a clear and simple policy with the advantage of preserving the benefit of allowances to resident taxpayers.[172]

It is unlikely that the South African government has ever considered the effective tax rates that are as a result of the same tax rates being applicable to residents and non-residents. However, Chapter 4 explains why the South African government should be considering this issue and why this issue should force the South African tax laws to change.

It is important to consider why Australia taxes residents and non-residents at different rates for capital gains tax.[173] Prior to 2006 Australia taxed non-residents on all types of capital gains that they may receive in Australia;[174] however as a result of the limited taxing rights given to Australia from capital gains made by non-residents,[175] there was little tax revenue that was collected in Australia on assets other than land held in Australia.[176]

The Australian parliament, consequently, decided to narrow the capital gains tax base for non-residents to exclude gains from potential taxation on all assets apart from land and land rich companies.[177] The official government explanation for reducing the capital gains tax base for non-residents was in order to enhance Australia's status as an attractive place for business and investment by reducing the current broad base for capital gains tax that Australia had.[178] In

[171] HM Revenue and Customs 'Restricting non-residents' entitlement to the UK personal allowance' (2014) available at https://bit.ly/2NbTaqN, accessed 15 July 2020 at 9.
[172] HM Revenue and Customs 'Restricting non-residents' entitlement to the UK personal allowance' (2014) available at https://bit.ly/2NbTaqN, accessed 15 July 2020 at 9.
[173] As detailed in the previous chapter, non-residents are not entitled to the 50 per cent discount that is available to residents who have held the asset for more than one year.
[174] Amendments to the capital gains taxation of non-residents was included in the Tax Laws Amendment (2006 Measures No. 4) Act 2006.
[175] Most double taxation agreements will not give the source country (Australia in the case where a non-resident owns assets in Australia) taxing rights to capital gains made on sale of assets other than from fixed property in that country. If any non-resident invested in shares in Australia and was from a country with which Australia had a double taxation agreement, Australia would, accordingly, not be entitled to tax the non-resident on any capital gains made from the sale of Australian shares.
[176] Krever & Sadiq 'Non-Residents and Capital Gains Tax in Australia' (2019) Canadian Tax Journal 67 at 13.
[177] Tax Laws Amendment (2006 Measures No. 4) Act 2006.
[178] The Parliament of the Commonwealth of Australia 'Explanatory Memorandum on the Tax Laws Amendment Act (2006 Measures No. 4) Bill 2006' (2006).

addition, the aim of these amendments was to align Australia's domestic law with the approach adopted in Australia's tax treaties.

However, other measures were subsequently introduced which had the opposite effect and can be said to possibly discourage foreign investment in fixed property in Australia and increase enforcement mechanisms.[179] In 2013 the Australian government introduced a withholding tax on capital gains made by non-residents on the sale of Australian fixed property.[180] In addition, and more importantly for the purposes of this thesis, the removal of the 50 per cent discount on capital gains for assets held for more than a year was implemented for non-residents in 2012.[181]

The reason given by the Australian Treasury for the removal of the 50 per cent discount was that the discount on capital gains was afforded to both residents and non-residents but was not necessary to attract investment from immobile assets; also that additional tax from the implementation of this change will result in substantial increased tax revenues for the Australian government.[182] In addition, the Australian Treasury states that the assets are immobile and produce location specific returns and that removing the capital gains tax discount for non-residents increases the return to Australia from gains made through foreign investment in Australian land.[183]

Another reason provided for the change in tactic by the Australian government with regard to the reduction in tax incentives for non-residents to invest in immovable property is that there is a link between the escalating housing prices in Australia and foreign buyers of Australian property.[184] In other words, Australians do not want foreign investors to have any capital gains tax incentive in purchasing property in Australia as this drives up property prices and makes it unaffordable for local buyers.

This reasoning behind the reduction in capital gains tax discounts provided by the Australian government is important in understanding why Australia taxes residents and non-residents at different tax rates to residents. They have essentially given three reasons for this reduction: that

[179] Krever & Sadiq 'Non-Residents and Capital Gains Tax in Australia' (2019) Canadian Tax Journal 67 at 18.
[180] Krever & Sadiq 'Non-Residents and Capital Gains Tax in Australia' (2019) Canadian Tax Journal 67 at 15.
[181] Australian Treasury '2012-2013 budget builds on growing record of tax reform' (2012) available at https://bit.ly/2NadXdZ, accessed 8 January 2020.
[182] Australian Treasury '2012-2013 budget builds on growing record of tax reform' (2012) available at https://bit.ly/2NadXdZ, accessed 8 January 2020.
[183] The Parliament of the Commonwealth of Australia 'Explanatory Memorandum on the Tax Laws Amendment Act (2013 Measures No. 2) Bill 2013' (2013).
[184] Krever & Sadiq 'Non-Residents and Capital Gains Tax in Australia' (2019) Canadian Tax Journal 67 at 22.

these discounts do not encourage foreign investment, it will increase tax revenues for the Australian government and specifically that it will increase the returns for gains made on Australian land.

I am of the view that this last factor is extremely important in determining the capital gains tax rate that a country implements on taxpayers. When a fixed property increases in value it is largely to do with the market conditions and conditions of that area where the property is located. In other words, it is local factors of the place where the property is situated that will determine whether a property increases in value or not. The country where that property is located should, therefore, be entitled to gain a benefit from the increased value received by the taxpayer on their property.

Chapter 3 establishes that non-residents pay a higher rate of capital gains tax than residents in Australia. It has been established that this is allowable in terms of the non-discrimination article in the double taxation agreement between South Africa and Australia and there is, therefore, no reason why Australia cannot tax non-residents at higher rates than residents. A major reason for non-residents paying more capital gains tax is the removal of the 50 per cent discount that was previously afforded to non-residents which was intentionally removed by the Australian government for the reasons stated above.

Therefore, I posit that the South African government should keep in mind the types of changes to our tax system that could be made based on the tax systems in other countries. As illustrated in Chapter 3 below, a non-resident will pay less than half of the capital gains tax than is paid by a resident on the same gain made, whereas in Australia a non-resident will pay more tax on a capital gain than a resident. As discussed in Chapter 4 below, a tax benefit is unlikely to induce foreign investment in the country; this view was also held by the Australian government. The South African government should consider increasing the tax rates for non-residents, possibly in a similar manner as done by Australia in order to increase the amount of tax that the South African government receives from gains made from the sale of South African land. The gains are made as a result of conditions in South Africa and the South African government must, therefore, receive a fair benefit from the gains made.

In addition to the reduction in tax liability for Australian residents on capital gains tax, Australia also made adjustments to the manner in which non-residents are taxed on income received.

In 1982, the Australian government removed the tax-free threshold for non-residents.[185] It is unclear why this was done,[186] but presumably to increase the amount of tax receivable by the Australian government.

A more recent development in Australia relating to the taxation of non-residents is the working holiday maker tax. Previously, working holiday makers[187] may have been able, depending on their specific circumstances, to become tax resident in Australia and have access to the tax-free threshold that is only available to resident taxpayers.[188] The Australian government states that the reason for implementing a special tax table for working holiday makers, which did not include a tax-free threshold, was to ensure greater compliance with Australian tax laws and align working holiday makers with other individuals treated as non-residents. In addition, it was predicted that this change would raise $540 million in tax revenue in the coming years.[189]

While this type of tax is different to the type of tax that is being considered in this thesis, as it relates to employment income and not income from a fixed property, it is interesting to note that Australia has purposefully increased the tax burdens[190] for people who may otherwise have been considered a tax resident and, therefore, had reduced tax rates.[191] While Australia has different circumstances to South Africa, South Africa would not be alone if they were to consider increasing tax rates for non-residents so as to increase the tax revenues that the government receives.

[185] The Parliament of the Commonwealth of Australia 'Explanatory Memorandum on the Income Tax Rates Amendment Act (Working Holiday Maker Reform) Bill 2016' (2016).
[186] The explanatory memorandum does not explain why the tax-free threshold was removed for non-residents but merely that it is to be removed. The Parliament of the Commonwealth of Australia 'Explanatory Memorandum on the Income Tax (Rates) Bill 1982' (1982).
[187] The working holiday maker program allows young people (18 to 30 years) from certain countries to apply for a temporary working visa that will allow them to work in certain occupations in Australia. These visas are generally valid for 12 months. Parliament of the Commonwealth of Australia 'Bills Digest No. 30, 2016-2017' (2016) at 6-8.
[188] Parliament of Australia 'Working Holiday Maker Reform' (2016) at 10. If the working holiday maker did not satisfy the test of being an Australian tax resident they would have paid tax like any other non-resident.
[189] Parliament of Australia 'Working Holiday Maker Reform' (2016) at 43.
[190] For example, if someone could have qualified as an Australian tax resident and, therefore, had access to the reduced tax rates, if they qualify as a working holiday maker they will not have access to the tax-free threshold. It has therefore artificially deemed some people to pay tax when they would not have had to otherwise, as the working holiday maker tax table does not have a tax-free threshold.
[191] It is worth noting that there has been a recent Federal Court of Australia judgment, *Addy v Commissioner of Taxation* (2019) FCA 1768, which has declared that the working holiday maker tax rates are unlawful as they discriminate against people based on their nationality and are, consequently, contrary to the provisions of the non-discrimination clause, Article 25, as contained in the double taxation agreement between Australia and the United Kingdom (where the taxpayer was from). An Australian undertaking the same work as the applicant in this case would have done so but had the benefit of having the tax-free threshold which the applicant did not. The applicant as a UK national was therefore subject to an increased tax rate due to her nationality even though she was actually an Australian tax resident at that time. For the circumstances of this case, the applicant should not have been assessed on her income according to the working holiday maker tax rates but rather at the tax rates of a resident.

It was established that the Income Tax Act of 1973 was the first tax legislation introduced into Botswana.[192] It was in the Tenth Schedule of this act that separate schedules for resident and non-residents were introduced in Botswana, however there is no explanation as to why it was done in this manner. It is presumed that this was done to increase the amount of tax collectable for the Botswana government.

What is evident from this chapter is that both the United Kingdom and Australia have taken measures to increase its tax revenues by taxing non-residents at higher rates than residents and that they are both of the view that people earning income in their countries should be paying their fair share of tax in their country. This is particularly relevant in relation to fixed property as Australia is of the view that they are entitled to benefit from gains made by a taxpayer as a result of income received from Australian land.

These economic justifications for increasing tax revenue by the United Kingdom and Australia for non-residents are applicable to South Africa. The South African government should consider the reasons why Australia and the United Kingdom have different tax rates for residents and non-residents as a factor in determining whether South African law should change so as to increase tax payable by non-residents on income received from either letting fixed property or the capital gain received upon the sale of fixed property. While amendments to South African law cannot be made because other countries have differing laws, the economic justifications for the tax laws in these other countries are applicable to South Africa. The South African government must seriously consider whether they should implement policies which are similar to those implemented in other countries who use different tax rates to South Africa. This would assist the South African government in increasing tax revenues to assist with the current dire state of finances that the government finds itself in.

2.8 *Conclusion*

The purpose of this chapter was to determine which types of income a non-resident is taxable on in South Africa in order to conduct the constitutional analysis contained in Chapters 4 and 5 on a relevant basis. The additional purpose was to establish the possible economic justifications for differentiated tax regimes for residents and non-residents in respect of income derived from immovable property.

[192] Botlhale 'Improving Tax Administration in Botswana' (2016) Public Affairs Research Institute conference paper.

It was established that South African domestic law and the double taxation agreements that South Africa has entered into with the countries of comparison gives South Africa taxing rights to income earned by non-residents from rental of immovable property situated in South Africa as well as proceeds from the disposal of immovable property held as a capital asset. These two types of income are, therefore, worthy of consideration as they assist in determining the purpose of this thesis – whether it is constitutionally allowable to tax residents at different tax rates to non-residents. If non-residents are not taxable on a certain type of income in South Africa there is no use in considering this type of income as it will not add to the thesis.

South Africa has very limited taxing rights to capital gains from the disposal of shares and interest income that is earned by a non-resident both in terms of South African domestic legislation (the more important limitation) and certain double taxation agreements. As has already been established, there is, accordingly, little use in considering interest income or capital gains from the disposal of shares in this thesis as non-residents may not be subject to taxation on interest earned in South Africa.

It was established that the OECD Model Tax Convention forms the basis for South African double taxation agreements and the OECD Commentary is followed in South African law and may be used as an interpretation tool in determining the meaning of the provisions of a double taxation agreement that South Africa has entered into. It was further established that a double taxation agreement becomes part of South African law once it has been promulgated.

This is important as it was concluded that the provisions of a double taxation override domestic legislation in the case of a conflict. Were double taxation agreements not to override domestic legislation, there would be no way of determining which country had taxing rights in the case where the domestic legislation of a country gives taxing rights to Country A, but the double taxation agreement gives taxing rights to Country B.

It is, therefore, prudent to consider rental income and proceeds from the disposal of fixed property in the determination of whether it is constitutionally justifiable to tax residents and non-residents at different effective tax rates. Considering other types of income, such as interest, would not take this enquiry any further.

Possible economic justifications for taxing residents and non-residents at different rates were discussed. The strongest argument for taxing non-residents at higher rates than residents would be in a case where a non-resident receives tax benefits in South Africa, such as the same rebates as residents, but they live in a country which uses the source-based method of taxation. These

taxable persons/entities would have a reduced amount of tax that they would pay in comparison to residents of South Africa. These people would have access to double tax benefits; they would receive tax benefits both from their home country and from the country of the source of income. South Africa would have economic justifications for increasing the current tax rates for non-residents. It is also important that the South African government finds alternative sources of taxation rather than merely increasing tax rates for resident individuals.

This chapter illustrated the reasons why the United Kingdom restricts the personal allowance for non-residents and why Australia has an increased rate of taxation for capital gains tax for non-residents. It also considered the working holiday tax rates in Australia. In particular it was illustrated that South Africa should have greater taxing rights to income earned from immovable property in South Africa, such as the case in Australia. The capital gain is made as a result of conditions in the source country and that country should have taxing rights to that capital gain. It is my view that the principles applied by the government of the United Kingdom with regard to the taxation of non-residents are sound and that non-residents should pay a fair amount of tax in the country from which they are receiving income and that if non-residents are given the same tax benefits as residents that they may receive an unfair advantage. It is my view that non-residents are not paying a fair amount of tax in South Africa on South African sourced income. This will be illustrated in Chapter 3 where it is shown how non-residents can pay as little as eight per cent of the amount of tax that is paid by a resident on the same amount of taxable rental income.

Chapter 3 –

The practical effect of taxing residents and non-residents at the same statutory rate

3. 1 Introduction

South African residents are taxed at different effective tax rates than non-residents on income from fixed property situated in South Africa. Thus, a South African who owns and lets immovable property in South Africa will pay a different amount of tax on the rental income as well as on the capital gains upon the disposal of the property than a non-resident would on that same property. This is so because a resident will add the taxable income from either the rental property or the capital gain from the disposal of fixed property to their South African income and will be taxed according to their marginal rate of taxation. In contrast, a non-resident who lives elsewhere and only has a rental property in South Africa and no other South African income would pay much less tax than the resident on the same amount of taxable income in South Africa.

The purpose of this chapter is to illustrate the practical effects of taxing residents and non-residents in South Africa at the same statutory rates in comparison to the different rates of taxation in Botswana, the United Kingdom and Australia. Each of the countries tax residents and non-residents in a different manner. South Africa has the same tax rates for residents and non-residents, Botswana has separate tax tables for income tax but the same table for capital gains tax, Australia has different income tax tables and treats capital gains differently and the United Kingdom does not extend the personal allowance to non-residents. This is summarised in the table below.[193]

[193] The reasons for the countries of comparison chosen have been discussed above. While all these countries have a double taxation agreement with South Africa, a comparison of tax rates with a country which South Africa does not have a double taxation agreement with would be equally applicable; this was explained above.

How residents are taxed in comparison with non-residents				
	South Africa	*Botswana*	*Australia*	*United Kingdom*
Rental income	Same tax rates	Different tax tables	Different tax tables	No personal allowance for non-resident
Capital Gains Tax	Same tax rates	Same capital gains rates	Residents entitled to 50% reduction in capital gain	No personal allowance for non-resident

This chapter will thus illustrate the discrepancies that exist in effective tax rates between the taxation of residents and non-residents on the same amount of taxable income. This will add to the purpose of this thesis which is to determine whether residents and non-residents should be taxed at different effective tax rates in South Africa.

The calculations illustrating the discrepancies will be done for both rental income and capital gains from the sale of immovable property for each country;[194] a comparison will then be made of the effective tax rates (in the form of a percentage) across all four countries for both rental income and capital gains tax. It is prudent to give examples for varying amounts of income as the effect differs according to the income of a person.[195]

[194] It was illustrated in Chapter 2 why these two types of income will be considered.
[195] For the purposes of this thesis it is assumed that the taxpayer is either a resident or a non-resident of a country. The purpose of this thesis is not to delve into whether someone qualifies as a resident or not; this is a separate discussion that does not fit within the scope of this work.

3.2 A Comparison of the taxation of residents and non-residents – Rental Income from fixed property

South Africa taxes residents and non-residents are taxed per the same individual tax table:[196]

Taxable income (R)	Rates of tax (R)
0 – 205 900	18% of taxable income
205 901 – 321 600	37 062 + 26% of taxable income above 205 900
321 601 – 445 100	67 144 + 31% of taxable income above 321 600
445 101 – 584 200	105 429 + 36% of taxable income above 423 300
584 201 – 744 800	155 505 + 39% of taxable income above 584 200
744 801 – 1 577 300	218 139 + 41% of taxable income above 744 800
1 577 301 and above	559 464 + 45% of taxable income above 1 577 300

Rental income Example 1 - South Africa[197]

Resident taxpayer

Salary income	R 600,000.00
Tax on salary[198]	R 146,709.00
Taxable rental income from letting property	R 100,000.00
Tax on rental income[199]	R 39,000.00

Non-resident taxpayer

Taxable rental income from letting property	R 100,000.00
Tax on rental income[200]	R 3,042.00
Additional tax paid by resident	***R35,958***

[196] Section 5(1) of the Income Tax Act states that normal tax shall be paid in respect of the taxable income received by or accrued to in favour of any person during the year of assessment. The Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2020 at section 2(1) of Schedule I states the rates of taxation to be levied on any natural person. This shows that there is no different tax table for residents and non-residents; all natural persons are taxed according to the same tax table. These tax rates can also be found on the SARS website - South African Revenue Service 'Rates of Tax for Individuals' available at https://bit.ly/1QLWGFF, accessed 15 July 2020.

[197] The examples provided are for a resident taxpayer with a salary of either R600,000 or R1,000,000. The reasons for these figures are that a salary of R600,000 and above falls into the group of higher income earners in South Africa. The average South African worker in the formal sector receives R257,460 per year (see Business Live 'This is the average salary in South Africa right now' available at https://bit.ly/2M7QnBl, accessed 26 January 2021). A salary of R600,000 and above is realistic for someone to own an investment property.

[198] As per the 2021 tax tables and including the primary rebate.

[199] Taxed at the marginal rate of 39 per cent that the taxpayer is on due to his or her salary income.

[200] Including primary rebate.

This example illustrates that a South African resident individual who has a taxable income[201] of R100,000 from the letting of immovable property will pay tax on that R100,000 at the rate of 39 per cent resulting in tax payable of R39,000. This is as a result of the taxpayer having a salary that puts him or her into the 39 per cent tax bracket; in other words, the additional rental income will be taxed at the marginal rate[202] of 39 per cent as the primary rebate[203] would have been taken into account with the taxpayer's salary.

In contrast, the non-resident taxpayer who also has a taxable income of R100,000 from the rental property only pays tax on the rental income in the amount of R3,042.[204] The non-resident pays eight per cent of the amount of tax that the resident pays; the non-resident utilises the primary rebate to reduce tax payable on rental income and is taxed at a lower rate of taxation on the rental income as they have no other income in South Africa. This illustrates the practical effect of taxing residents and non-residents at the same statutory rates for rental income.

Rental income Example 2 - South Africa

Resident taxpayer

Salary income	R 1,000,000.00
Tax on salary[205]	R 307,813.00
Taxable rental income from letting property	R 100,000.00
Tax on rental income[206]	R 41,000.00

Non-resident taxpayer

Taxable rental income from letting property	R 100,000.00
Tax on rental income[207]	R 3,042.00
Additional tax paid by resident	***R37,958***

[201] In terms of section 1 read with section 5 of the Income Tax Act, taxable income is the amount of income that a taxpayer has received or accrued that is subject to taxation. A taxpayer's taxable income is determined by establishing the gross income, minus exempt income and then deducting expenses that are allowable as a deduction. The tax rates as per the individual tax table are then applied to this taxable income.
[202] This is in terms of the individual tax table as detailed above. The taxpayer would fall within the fifth band of the individual tax table and the taxable income would be taxed at 39 per cent.
[203] As per section 6 of the Income Tax Act, every individual taxpayer in South Africa is entitled to a yearly primary rebate which reduces the amount of tax payable by that person. The primary rebate, for persons under 65 years of age, for the 2021 tax year is R14 958 as per the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2020. Additional rebates are provided to persons over 65 years and 75 years.
[204] For the purposes of this chapter, all non-residents are presumed to only be investing in South Africa and not to be earning any other income in South Africa, including a salary.
[205] As per the 2021 tax tables and including the primary rebate.
[206] Taxed at the marginal rate of 41 per cent that the taxpayer is on due to his salary income.
[207] Including primary rebate.

The second example illustrates a South African resident with a salary of R1,000,000 and R100,000 taxable rental income. The difference in tax paid by the resident and non-resident in this example is R37,958; the difference in example 1 was R35,958. The non-resident pays seven per cent of the tax that the resident pays. There is not a big difference in the effective tax rates when comparing a resident with a salary income of R600,000 as opposed to R1,000,000.

This example further illustrates the discrepancy in the amount of tax paid by residents and non-residents on rental income when the residents fall within different bands on the South African tax tables. The discrepancy is apparent across tax bands.

In Australia, non-resident taxpayers are taxed according to a different tax table than residents. The Australian tax table for residents provides that:[208]

Residents	
Taxable Income	*Tax on this income*
0 -$18,200	$0
$18,201 - $37,000	19c for each $1 over $18,200
$37,001 - $90,000	$3,572 plus 32.5c for each $1 over $37,000
$90,001 - $180,000	$20,797 plus 37c for each $1 over $90,000
$180,001 and above	$54,097 plus 45c for each $1 above $180,000

On the other hand, the tax table for non-residents is as follows:

Non-residents	
Taxable Income	*Tax on this income*
0 -$90,000	32.5c for each $1
$90,001 - $180,000	$29,250 plus 37c for each $1 over $90,000
$180,001 and above	$62,550 plus 45c for each $1 above $180,000

The examples below both use a taxable income equivalent to R100,000 (converted into Australian dollars) for rental income.

[208] Australian Taxation Office 'Individual Income Tax Rates' available at *https://bit.ly/2Q9PDIR*, accessed 15 July 2020.

Rental income Example 1 - Australia[209]

Resident taxpayer

Salary income	$51,721
Tax on salary	$8,356
Taxable rental income from letting property	$8,614
Tax on rental income	$2,799

Non-resident taxpayer

Taxable rental income from letting property	$8,614
Tax on rental income	$2,799
Additional tax paid by resident	***$0***

- Based on the same R600,000 salary as per Rental Example 1 - South Africa
- $1AUD equals R11.6 as on 15 July 2020 as per XE.com

This example shows that a non-resident Australian taxpayer with a taxable income of R100 000 ($9 641) from a rental property will pay the same amount of tax as a resident taxpayer with the same taxable rental income. They both pay tax at the rate of 32.5 per cent on the rental income. This differs significantly from South Africa where a resident pays eight per cent of the tax paid by a non-resident.

Rental income Example 2 - Australia

Resident taxpayer

Salary income	$86,164
Tax on salary	$19,550
Taxable rental income from letting property	$8,614
Tax on rental income	$3,014

Non-resident taxpayer

Taxable rental income from letting property	$8,614

[209] Australian Taxation Office 'Simple Tax Calculator' available at https://bit.ly/245MDMR, accessed 15 July 2020

Tax on rental income	$2,799
Additional tax paid by resident	***$215***

- Based on the same R1,000,000 salary as per Rental Example 2 - South Africa
- $1AUD equals R11.6 as on 15 July 2020 as per XE.com

In Example 2 the resident has paid additional tax of $215 in comparison to the non-resident; the non-resident has paid 93 per cent of the tax paid that was paid by the resident. This is in contrast with Example 1 of South Africa where the non-resident paid eight per cent of the amount of tax paid by the resident and Example 2 of South Africa where the non-resident paid seven per cent of the amount of tax paid by the resident.

As a result of the different tax tables for residents and non-residents, a resident of Australia will either pay the same amount of tax (as per Example 1) or slightly more tax than the non-resident from the letting of property within Australia (Example 2).

In comparison, in South Africa because of it having the same tax tables for residents and non-residents, there is a large discrepancy in the amount of tax paid by a resident as opposed to a non-resident on the same amount of taxable rental income.

Botswana, like Australia, also has a different tax table for residents and non-residents.[210]

Residents	
Taxable Income	*Tax on this income (P)*
0 -36 000	Nil
36 001 - 72 000	0 + 5% of the excess over P36 000
72 001 - 108 000	1 800 + 12.5% of excess over P72 000
108 001 - 144 000	6 300 + 18.7% of excess over P108 000
144 000 and above	13 050 + 25% of excess over P144 000

[210] Botswana Unified Revenue Service http://www.burs.org.bw/index.php/tax/income-tax/individuals, accessed 15 July 2020.

Non - Residents	
Taxable Income	*Tax on this income (P)*
0 -72 000	5% of every Pula
72 001 - 108 000	3 600 +12.5% of excess over P72 000
108 001 - 144 000	8 100 + 18.75% of excess over P108 000
144 000 and above	14 850 + 25% of excess over P144 000

The examples below both use a taxable income equivalent to R100,000 (converted into Pula) for rental income.

Rental income Example 1 - Botswana

Resident taxpayer

Salary income	P420,686
Tax on salary	P82,221
Taxable rental income from letting property	P70,096
Tax on rental income	P17,524

Non-resident taxpayer

Taxable rental income from letting property	P70,096
Tax on rental income	P3,504
Additional tax paid by resident	***P14,020***

- Based on the same R600,000 salary as per Rental Example 1 – South Africa
- P1 equals R1.43 as on 15 July 2020 as per XE.com

It is noted that a resident pays more tax than the non-resident. The resident pays tax on the rental income at the rate of 25 per cent, as he or she is in the 25 per cent marginal tax rate due to salary income. The non-resident pays tax at the rate of five per cent as the non-resident does not have a salary or other taxable income in Botswana. In this example the non-resident pays twenty per cent of the tax that is paid by the resident.

Rental income Example 2 - Botswana

Resident taxpayer

Salary income	P756,720
Tax on salary	P152,418
Taxable rental income from letting property	P70,096
Tax on rental income	P17,524

Non-resident taxpayer

Taxable rental income from letting property	P70,096
Tax on rental income	P3,504
Additional tax paid by resident	***P14,020***

- Based on the same R1,000,000 salary as per Rental Example 2 – South Africa
- P1 equals R1.43 as on 15 July 2020 as per XE.com

As can be seen, in both Example 1 and Example 2, the additional tax paid by the resident is P14,020. The non-resident pays twenty per cent of the tax that the resident pays; in comparison with South Africa Rental Example 1 where the non-resident pays eight per cent of the tax that a resident pays.

This rate of taxation for non-residents, which is higher than in South Africa, is due to the relatively small difference between the resident and non-resident tax tables of Botswana. This is in comparison to Australia where, as per the examples, the non-resident either pays the same amount of tax as the resident or close to 90 per cent of what the resident pays.

The United Kingdom taxes residents and non-residents in terms of the same tax table. This looks as follows:[211]

Band	**Taxable income**	**Tax Rate**
Personal allowance	Up to £12,500	0%
Basic rate	£12,501 to £50,000	20%
Higher rate	£50,000 to £150,000	40%
Additional rate	over £150,000	45%

[211] HM Revenue and Customs 'Income Tax Rates and Personal Allowances' available at https://bit.ly/12zmnRL, accessed 15 July 2020.

Rental income Example 1 – United Kingdom[212]

Resident taxpayer

Salary income	£28,695
Tax on salary	£3,239
Taxable rental income from letting property	£4,783
Tax on rental income	£956

Non-resident taxpayer

Taxable rental income from letting property	£4,783
Tax on rental income	£956
Additional tax paid by resident	***£0***

- Based on the same R600,000 salary as per Rental Example 1 – South Africa
- £1 equals R20.9 on 15 July 2020 as per XE.com

In this example the non-resident pays the same amount of tax as the resident.

Rental income Example 2 – United Kingdom

Resident taxpayer

Salary income	£47,833
Tax on salary	£7,066
Taxable rental income from letting property	£4,783
Tax on rental income	£1,479

Non-resident taxpayer

Taxable rental income from letting property	£4,783
Tax on rental income	£956
Additional tax paid by resident	***£523***

- Based on the same R1,000,000 salary as per Rental Example 2 – South Africa
- £1 equals R20.9 as on 15 July 2020 as per XE.com

[212] HM Revenue and Customs 'Estimate your take-home pay' available at https://bit.ly/2DXPGEe, accessed 15 July 2020.

In this example the resident has paid £523 more tax than the non-resident. In other words, the non-resident has paid 65 per cent of the amount paid by the resident on the same taxable income.

A UK resident is entitled to a personal allowance of £12,500 which reduces a taxpayer's taxable income so that less tax is paid.[213] The personal allowance is not available to non-resident taxpayers unless the individual is a resident of the European Economic Area or the taxpayer worked for the UK government.[214]

While the personal allowance is taken into account for the UK resident, it is exhausted by the taxpayer's salary so it does not have an effect on the tax paid by the resident. This is in the same manner that the primary rebate is taken into account in determining an individual's tax on salary in South Africa.[215]

The UK calculations do not take into account the National Insurance that is payable by most UK residents. The National Insurance relates to a portion of a person's income contributing to a pension, job seeker's allowance and other similar funds.[216] While this may be compulsory, the calculations for the other countries do not take into account similar insurances; it will thus not be discussed any further.

As set out above, the percentage of tax paid by residents in comparison to non-residents per country on a taxable rental income (converted into the currency applicable to the country of comparison) is as follows:

Percentage tax paid by non-resident in comparison to resident (not tax rate but comparison percentage) - Rental Income

	Example 1	*Example 2*
South Africa	8%	7%
Australia	100%	93%
Botswana	20%	20%
United Kingdom	100%	65%

[213] HM Revenue and Customs 'Income Tax Rates and Personal Allowances' available at https://bit.ly/12zmnRL, accessed 15 July 2020.
[214] HM Revenue and Customs 'Tax on your UK income if you live abroad' available at https://bit.ly/2JoehCa, accessed 22 June 2020.
[215] The difference is that both residents and non-residents are entitled to the primary rebate in South Africa. The effect of the primary rebate is illustrated in rental example 1 and 2 South Africa above.
[216] HM Revenue and Customs 'National Insurance' available at https://bit.ly/2qYs9eP, accessed 15 July 2020.

As can be seen by this table, South Africa taxes its non-residents at the lowest rates of all four countries. It taxes its non-residents at a percentage that is half that of Botswana and far less than half of that of the United Kingdom and Australia. In the United Kingdom and Australia, a non-resident will in some circumstances pay the same amount of tax on rental income from a property as a resident. This conclusion is subject to the proviso that the amount of tax payable will always vary depending on the other income that the taxpayer has; however, the examples illustrate that resident taxpayers with a large difference in salaries will still be taxed at much higher rates of taxation in South Africa compared to non-residents.

These examples illustrate the need to determine whether South African residents and non-residents should be taxed at differing rates for rental income from property located in South Africa to ensure that there is more equity in effective tax rates. Other countries ensure that there is not such a large discrepancy between residents and non-residents by using different tax tables or not allowing non-residents use of a personal allowance to reduce tax payable.

3.3 A Comparison of the taxation of residents and non-residents – Capital Gains Tax

Capital Gains Tax Example 1 – South Africa

Resident taxpayer	
Salary income	R 600,000
Tax on salary	R 146,709
Capital gain from sale of immovable property	R 1,000,000
Less annual exclusion[217]	R 40,000
Capital gain from sale of immovable property	R 960,000
Included in taxable income[218]	R 384,000
Tax on capital gain	R 154,544
Non-resident taxpayer	
Capital gain from sale of immovable property	R 1,000,000
Less annual exclusion	R 40,000
Capital gain from sale of immovable property	R 960,000
Included in taxable income	R 384,000
Tax payable	R 71,530

[217] As per paragraph 5 and 6 of the Eighth Schedule to the Income Tax Act, every individual taxpayer has an annual exclusion which reduces their taxable capital gain by R40 000.
[218] As per paragraph 10 of the Eighth Schedule to the Income Tax Act, a person's taxable capital gain is 40 per cent of that person's net capital gain.

Additional tax paid by resident	***R 83,014***

In this example,[219] the resident taxpayer has paid R83,014 more tax than the non-resident. In other words, the non-resident has paid 46 per cent of the amount of tax paid by the resident.[220]

Capital Gains Tax Example 2 – South Africa

Resident taxpayer	
Salary income	R 1,000,000
Tax on salary	R307,813
Capital gain from sale of immovable property	R 1,000,000
Less annual exclusion	R 40,000
Capital gain from sale of immovable property	R 960,000
Included in taxable income	R 384,000
Tax on capital gain	R 157,440
Non-resident taxpayer	
Capital gain from sale of immovable property	R 1,000,000
Less annual exclusion	R 40,000
Capital gain from sale of immovable property	R 960,000
Included in taxable income	R 384,000
Tax payable	R 71,530
Additional tax paid by resident	***R 85,910***

In this example, the resident taxpayer has paid R85,910 more tax than the non-resident; the non-resident has paid 45 per cent of the amount of tax paid by the resident.

In Australia, non-residents are not entitled to the 50 per cent capital gain discount that residents are entitled to.[221]

[219] For the purposes of simplicity, it is presumed that the taxpayer for all of the examples relating to capital gains tax do not have taxable income in relation to the rental of the fixed property.
[220] The Eighth Schedule to the Income Tax Act does not differentiate between residents and non-residents. The Schedule deals with a gain made by a 'person' and in certain paragraphs will differentiate between a natural person and companies. There is no such differentiation between residents and non-residents.
[221] Australian Taxation Office 'Working out your capital gain or loss' available at https://bit.ly/2QKppAc, accessed 15 July 2020. Residents are entitled to this discount if they acquired the asset at least 12 months before the capital gains event.

A capital gain calculation in Australia will, therefore, look as follows:

Capital gains tax example 1 - Australia

Resident taxpayer	
Salary income	$51,868
Tax on salary	$8,344
Capital gain from sale of immovable property	$86,164
50% discount	$43,025
Tax on capital gain	$14,195
Non-resident taxpayer	
Capital gain from sale of immovable property	$96,525
Tax on capital gain	$27,966
Additional tax paid by non- resident	***$13,771***

In this example the non-resident has paid more capital gains tax than the resident. The resident has paid 51 per cent of the amount of tax paid by the non-resident.

Capital gains tax example 2 - Australia

Resident taxpayer	
Salary income	$86,164
Tax on salary	$19,550
Capital gain from sale of immovable property	$86,164
50% discount	$44,082
Tax on capital gain	$15,766
Non-resident taxpayer	
Capital gain from sale of immovable property	$86,164
Tax on capital gain	$28,003
Additional tax paid by non-resident	***$12,237***

In this example the resident taxpayer has paid less tax than the non-resident; the resident has paid 56 per cent of the amount of tax that the non-resident has paid. The above two examples illustrate that a non-resident has actually paid more tax than a resident. This is the first time this is evident in this chapter.

Capital gains tax Example 1 - Botswana[222]

Resident taxpayer

Salary income	P420,686
Tax on salary	P82,221
Capital gain from sale of immovable property	P701,473
Tax on capital gain	P153,318

Non-resident taxpayer

Capital gain from sale of immovable property	P701,473
Tax on capital gain	P153,318
Additional tax paid by resident	***P0***

The capital gains tax table is the same for residents and non-residents in Botswana. The other income of a taxpayer does not affect the amount of capital gains tax payable in Botswana[223] unlike for South Africa, Australia and the United Kingdom. There is, therefore, no point in providing a second example. The non-resident pays the same amount of capital gains tax as the resident no matter the capital gain and/or salary income.

[222] Botswana Unified Revenue Service 'Rates of tax for individuals for 2011\2012 and subsequent years' available at https://bit.ly/2sMZ4DE, accessed 15 July 2020.
[223] This is because Botswana has a separate tax table for capital gains tax unlike the other countries of comparison where the capital gains tax is integrated into the normal income tax tables. Botswana Unified Revenue Service 'Rates of tax for individuals for 2011\2012 and subsequent years' available at https://bit.ly/2sMZ4DE, accessed 15 July 2020.

Capital gains tax Example 1 – The United Kingdom[224]

Resident taxpayer

Salary income	£28,695
Tax on salary	£3,239
Capital gain from sale of immovable property	£47,833
Less annual exclusion	£12,300
Capital gain from sale of immovable property	£35,533
Taxed at 18%	£33,805
Tax	£6,084
Taxed at 28%	£1,728
Tax	£483
Tax on capital gain	*£6,567*

Non-resident taxpayer

Capital gain from sale of immovable property	£47,833
Less annual exclusion	£12,300
Capital gain from sale of immovable property	£35,533
Taxed at 18%	£35,533
Tax	£6,395
Tax on capital gain	*£6,395*
Additional tax paid by resident	***£172***

As can be seen, the resident has paid more capital gains tax than the non-resident. While the non-resident is not entitled to the personal allowance,[225] the resident has already utilised his or her personal allowance in reducing tax paid on salary income. The non-resident has paid 97 per cent of the capital gains tax paid by the resident.

[224] HM Revenue and Customs 'Capital Gains Tax' available at https://bit.ly/2EclpTd, accessed 15 July 2020 & HM Revenue and Customs 'Calculate your non-resident capital gains tax' available at https://bit.ly/2EbqBXA, accessed 16 July 2020.
[225] HM Revenue and Customs 'Calculate your non-resident capital gains tax' available at https://bit.ly/2EbqBXA, accessed 16 July 2020.

Capital gains tax Example 2 – the United Kingdom

Resident taxpayer

Salary income	£47,833
Tax on salary	£7,066
Capital gain from sale of immovable property	£47,833
Less annual exclusion	£12,300
Capital gain from sale of immovable property	£35,533
Taxed at 18%	£14,667
Tax	£2,640
Taxed at 28%	£20,866
Tax	£5,842
Tax on capital gain	*£8,482*

Non-resident taxpayer

Capital gain from sale of immovable property	£47,833
Less annual exclusion	£12,300
Capital gain from sale of immovable property	£35,533
Taxed at 18%	£34,500
Tax	£6,395
Tax on capital gain	*£6,395*
Additional tax paid by resident	**£2,087**

As in Example 1, the resident has paid more capital gains tax than the non-resident. Specifically, the non-resident has paid 75 per cent of the tax paid by the resident.

As set out above, the percentage of tax paid by non-residents in comparison to non-residents per country on a taxable capital gains (converted into Rands) is as follows:

Percentage tax paid by non-resident in comparison to resident (not tax rate but comparison percentage) - Capital gains tax

	Example 1	*Example 2*
South Africa	46%	45%
Australia	51% (more)	56% (more)
Botswana	100%	100%
United Kingdom	97%	75%

3.4 Conclusion

There are notable differences between the capital gains tax comparison table as set out in 3.5 and the rental income table as contained in 3.3. I have set out a combined graph to better illustrate this:

Percentage tax paid by non-resident in comparison to resident (not tax rate but comparison percentage) – rental income and capital gains tax

	Rental Income		**Capital Gains Tax**	
	Example 1	*Example 2*	*Example 1*	*Example 2*
South Africa	8%	7%	46%	45%
Australia	100%	93%	51% (more)	56% (more)
Botswana	20%	20%	100%	100%
United Kingdom	100%	65%	97%	75%

This table does not illustrate the tax rate paid by an individual, but rather a comparison of how much percentage tax a non-resident pay in comparison with a resident.

Large discrepancies are apparent in this table: firstly, South Africa has a noticeable difference between the tax rates for rental income as opposed to capital gains tax. A non-resident is paying a higher percentage of capital gains tax in contrast to rental income when compared to what residents are paying. The taxation of capital gains in South Africa of residents in comparison to non-residents is more equal than the taxation of rental income although the difference is still far greater than the other countries of comparison. This may suggest, which is discussed in later chapters, the need to tax residents and non-residents on different scales for rental income as well as on capital gains tax.

The other major difference in this table is Botswana; the amount of capital gains tax paid by a non-resident as opposed to a resident is much higher than the same comparison for rental income.

This chapter illustrates the differences in taxes that are paid by residents in comparison to non-residents between South Africa, Australia, Botswana and the United Kingdom for both rental income and capital gains tax. What is apparent is that for both rental income and capital gains tax non-residents of South Africa pay far less tax than residents do in comparison to all three other countries for both rental income and capital gains tax. In Australia (unlike any of the

other countries of comparison), the non-resident has actually paid significantly more capital gains tax than the resident. This is due to the non-resident not being entitled to the 50 per cent discount on capital gains tax that residents are entitled to.

This is significant as it illustrates that South Africa is not in line with these other jurisdictions when it comes to taxing residents and non-residents. It could certainly be argued that South Africa has scope, in comparison to other countries, to increase its tax rates for non-residents.

The purpose of this chapter is to illustrate the differences that exist between the taxation of residents and non-residents so the chapters that follow have a practical basis. It would be of no use to consider whether residents and non-residents in South Africa should be taxed according to different tax tables if there was no practical difference in taxing them at the same statutory rates. This chapter illustrates that there is a need to determine whether residents and non-residents should be taxed at varying rates.

The individuals in the above examples who are investing in South Africa as a non-resident will declare this South African rental income in South Africa as well as in their country of residence. For example, a resident of Australia must pay tax on his or her worldwide income;[226] that resident will receive a tax credit for any tax that is paid in South Africa on the rental income in terms of Article 23 of the double taxation agreement between South Africa and Australia.[227] In other words, any difference between the tax payable in Australia and South Africa on this rental income will be taxable in Australia.

While one may argue that it does not matter if the taxpayer is paying less tax in South Africa than a South African resident would as the taxpayer is not paying less tax overall, the tax is being paid in Australia instead of South Africa; the fact is that South African residents are paying tax at different effective rates than non-residents in South Africa.

[226] Australian Taxation Office 'Foreign Income' available at https://bit.ly/2OLFwbM, accessed 15 July 2020. Tax residents of the United Kingdom also pay tax on their worldwide income. HM Revenue and Customs 'Tax on foreign income' available at https://bit.ly/1E358ar, accessed 15 July 2020. Tax residents of Botswana, however, only pay tax on Botswana sourced income as per section 9 of the Income Tax Act Cap 52:01.

[227] South African Revenue Service 'Convention between the Government of the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Income Taxes' 1999.

Chapter 4 – The Constitutionality of taxing residents and non-residents at different effective tax rates in terms of the right to equality

4.1 Introduction

Is it constitutional[228] to have different effective tax rates for residents and non-residents who both invest in immovable property in South Africa?[229] This is the question that this chapter aims to answer in terms of the fundamental right to equality as contained in section 9 of the Constitution.[230] The other rights that Chapter 5 will deal with include the right to property and the right to economic freedom.

In order to answer this question, I now determine whether the law in question which results in the different effective tax rates is constitutionally sound or not. The basis of this enquiry revolves around whether the equality clause of the Constitution has been unjustifiably infringed. The right to equality before the law is equally applicable to tax legislation and any other legislation.[231]

The equality clause, as contained in section 9 of the Constitution reads as follows:

> '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed Chapter 2: Bill of Rights 6 to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

[228] In terms of The Constitution of the Republic of South Africa, 1996.
[229] As dealt with in earlier chapters, the different effective tax rates are as a result of residents and non-residents getting taxed according to the same tax tables and having the benefit of the same rebates. As a resident taxpayer with a rental property would presumably have other income in South Africa (this thesis is based on the premise that the people investing in fixed property have other income to purchase the property and that the money to invest in fixed property is not inherited), whereas a non-resident would not, the resident pays a higher effective tax rate than the non-resident.
[230] Although the Constitution does not expressly confer the rights contained in the Bill of Rights (which includes the right to equality) to taxpayers, these rights undoubtedly apply to taxpayers. Moosa 'Are taxpayers rights in South Africa classifiable as 'human rights'' (2017) *Insurance and Tax Journal* (2017) Vol 32(4) at 24.
[231] Clegg, Arendse, Williams 'Silke on Tax Administration' Lexis Nexis Online. See also Moosa 'Are taxpayers rights in South Africa classifiable as 'human rights'' (2017) *Insurance and Tax Journal* (2017) Vol 32(4) at 24 where he states that the Constitution gives recognition to rights emanating from any tax legislation.

> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[232]
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

The concept of equality of a person before the law has been explained by Dlamini.[233] He states that all human beings are worthy of being treated with dignity and respect, but that this does not necessarily mean all individuals must be treated identically in all circumstances. Various social, economic and political factors may necessitate differential treatment of persons.[234] Goldswain[235] also deals with the concept of equality in terms of the Constitution and states, with reference to *S v Zuma*[236] that fundamental rights, such as the right to equality, must be interpreted in a manner that is generous and purposive. Goldswain states that using a generous and purposive approach in interpreting the right to equality in a revenue context can have far reaching consequences. By interpreting the right to equality in a revenue context in a generous and purposive manner it can be said that any potential breach of the right to equality must not be determined in a strict manner but rather be given a wide ambit.[237]

I now consider taxing individuals at different effective tax rates as a result of their residency status in the light of the equality clause. This is because people are being treated differently in that they must pay different amounts of tax even where they have the same amount of taxable

[232] These are considered the 'listed grounds'.
[233] Dlamini 'Equality or justice? Section 9 of the Constitution revisited – Part I' (2002) Journal for Juridical Science 27 (1) 14.
[234] Dlamini 'Equality or justice? Section 9 of the Constitution revisited – Part I' (2002) Journal for Juridical Science 27 (1) 14 at 30. See also Westen 'The Empty Idea of Equality' (1982) Harvard Law Reiew at 543 where it states that the principle that 'like should be treated alike' is a universal moral truth. People who are alike should be treated alike, whereas people who are unalike should be treated unalike in proportion to their unlikeness. See also Fritz 'An appraisal of selected tax-enforcement powers of the South African Revenue Service in the South African Constitutional context' (2017) LLD Thesis at 40 where it states that the right to equality has been interpreted in South Africa to give effect to the idea that differentiation is allowed in some instances.
[235] Goldswain 'Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law' (2011) Vol 15 No.2 1 at 4-5.
[236] 1995 (6) BCLR 665 (CC).
[237] Goldswain 'Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law' (2011) Vol 15 No.2 1 at p5.

income. In other words, there is no equality in the way in which residents are being taxed in comparison with non-residents.

As was established in Chapter 3, residents pay higher rates of taxation than non-residents on the same amount of taxable income from either rental income in South Africa or capital gains on the proceeds from the disposal of fixed property. This chapter aims to deal with the consideration of whether a resident's right to equality has been violated as a result of this higher rate of taxation paid.

It cannot be said that a non-resident, who is paying a lesser rate of taxation than a resident, can have his or her right to equality violated. It is only the party who is paying the higher rate of taxation and being treated unequally that could potentially have their right to equality circumscribed. This chapter is, therefore, concerned with whether a resident taxpayer's right to equality has been circumscribed.

This chapter will begin by dealing with the Katz Commission report which produced the first consideration of South Africa's tax laws in the light of the interim Constitution. This chapter will also consider case law that deals with both the right to equality as well as tax cases where the taxpayer has alleged that their constitutional rights have been violated. In addition, commentary by authors who have considered tax and the right to equality with regard to various provisions of our tax laws will be discussed and analysed.

The chapter will end with an analysis of whether the following provisions of current South African tax law are in breach of section 9 of the Constitution:

a) The tax rebates;[238]
b) The individual tax table;[239]
c) The annual capital gains exclusion;[240] and
d) The capital gains inclusion rate.[241]

[238] Section 6 of the Income Tax Act.
[239] Rates and Monetary Amounts and Amendment of Revenue Laws Act, 2018.
[240] Paragraph 5 of the Eighth Schedule of the Income Tax Act.
[241] Paragraph 10 of the Eighth Schedule of the Income Tax Act.

4.2 The Katz Commission

In the 1994 Budget Review, the Minister of Finance announced the appointment of the 'Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa' which became known as the Katz Commission. The terms of reference of the Katz Commission required the members of the commission to enquire into the current South African tax system and to make recommendations on its improvement taking into account internationally accepted tax principles and practices.[242]

The Katz Commission made recommendations to the government as a result of the enquiry as to what changes should be made to the tax laws to attempt to put the tax laws in line with the Constitution. It therefore forms the starting point for considering whether a provision of the tax laws in South Africa is in breach of the Constitution.

The specific terms of reference relevant to this thesis include personal income tax with special reference to: the gender issue,[243] the tax base,[244] tax thresholds,[245] income brackets, tax rates, and fiscal drag.[246]

The Katz Commission states that its purpose with regard to the provisions of the Constitution and their relation to the tax laws was to make recommendations identifying instances where it is likely that existing provisions in fiscal legislation violated the Constitution.[247]

Chapter 6 of the Katz Commission report deals specifically with the implications of the Interim Constitution for the South African tax system.[248] Chapter 6 begun its analysis with a consideration of the Income Tax Act and equality. It refers to section 8(2) of the Interim

[242]Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 1.
[243] The gender issue refers to the fact that men and women were treated differently in terms of the Income Tax Act.
[244] This refers to the people who pay tax in the country.
[245] The amount of income that a person needs to make before they are subject to income tax.
[246] 'Commission on Inquiry' at 1. The term 'fiscal drag' is more commonly known as bracket creep and was defined in the National Treasury 'Budget Review 2019' 20 February 2019 as an increased real tax liability when the personal income tax brackets and rebates are not fully adjusted for inflation.
[247] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 69.
[248] As per Goldswain 'Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law' (2011) Vol 15 No.2 1 at p4, the Constitution made little changes to the Bill of Rights that were contained in the Interim Constitution. In particular, section 8(2) of the Interim Constitution and section 9(3) of the Constitution, which are of utmost importance for this thesis, read the same for practical purposes. Any cases or reports dealing with the right to equality in terms of the Interim Constitution may, therefore, be imputed to the Constitution.

Constitution which states that no person shall be unfairly discriminated against on the grounds of gender.

The report then proceeds to identify provisions of the Income Tax Act, as it then stood, that it felt discriminated against persons based on their gender and marital status. As an example, the primary rebate that was provided to individuals differed depending on which of the following three categories they fell into:

a) They were a married person;[249]
b) They were a non-married person; or
c) They were a married woman.

A married person referred to any male person who was married.

In addition to the primary rebate, the tax tables that form the basis of the individual tax system[250] differentiated between: married persons with no children, unmarried persons and married women.[251] As the Katz Commission considers that discrimination on marital status was not appropriate in light of the Constitution, it recommends the adoption of a single schedule applicable to all taxpayers.[252]

This single schedule could be an 'average' of the existing three; however, by doing this, the Katz commission recognises that one breadwinner families would be impacted negatively.[253]

The report states that these provisions which differentiated on marital status *prima facie* fell foul of the substantive right against discrimination as per section 8(2) of the Interim Constitution. This is because:

[249] A married person referred to any male person who was married. 'Commission of Inquiry' at 69.
[250] A person's tax liability is determined by a calculation in terms of the individual income tax tables.
[251] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 90.
[252] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 91.
[253] ''Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) at 91. This is because the tax table for married persons had a lower tax rate for lower income earners compared to the table for unmarried persons. The tax threshold for married persons started at R12,500 whereas the tax threshold for unmarried persons started at R10,715. Also, the top marginal rate for married persons started at R80,000 whereas it started at R56,000 for unmarried persons.

> 'these provisions distinguish between married men and women on the basis of the personal characteristics of the taxpayer, namely, sex and/or gender and consequently can be described as unfair discrimination, that is discrimination based solely on immutable characteristics without any other clear justification, sustainable under the Constitution.'[254]

This was not, however the end of the enquiry as the state may still justify such limitations on the grounds of section 33 of the Interim Constitution.[255] The report states that in its view the only cogent argument that could justify maintaining the tax rates as they were is the breadwinner argument; namely that the husband (or wife) in a single income family is the main breadwinner and should therefore be entitled to certain tax concessions. However, the report states that this approach of favouring a single income family over other taxpayers was not successful in other jurisdictions.[256]

The report briefly considers whether a rate of taxation for married and unmarried persons may be held to be constitutional. It states that while marriage is not a listed ground in terms of section 8(2) of the Interim Constitution, this section envisages an extension of prohibited grounds. If the tax table maintained the distinction between married and unmarried persons, it would also then be possible for an unmarried, single parent to argue that he/she should receive special tax tables. The report therefore strongly recommends that any differentiation based on marital status could be unconstitutional and that it is inappropriate in the light of the Constitution and in the context of income tax legislation. The Katz Commission therefore recommends that no distinction be made on a person's marital status.[257]

The report then deals with the issue of discrimination based on age. It states that the provisions that differentiate based on a person's age are *prima facie* in breach of section 8(2) of the Interim Constitution. However, it states that a court would, in all likelihood, uphold the differentiation

[254] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 71.
[255] Section 36 of the Constitution.
[256] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 71. The report referred to a United Kingdom judgment where full-time workers received greater benefits than part-time workers; the majority of full-time workers were men and the majority of part-time workers were women. The case stated that the provision that treated full-time workers favourably was unjustifiable as it indirectly resulted in the indirect discrimination against women. I believe that the Katz Commission did not delve deep enough into this issue and by merely referring to one English case that is not even on point they were incorrect in coming to the conclusion that they did. The Katz Commission should have allowed for greater tax benefits for single income families to assist them in covering their essential expenses.
[257] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 73.

in terms of medical credits as old people are more likely to incur medical expenses than younger persons.[258] The additional rebates from income tax that are afforded to older persons are more doubtful and would have to be justified on the basis that elderly persons are more likely to be pensioners and as a result have a smaller income; the argument would need to be on that basis they should be entitled to preferential tax treatment due to their diminished income. This conclusion, however, was stated as being debatable.[259]

The Katz Commission consequently held that any discrimination based on gender and marital status was probably unconstitutional and inappropriate in the context of income tax legislation. The Katz Commission recommends that all provisions in the Income Tax Act that were based on a person's gender or marital status should be eliminated. However, it states that the differentiation based on age, as discussed above, may be justifiable.[260]

The South African government embraced the recommendations of the Katz Commission and changed the individual tax rates to a unitary rate of tax for all persons regardless of gender or marital status.[261] In addition, the rebates for married male persons, unmarried persons and married woman were also all removed and one single rebate was introduced.[262]

Vivian states the following regarding the position taken by the Katz Commission in relation to provisions which were believed to be discriminatory:

> 'The Commission decided simply that any reference in the Income Tax Act to gender or marital status was per se probably unconstitutional and as such had to be removed. This is despite the fact that the interim constitution did not consider marital status as

[258] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 72.
[259] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 73. In my view, while there will wealthy pensioners who do not need an additional rebate, these would be an exception and the majority of pensioners will have a diminished source of income once they retire and draw a pension and they will greatly benefit from the additional rebates.
[260] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 73.
[261] These amendments to bring the unitary rate of taxation were introduced by Schedule 1 of the Income Tax Act no. 21 of 1995.
[262] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 91 at 93. The rebates are now contained in section 6 of the Income Tax Act. The additional rebates for persons older than 65 and 75 years of age have been maintained as well as the increased medical credits for persons over 65 years as well as the increased interest exemption for persons over 65 years.

> a factor of discrimination. In this simplistic manner it was satisfied that it had removed unconstitutional discrimination from the income tax.' [263]

The only provision in the Income Tax Act that specifically mentions a person's marital status that was not altered after the Katz Commission was section 68(3)(a).[264] This section stated that every parent must declare the income of a child that was received by or accrued to that child either directly or indirectly from himself or his wife.[265]

The Katz Commission deals with the non-resident shareholders' tax that was in place at the time of the Katz Commission. This tax was levied in terms of section 41 to 47 of the Income Tax Act.[266] South Africa was in the unique position amongst developing nations that a non-resident taxpayer who invested in equities in South Africa were taxed at comparatively higher rates than domestic equity investors.[267] Non-resident investors were made to pay a non-resident shareholders' tax.[268] The Katz Commission was of the view that any relief given to non-resident investors should be done in terms of the non-resident shareholders tax as the non-resident shareholders tax was widely perceived as a tax disincentive.[269] In the South African 1995 Budget Review, there was an announcement that there would be a change in the tax laws as a result of the recommendations of the Katz Commission.[270] The Department of Finance agreed with the recommendations of the Katz Commission and exempted non-resident shareholders from the payment of a non-resident shareholders' tax. This was done even with a predicted substantial loss of revenue to the fiscus.[271]

[263] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 91.
[264] Van Schalkwyk 'Constitutionality and the Income Tax Act' (2001) 9 Meditari Accountancy Research at 294. 294.
[265] This section was amended with Act 5 of 2001 and the words 'himself or his wife' were deleted. This was explained in the National Treasury 'Explanatory Memorandum on the Taxation Laws Amendment Bill, 2001.'
[266] These sections were repealed by The Income Tax Act No. 21 of 1995.
[267] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 223.
[268] In terms of section 41 to 42 of the Income Tax Act as it was prior to the repeal of this type of tax.
[269] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 223.
[270] National Treasury 'Budget Review 1995' 15 March 1995. The Budget Review, at 2.3.2.5, states that the views of the Commission on issues such as gender and marital discrimination and the elimination of child rebates would be accepted and implemented in the form of a unified tax structure.
[271] National Treasury 'Budget Review 1995' 15 March 1995 at 5.3.2.8 where it states that the estimated revenue loss to the fiscus would be R572 million. As per the National Treasury 'Budget Review 1996' 13 March 1996 the revenue from the withdrawal of the non-resident shareholder's tax in the 1996 period was R102 million from the previous tax year. In the National Treasury 'Budget Review 1997' 12 March 1997 the fiscus no longer received any revenue from this tax and roughly R235 million less was recovered in the 1997 year as opposed to the 1996 year.

Vivan[272] compares the theory of taxation as laid out by 'classical economists'[273] and the equality of taxation[274] that was meant to have been the result of the work done by the Katz Commission.[275] With regards to the theory of taxation, the classical economists developed a system of equality of taxation. This system held that the basis of taxation is all income received by the taxpayer; from this an amount sufficient to cover the necessities of life for the taxpayer as well as all persons the taxpayer has an obligation to support is subtracted. The remainder after subtracting these types of income results in the taxable income of the taxpayer. Accordingly, tax cannot be imposed upon a taxpayer until the taxpayer has covered the costs of his own living and that of his dependants.[276]

Prior to the Katz Commission, the South African tax system maintained a measure of tax equality in accordance with the principles as set out by the classical economists; this was done by a system of rebates which took the taxpayer's household circumstances into account.[277] The Katz Commission failed to understand the link between the necessities of life and the tax rebates.[278] The point of a tax rebate is to ensure that people have enough money to pay for

[272] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 79.

[273] As per Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 82-83, classical economists were a group of writers who dealt with the history and principles of taxation. While many wrote about these principles, it is the writing of Adam Smith in 'An inquiry into the nature and Causes of the Wealth of Nations' (1776) Bantam on the canons of taxation that were so well articulated that there has been no need to restate them. Briefly, the canons are broken down into four parts: equality, certainty, convenience of payment and economy in collection.

[274] As per Smith 'An inquiry into the nature and Causes of the Wealth of Nations' (1776) Bantam at 1043, the equality of taxation is the first canon of taxation and states that each person within a state must contribute to the support of the government as nearly as possible in proportion to their income earned. In other words, a person with a greater ability to pay should pay more tax. On this point it can be stated that a non-resident earning the same taxable income as a resident from rental income or proceeds from the disposal of immovable property but paying less tax than the resident would not be contributing to the support of the government as nearly as possible in proportion to their income earned. As Vivian states in 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 84-85 this means that the individual taxpayer's ability to bear the tax burden must be the starting point of enquiry into the equity of the tax and not the desire of the state for revenue.

[275] The Katz Commission states, at 18, that achieving a greater degree of equity in the tax system is of vital importance in the work of the Katz Commission. While the Katz Commission deals with a variety of measures to improve tax equity, for the purposes of this thesis the constitutional equity that the Katz Commission considers is of importance.

[276] Vivian referred to the work of Mill 'Principles of Political Economy Books IV and V' (1848) which states this is the fundamental principle of taxation.

[277] As per the South African Reserve Bank 'Tax Chronology of South Africa: 1979 -2017' (2017), the individual tax tables had separate categories for income tax payable from 1979 until 1995 when everyone was taxed at a uniform rate. As per Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 91., this system took a taxpayer's personal circumstances into account which was no longer the case when the uniform tax tables were introduced in the 1995 tax year.

[278] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 91.

necessities without being taxed on that amount. In other words, the rebate from tax must be enough to allow people to use the rebate to pay for things that they need; people who earn less than an amount to cover necessities of life should not form part of the country's tax base.[279] Vivian's work on the purpose of a tax rebate forms the basis for the conclusion drawn in this thesis that non-residents should not be entitled to rebates from tax on South African sourced income as they do not pay for their necessities of life in South Africa. Vivian's work is, therefore, very important for some of the conclusions and recommendations made in this thesis.

The Katz Commission did not enquire whether the rebates were sufficient to cover the necessities of life. Without rebates that adequately cover necessary expenses, equality of tax as per the classical economists' version of equality of taxation cannot be obtained.

In my view, the theories as expounded upon by Adam Smith and adopted by Vivian are correct. People should be allowed an exemption from paying tax up until the point where their necessities of life are covered; it is unfair to expect a person to pay tax on part of their income when they do not have enough to support themselves and their families. However, it is understood that in practice to implement such a system may not be so easy, as everyone has a different necessities based on their family circumstances. The government should go back to the principles of taxation to understand the purpose of the rebates in the first place so that they can give further thought to possible changes that should be made to the current system so as to ensure that all people can pay for their necessities prior to having to pay tax on their income. The current rebates are certainly not enough for an individual to buy the necessities of life; this is exacerbated when an individual has children and/or is the sole income earner in family.

One of these rebates which was removed was the rebate for children. This rebate was introduced a long time ago to achieve equality of taxation by assisting persons with children to be able to take care of their children.[280] South African parents must now pay substantial school fees for their children to attend government schools and the child rebate that was in place prior to the Katz Commission was subsequently removed as a result of recommendations of the Katz Commission.

[279] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 91.

[280] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 92. It is obviously essential for a society both morally and for the society to continue that people with children have the ability to take care of their children. A rebate for children is a valid and important reduction in tax that should be made available to people with children.

There is an important aspect that currently exists in our law that was Vivian's article does not deal with. Section 10(1)(q) of the Income Tax Act allows a bursary exemption for parents with children at school or university.[281] What this entails is that a parent with a child at school or university (from Grade R to PhD level), who earns below R600,000 a year, may structure their salary so that a portion of their salary is paid to the parent as exempt income. This is a lesser known benefit that parents may access that can reduce their tax liability as a result of having children at school or university. The ability to structure your salary is not apparent from a plain reading of section 10(1)(q), but this has been confirmed by the National Treasury 'Explanatory Memorandum on the Revenue Laws Amendment Bill, 2006' as well as *Anglo Platinum Management Services (Pty) Ltd v Commissioner of South African Revenue Service.*[282] This ability to structure your salary was introduced with the removal of section 23(j) of the Income Tax Act in 2006. Vivian's article was published in March 2006; this was after the publication of Vivian's article.

While this provision has the potential to assist parents in taking care of their children and ensuring they get an education, it is not a well-known or widely implemented provision. In addition, this provision will only assist a parent when their child reaches Grade R. For the first five or so years of the child's life the parent will have no tax benefit available that will assist them in taking care of their child.

The removal of the different rebates for people in different stages in life results in a situation where a household with six children, an unemployed husband, struggling to survive on the wife's low salary will receive half the rebate of a husband and wife, with no children earning good salaries.[283] The Katz Commission did not take into account that it costs money to raise children and that the necessities of life for people with children are far greater than those without;[284] people with children should be allowed a greater rebate as their necessity of life expenses are higher.

[281] It must be noted that the National Treasury 'Draft Explanatory Memorandum on the Draft Taxation Laws Amendment Bill, 2020' (31 July 2020) indicated that this system will no longer be allowed from 1 March 2021. Presuming that this draft law is implemented into law then this benefit which is currently available to parents of children will no longer exist.
[282] 2016 (3) SA 406 (SCA).
[283] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 93.
[284] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 87. In fulfilling its mandate of identifying possible violations of the interim Constitution, the Katz Commission would need to take into account practical considerations. To merely look at the wording of a piece of legislation and decide that it is unconstitutional will never result in a fair or

In order for society to continue it is necessary for people to have children and having children comes with resultant expenses. People with children should be given monetary assistance by the state, in the form of a reduction in their tax liability, to ensure that they can afford all the necessities that children require. By providing parents of children with a reduction in their tax liability this in no way prejudices people without children, as any tax savings that the parents with children have would be used to purchase items necessary for looking after the children.

I must argue that it is unfair to have a set rebate for all people irrespective of their life situation; the previous system of three primary rebates was not discriminatory but was in line with the principles of equality of taxation as set out by classical economists and was also understood by the Margo Commission.[285] These rebates existed to adjust the tax burden according to the taxpayer's ability to bear the burden; the Katz Commission decided that these distinctions were not in line with the Constitution as a result of the differentiation between married and unmarried persons.

The unitary primary rebate is set arbitrarily;[286] the Katz Commission did not understand the purpose of it and did not give a justification for its quantum.[287] I am of the opinion that the rebates today have no bearing on the actual costs of living, but have just been increased over time at a rate below inflation to increase the amount of tax revenue that the government generates from personal income tax. The author agrees with the views held by Vivian that the Katz Commission was incorrect in their lack of analysis and understanding of the rebates.

The Katz Commission based their findings on the incorrect assumption that merely having words such as male, unmarried, married and woman in legislation was unconstitutional and had to be removed.[288] The Katz Commission did not take proper cognisance of the reasoning behind the existence of these distinctions and subsequent impact that removing these distinctions would have on the amount of tax that people were paying. The Katz Commission

realistic outcome. The practical realities of how legislation impacts the lives of individual's needs to be considered.

[285] The formal name of the Margo Commission was the 'Report of the Commission of Inquiry into the Tax Structure of the Republic of South Africa' 1987. This was stated at 7.7 – 7.8 of the report.

[286] As per the South African Reserve Bank 'Tax Chronology of South Africa: 1979 – 2017' (2017), in 1979 the primary rebate was R1,000 and the top tax bracket is R22,000 (primary rebate is 4.5 per cent of the top tax threshold) In the 2020 tax year the primary rebate is R14,220 and the top tax bracket is R1,500,000 (primary rebate is one per cent of the top tax threshold). It is evident that the primary rebate has not kept up with inflation and while it may have been sufficient to cover the necessities of life in 1979, it is certainly not the case in 2020.

[287] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 94.

[288] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 95.

was incorrect in just assuming that these distinctions were unconstitutional and recommending their removal. If the Katz Commission had put more thought into this aspect of their report they would have come to the conclusion that those distinctions are there for a reason and should not have been removed. While their mandate was to make recommendations as to any possible violations of the interim Constitution,[289] they could easily have identified this provision as ostensibly violating the interim Constitution, but that practically it did not.

The Katz Commission recommends a unified marginal rate of taxation.

> 'Horizontal equality requires that taxpayers who are in the same financial position pay the same tax.' [290]

South Africa had a number of different tax tables prior to the Katz Commission. There were tables for married men, married women and single persons.[291] The Katz Commission recommends that there rather be a single unified tax table. The previous system with multiple rates attempted to ensure that households with two incomes and households with only one income (but also two people) paid the same amount of tax.[292] If there are two sources of income, there are two rebates and the two source income household will pay less tax even though they are receiving the same income.[293] The unified marginal rate system will ensure that there is no equity between households with two people and one income and households with one income and two people. The unified system of rebates and tax tables therefore discriminate twice against single income households; horizontal inequality is the result.[294]

[289] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 69.
[290] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 99.
[291] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 99.
[292] It is fair to make provision for households with only one income as the one income will need to cover the same necessary household expenses as a household with two incomes but will have to pay more tax than the dual income household. As previously stated, an individual should not need to pay tax on an amount until their necessities of life have been paid; by allowing a single income household greater tax benefits, this would enable a single income household the ability to pay their necessities before any tax is paid. When people get married and become a single household, their household expenses are intertwined; it is not unfair that just because there are two incomes in that household that they pay less tax in comparison with a single income household.
[293] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 99.
[294] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 102.

4.3 The right to Equality

Section 9 of the Constitution dealing with the right to equality reads as follows:

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

Section 9 of the Constitution must be read with section 7(3) of the Constitution which states that all rights in the Bill of Rights, such as the right to equality, is subject to the limitations clause in section 36.[295] Section 36 of the Constitution allows for a provision that is found to be in contravention of a section of the Constitution to still be constitutional if it complies with section 36. This is also known as the proportionality enquiry.[296]

[295] Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 217.
[296] Lurie 'Proportionality and the Right to Equality' (2020) German Law Journal Vol. 21 at 186. See also Rautenbach 'Proportionality and the Limitation Clauses of the South African Bill of Rights' (2014) Potchefstroom Electronic Law Journal Vol. 17 at 2228.

4.3.1 The applicability of the right to equality in South Africa

An important factor to note is who the provisions of the Constitution apply to. As seen above, 'everyone' is equal before the law and the state may not discriminate against 'anyone'. I now consider these terms in greater detail.

For the purposes of this chapter it is worthwhile considering whether the right to equality extends to non-resident taxpayers or whether it is only applicable to resident taxpayers.[297] This issue has been dealt with by the Constitutional Court in various matters. Two of them worth noting are *Larbi-Odam and others v Member of the Executive Council for Education (North-West Province) and another*[298] and *Khosa and others v Minister of Social Development and others.*[299]

In the *Khosa* matter, the court extended the right to equality, in terms of section 9 of the Constitution, to permanent residents of South Africa.[300] This was in terms of the right to social assistance which is conferred upon 'everyone' in terms of the Constitution; denying permanent residents the right to social assistance was held to be an infringement on their right to equality. This case is noteworthy for using the right to equality and socio-economic rights to extend constitutional protection of social welfare beyond South African citizens to foreign nationals.[301]

In the *Larbi-Odam* case, the court dealt with the right to equality in terms of a group of foreign citizen teachers who were treated differently due to their nationality; these people had permanent residence in South Africa.[302] It was held that the discrimination against the foreign citizens constituted unfair discrimination and breached their right to equality.

It is evident from these cases that the right to equality in terms of section 9 of the Constitution is not only applicable to South African citizens, but that it may be extended to foreign nationals who are lawfully in this country; there may be a situation where a foreign national living in South Africa invests in fixed property. This person would also have the same right to equality

[297] While this thesis illustrates that residents are paying more tax than non-residents and it is residents who would be alleging that their right to equality has been breached, it is prudent to establish who is afforded protection under the equality clause. While this thesis may not deal with a situation where a non-resident is being discriminated against, it is foreseeable that there might be a situation where a non-resident may be alleging that their right to equality has been infringed.
[298] CCT 2/97
[299] CCT 12/03.
[300] *Khosa and others v Minister of Social Development and others* CCT 12/03 at 85.
[301] Murray (Ed) 'International Encyclopaedia of Laws' (2014) Kluwer Law International at 278.
[302] *Larbi-Odam and others v Member of the Executive Council for Education (North-West Province) and another* CCT 2/97 at 19 & 25.

as a South African citizen who invests in property in South Africa. However, these judgments do not deal with situations where a foreign citizen is not actually present in the country; such as with a non-resident taxpayer living in another country but investing in South Africa.

It is unlikely that a court would extend the right of equality to a person who is not present in South Africa but merely investing in South Africa from abroad as court's have only extended this right to people who at least have permanent residence in the country. It is a far stretch for this right to extend from foreign nationals living with permanent residency in the country to foreign nationals who live in another jurisdiction and merely invest money in South Africa. A non-resident taxpayer would struggle to argue that their right to equality in South African has been infringed. However, as mentioned earlier, this chapter aims to illustrate that a resident's right to equality has been infringed and not that of a non-resident. For the purposes of this thesis, tt does not, therefore, matter that a non-resident who does not live in South Africa does not have a right to equality for tax matters in terms of the South African Constitution. For the purposes of this thesis a tax resident of South Africa could either be a South African citizen living and working in South Africa and/or a foreign citizen permanent resident in South Africa living and working in South Africa.

Currie and De Waal deal with the concept of equality in broad terms.[303] They state that at its most basic, the idea of equality in formal terms is that people who are in similar situations should be treated in a similar manner. For example, that as adult men and women have the same capabilities to decide political choices that both adult men and women should be allowed the right to vote. In contrast, children are not in the same position as adults as they cannot make informed political choices; they should not be given the ability to vote, but that it is not unfair to limit their rights in this manner. However, they state that it is not the basic idea of equality that is difficult to implement in practice but rather two issues ancillary to the idea that people in similar circumstances must be treated in a similar manner. Firstly, is what counts as relevant when determining the similarities between people's circumstances.[304] For example, when it comes to military conscription, men are, generally speaking, physically stronger than women. The question is then whether men and women who are similarly situated when it comes to performing military service? If they are similarly situated, they must be treated the same; if

[303] Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 210.
[304] Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 210 – 211.

they are not similarly situated (if women are not capable of performing the same type of military service as men) then conscripting men and not women is justified.[305]

The second issue is what constitutes similar treatment of people who are similarly situated. For example, both blind children and children with sight are equal in the sense that they are both entitled to education of a similar standard. However, it is not sufficient to give blind children the same type of schooling as those with sight as the blind children will obviously be at a large disadvantage.[306] It would not be acceptable to treat these two different types of people in the same manner as the result will be that one of the groups will be at a disadvantage and as a result receive treatment that is at a lesser standard than sighted children.[307]

Currie and De Waal elaborate upon the difference between the concepts of formal and substantive equality.[308] Formal equality entails equal treatment of like individuals in like situations. Substantive equality on the other hand requires the law to ensure equality of outcome and disparity of treatment is accorded in order to achieve this. Returning to the example above of blind children at school; substantive equality means that as all children have the right to the same levels of education, and that putting blind children into the same schools as sighted children would result in a significant disadvantage to the blind children. Blind children need to, therefore, be given preferential treatment in relation to sighted children to ensure that they receive the same level of education.

Substantive equality consequently entails an examination of the actual social and economic conditions of people in order to determine whether the Constitution's commitment to equality is being upheld.[309]

Relating this to the current situation, I must consider whether resident taxpayers and non-resident taxpayers are in a similar situation and should be treated the same. Both have invested in fixed property in South Africa and have received the same taxable income and/or capital gain from the disposal of that property. At a formal level of equality, the resident and non-resident should be treated the same under these circumstances; as they receive the same amount of taxable income and/or capital gain, they should pay the same amount of tax. As was illustrated in Chapter 3, this is not the case. A purely formal understanding of equality would

[305] This is presuming that the military service would require work in which strength is required.
[306] Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 211.
[307] Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 211.
[308] Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 213.
[309] Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 213.

result in a conclusion that the resident's right to equality has been violated. However, in terms of a substantive view of equality further considerations need to be taken into account in order to determine whether there is practical equality. These considerations, which are discussed below, would include factors such as that a non-resident may not receive the same amount of governmental services as they do not live in South Africa and are therefore justified in paying less tax than a resident.

I now discuss how this right to equality must be applied in terms of the South African Constitution.

O' Regan has stated that equality is a central theme of the South African Constitution and asserts that the right thereto permeates the entire text.[310] She uses the examples of section 39 of the Constitution which states that in interpreting the Bill of Rights, a court must promote values that underlie an open and democratic society based on human dignity, equality and freedom. Further, when dealing with the limitation clause and whether a right may be limited, a right may only be limited if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[311] In other words, the right to equality does not exist only in section 9 of the Constitution but it also has a significant impact on other important aspects of the Constitution.

Langa takes the same view as O' Regan and states that the achievement of equality is identified as one of the founding provisions of the Constitution and is the first substantive right listed in the Bill of Rights.[312] Langa goes on to state that while the government may legitimately make classifications and afford different treatment to different groups, this may only be done if the criteria upon which the classifications are based are permissible.[313] Whether a classification is permissible would depend on the purpose of the classification and whether there is a sufficient

[310] O' Regan 'The Right to Equality in the South African Constitution' (2013) Columbia Journal of Gender and Law 25 at 111. See also Albertyn & Blatt 'Facing the Challenge of Transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) South African Journal on Human Rights Vol. 14 at 249 where they state that equality is a foundational value and organising principle of South Africa's democracy.
[311] O' Regan 'The Right to Equality in the South African Constitution' (2013) Columbia Journal of Gender and Law 25 at 111. See also Jagwanth 'Expanding equality' (2005) Acta Juridica Vol. 1 at 131.
[312] Langa 'Equality Provisions of the South African Constitution' (2001) 54 Southern Methodist University Law Review 2101. See also Smith 'Equality constitutional adjudication in South Africa' (2014) African Human Rights Law Journal 14 at 610 where he states that the equality provision, along with other interrelated rights, such as dignity and socio-economic rights occupy key positions in the South African Bill of Rights.
[313] Langa 'Equality Provisions of the South African Constitution' (2001) 54 Southern Methodist University Law Review 2101 at 2103.

link between the criteria used to make the classification and the governmental objectives in having the classification and different treatment.[314]

Another aspect not considered in the judgments dealt with below is the concept that equality also has to do with the distribution of resources in society.[315] These resources refer not only to movable and immovable property but also the exercise of political and social power which enable people to participate meaningfully in society. This view of equality supports a substantive view of equality in which dignity is the primary interest protected.

Substantive equality is the preferred notion of equality.[316] A substantive approach to equality deals with the notion from a positive point of view; in other words, that laws treat individuals as substantive equals recognising and taking people's differences into account.[317] Whereas a negative point of view, such as the formal view of equality, deals with equality consistently and states that people must not be treated differently. This view of equality does not take the individual's circumstances into account. The substantive view on equality, which is discussed in the cases below, also deals with indirect inequality. Indirect inequality is important to incorporate into the discussion of the right to equality as it gives recognition to the reality that people are not competing on a level playing field.[318]

[314] Langa 'Equality Provisions of the South African Constitution' (2001) 54 Southern Methodist University Law Review 2101 at 2103.
[315] Kruger 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) South African Law Journal Vol. 128 at 507.
[316] Smith 'Equality constitutional adjudication in South Africa' (2014) African Human Rights Law Journal 14 at 609. This was stated by the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6 (CC) at 9. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 214 where they state that a substantive concept of equality entails a purposive approach to interpretation and is accordingly supportive of the fundamental values of the Constitution. Section 9 of the Constitution must therefore be grounded on a substantive concept of equality.
[317] Smith 'Equality constitutional adjudication in South Africa' (2014) African Human Rights Law Journal 14 at 613.
[318] Smith 'Equality constitutional adjudication in South Africa' (2014) African Human Rights Law Journal 14 at 613. See also Fredman 'Substantive Equality Revisited' (2016) International Journal of Constitutional Law Vol. 14 at 713 where he states that South African Constitutional Court has embraced the principle of substantive equality in interpreting the right to equality. See also O' Connell 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2001) International Journal on Constitutional Law Vol. 6 at 268 where it was stated that judges and commentators have turned to incorporating 'dignity' into a consideration of substantive equality so as to flesh out what substantive equality entails. It was further stated that this is particularly so in Canada in South Africa.

Albertyn has also emphasised the importance of the concept of substantive equality.[319] She states that an investigation into the impact of the provision on the individual or the group is important in terms of substantive equality. Equality claims are assessed in relation to lived inequalities; such lived realities do not have formal boundaries. Courts must interrogate the private sphere and understand the relationship between law and social arrangements.[320]

In addition is the purpose of the right. A clear exposition of the purpose of the right and of the constitutional values that underpin it allow the court to make a determination as to whether a provision has infringed on a person's right to equality.[321]

Lurie states that South African courts have never held that the right to equality has been infringed, but that it is saved in terms of section 36 of the Constitution.[322] The courts have either held that the right to equality has not been infringed or that infringement is unjustifiable. The reason for this is the how the enquiry into whether the right to equality has been infringed takes place in the courts.

This is done as there is a prohibition on 'unfair discrimination' which imbues the idea of unfairness with the idea of human dignity.[323] If it is on a listed ground and presumed to be unfair, then the state must attempt to justify it. If it cannot, there is no point in attempting to justify it again in terms of the section 36 proportionately enquiry; if it has already been found to be unfair, section 36 cannot save the provision. Secondly, the first step in the equality enquiry is whether there is a rational connection between the law and its purpose; this rationality test is part of the section 36 enquiry. Lastly, the enquiry into whether a provision results in discrimination includes considering whether there has been an impairment of dignity. It is unlikely that a court would be able to accept a justification for 'unfair discrimination' under

[319] Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 South African Journal of Human Rights at 253. See also Albertyn & Blatt 'Facing the Challenge of Transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) South African Journal on Human Rights Vol. 14 at 249 where it was stated that the right to equality provides the means by which substantive equality can be achieved by legally entitling groups and persons to claim the fundamental right to equality as well as the means with which to achieve this right. It was also stated that as a value, the right to equality gives substance to the vision of the Constitution and because the value is used to interpret and apply the right, means that the right to equality is infused with the substantive content of the value.

[320] Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 South African Journal of Human Rights at 259.

[321] Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 South African Journal of Human Rights at 260.

[322] Lurie 'Proportionality and the Right to Equality' (2020) German Law Journal Vol. 21 at 186.

[323] Lurie 'Proportionality and the Right to Equality' (2020) German Law Journal Vol. 21 at 186.

section 36 that has already been shown to impair human dignity.[324] In other words, the test that needs to be considered under section 36 has already occurred under the section 9 equality enquiry. If a provision is found to violate a person's right to equality in terms of section 9, a court will be hard pressed to justify the limitation under section 36.

The importance of the equality provision in the Constitution is evident. The importance of this provision as a fundamental right in terms of the Constitution is vital for this thesis as any argument that might be put forth by the government to justify the differential tax rates for residents and non-residents would have to be more important than a person's right to equality. This is a big hurdle that the government would need to get over and they would need to have an extremely strong argument.

4.3.2 Court cases dealing with the right to equality

I must now consider the many South African court cases that deal with the concept of equality in order to get a proper understanding of whether provision can be said to violate the equality clause. The starting point for this query is the seminal Constitutional Court case of *Harksen v Lane NO and others*[325] which dealt with the equality clause in the Constitution.

The test for determining whether the right to equality has been breached as set out in *Harksen* has been endorsed by our courts which indicates legal certainty in so far as the test for the right to equality is concerned.[326]

[324] Lurie 'Proportionality and the Right to Equality' (2020) German Law Journal Vol. 21 at 186. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 218 where it was stated that in a section 9 case it is difficult to apply the usual two-stage analysis of a right and its limitation. Further, that it is unclear whether section 36 can have any meaningful application to a section 9 equality consideration. This is because the section 9 rights are qualified by the same or similar criteria used to determine whether there is a justifiable limitation in terms of section 36. If a type of discrimination has already been classified as unfair based on the provision being in contrast to a person's human dignity, it is difficult to imagine a situation where such a discrimination could be acceptable in an open and democratic society. In addition, it is hard to imagine a situation where a law which differentiates for reasons not related to a legitimate governmental purpose as being reasonable. Our courts have, however, when they have found that section 9 has been infringed continued to complete the section 36 analysis; there have however been no cases where the impugned provision has been upheld as a reasonable limitation in terms of section 36. In addition, in Jagwanth 'Expanding equality' (2005) Acta Juridica Vol. 1 at 132 where it was stated that the substantive equality approach adopted by our Constitutional Court requires the right to equality to be applied in terms of its social context; this includes political and economic disparities as well as an incorporation of the value of human dignity. Such an enquiry will include a consideration of the impact or consequences of the discriminatory measure rather than whether there is a difference in treatment between similarly placed persons.

[325] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC).

[326] Kruger 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) South African Law Journal Vol. 128 at 479.

This case dealt with the constitutionality of certain provisions of the Insolvency Act.[327] In particular, sections 21, 64 and 65 were challenged on the basis that they were in breach of the interim Constitution of the Republic of South Africa.

Section 21 of the Insolvency Act entails that all the property of a person under sequestration proceedings vests in the Master of the High Court or trustee of the sequestrated estate; this included the property of the spouse of the person who is being sequestrated. The property of the appellant, Mrs. Harksen was attached by the trustees of the estate of Mr. Harksen, her husband.[328]

This section of the Insolvency Act was attacked on two grounds: firstly that it infringed on the appellant's right to property as contained in section 28 of the interim Constitution (this section is now contained in section 25 of the Constitution).[329] Secondly, that the section violated the equality clause as contained in section 8 of the interim Constitution (this section is now contained in section 9 of the Constitution).[330] The consideration of the equality clause of the interim Constitution in this case is of utmost importance to the object of this chapter.[331]

The appellant alleged that section 21 of the Insolvency Act results in the unequal treatment of solvent spouses and discriminates unfairly against them. The Constitutional Court set out in *Harksen v Lane* what needs to be considered when a person alleges that the equality clause has been violated by a certain law. This involves a multi-stage process.[332]

The first leg of the enquiry into whether the equality clause has been violated is to determine whether the legislative provision differentiates between people; in other words, does the provision result in people being treated differently.[333] This is the enquiry that must be made in line with section 8(1) of the interim Constitution which reads as follows:

[327] No. 24 of 1936.
[328] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 25.
[329] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 31.
[330] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 41. It was contended by Mrs. Harksen, at para 37, that the attachment of her property constituted an expropriation of her property without compensation. It was held by the court that the transfer of the assets of the spouse of a sequestrated estate does not constitute a permanent deprivation of property rights nor does it have the effect of a compulsory acquisition or expropriation of property. It was held that the attachment of the spouse's property cannot be said to be an expropriation and does not, therefore, contravene the property clause as contained in section 28 of the interim Constitution.
[331] The purpose of this chapter is to determine whether it is constitutionally permissible to tax resident and non-residents at different effective rates of taxation.
[332] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 43 – 46.
[333] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 43.

'Everyone is equal before the law and has the right to equal protection and benefit of the law.' [334]

It was held in *Harksen* that if the impugned provision does differentiate between people, then it must be determined whether there is a rational connection between the differentiation and the legitimate governmental purpose that it is designed to achieve.[335] If the differentiation can be justified by a legitimate governmental purpose, the provision will not breach the first leg of the equality clause.

If the differentiation is not justifiable, then the provision infringes on section 8(1) of the interim Constitution and is unconstitutional; subject to the limitation clause contained in section 36 of the Constitution.[336] However, differentiation that is justifiable may still constitute unfair discrimination. This would be in terms of section 8(2) of the interim Constitution. If a provision is justifiable in terms of section 8(1), the enquiry continues to stage 2.[337]

Freedman states that the first test as enunciated in *Harksen* to establish whether there has been unjustifiable differentiation as having a legitimate governmental purpose would be very difficult, if not impossible for the applicant to prove.[338] In other words, the applicant would find it difficult to show that there is no rational connection between the differentiation and a legitimate governmental purpose; a government is unlikely to choose an irrational manner of achieving its goals.[339]

In addition, the courts are likely to sympathise with the difficulties that the legislature has in legislating to fulfil its objectives as well as that courts hold the belief that their function is not to unnecessarily interfere with the legislature.[340] As such, there will be limited circumstances in which a court would find that a law is not rationally connected to a legitimate governmental objective and in almost all circumstances the first leg of the enquiry, as stated in *Harksen*, would be said to have a legitimate governmental purpose and the differentiation would not be justifiable. The court must then continue to address the second leg of the enquiry and whether there is discrimination and if so, is the discrimination unfair.

[334] This is contained in the exact same wording as section 9(1) of the Constitution.
[335] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 43.
[336] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 45.
[337] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 45.
[338] Freedman 'Understanding the Right to Equality' (1998) South African Law Journal 115 at 248.
[339] Freedman 'Understanding the Right to Equality' (1998) South African Law Journal 115 at 249.
[340] Freedman 'Understanding the Right to Equality' (1998) South African Law Journal 115 at 249.

Kruger is of the view that once a court has found that legislation serves a legitimate governmental purpose in the first stage dealing with differentiation, it would be difficult to see how a court could reach a different conclusion when dealing with the limitation analysis under section 36 of the Constitution.[341]

The second leg of the enquiry as to whether a provision violates the equality clause in the Constitution is to determine whether there is unfair discrimination. In this regard Section 8(2) of the interim Constitution reads as follows:

> 'No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.' [342]

The first leg of this enquiry is to determine whether there is discrimination. Once discrimination has been established then it must be determined whether the discrimination is unfair.[343]

If the differentiation is on a specified ground, discrimination will have been established. If the differentiation is not on a specified ground, then whether or not there is discrimination will depend on whether the ground is based on attributes and characteristics which have the potential to impair the fundamental dignity of a person or affect them adversely in a comparably serious manner.[344]

[341] Kruger 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) South African Law Journal Vol. 128 at 504.

[342] Section 9(3) of the Constitution which is the comparable section of the Constitution reads very slightly differently to section 8(2) of the interim Constitution. It reads as follows:
The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

[343] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 46.

[344] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 54. As per Kruger 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) South African Law Journal Vol 128 at 502, the judgments of *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) and *Prinsloo v Van der Linde* CCT 4/96 do not provide any clarity on the meaning of the phrase 'adversely affect in a comparably serious manner' and that the only court case to Kruger's knowledge that used the qualification of an affront affecting a person in a comparably serious manner is *City Council of Pretoria v Walker CCT 8/97*. In this case, which is dealt with in detail below, the court stated that legal action taken against white defaulters for non-payment whereno legal action was taken against black defaulters resulted in the law being more harshly used against someone because of his or her race group. The use of a law against someone as a result of their race group 'would have affected them in a manner which is at least comparably serious to an invasion of their dignity'. *City Council of Pretoria v Walker CCT 8/97* at para 80-81. This gives an indication of the severity of the affront that must be present in order for a court to consider that a person has been affected in a comparably serious manner. It is my view that while the *Prinsloo* judgment does not state what a comparably serious manner entails, it states what it does not entail and this can also be instructive. The court held that the regulation which differentiates between owners and occupiers of land inside fire control areas and those who own and occupy land outside of these areas does not affect the dignity of a person

In regard to determining whether discrimination is present, Freedman states that proving discrimination would be relatively simple. If the differentiation is on a listed ground it would be almost impossible to show there has been no discrimination. When the differentiation is on an unlisted ground, it would need to be shown that the differentiation is based on either attributes or characteristics which have the potential to impair the fundamental human dignity of a person or if the differentiation affects them in a comparably serious manner.[345]

While this may appear to be a stricter standard, this test should also be relatively easy to satisfy as *Harksen* indicated that the term 'characteristics and attributes' must be interpreted widely, that the differentiation must merely have the potential to infringe a person's dignity and that the concept of dignity is broad and elusive.[346]

Once discrimination has been established it must be determined whether the discrimination amounts to unfair discrimination. If the discrimination is on a specified ground, unfairness will be presumed. If it is not on a specified ground unfairness will have to be proven by the complainant.[347] The test of unfairness will depend primarily on the impact of the discrimination on the complainant and others in his or her situation.[348]

The final test as to whether a provision can pass constitutional muster would then be to establish whether the provision can be said to be a justifiable limitation in terms of section 33 of the interim Constitution.[349]

The court proceeded to apply the above principles relating to whether the equality clause has been breached to the matter at hand, section 21 of the Insolvency Act.[350] It was stated that section 21 differentiates between the solvent spouse of an insolvent and other persons who had dealings with insolvents; the governmental purpose of the section must be considered. It was held that it is difficult for a trustee to determine which assets belong to which spouse in a relationship as it is common that items are bought together by spouses or it is not clear which items belong to who. This section assists a trustee in an insolvent estate to determine which property belongs to which spouse as it would not be clear to the trustee tasked with the

nor does it adversely affect them in a comparably serious manner. *Prinsloo v Van der Linde* CCT 4/96 at 41. This illustrates that the affront on the affected party needs to be serious and the facts of the *Prinsloo* case were not nearly strong enough for such an application to be made.

[345] Freedman 'Understanding the Right to Equality' (1998) South African Law Journal 115 at 249.

[346] Freedman 'Understanding the Right to Equality' (1998) South African Law Journal 115 at 250.

[347] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 54.

[348] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 54.

[349] The limitation clause is contained in section 36 of the Constitution.

[350] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 56.

administering of the insolvent estate which property belongs to that estate.[351] It was held that this section ensures that all of the property of the insolvent is brought into the insolvent estate;[352] it, therefore, had a legitimate governmental purpose in the differentiation that the section causes. The section did not violate the provisions of section 8(1) of the interim Constitution.

As this challenge was not on one of the listed grounds in section 8(2) of the Constitution, it was held that determination of whether the differentiation constituted discrimination must be an objective enquiry. It was held that the differentiation constituted discrimination as people who had dealings with the insolvent or whose property is in the possession of the insolvent are not affected in the same way as the spouse of the insolvent.[353]

As the ground that was challenged was not a specified ground, Mrs. Harksen bore the onus of proving that the discrimination was unfair. The purpose of section 21 of the Insolvency Act was said to be to protect the rights of the creditors in an insolvent estate. In addition, the solvent spouse's goods are not necessarily removed from her premises, but merely attached by the sheriff. The inconvenience and burden that the solvent spouse suffered as a result of the section is not unreasonable and does not impair her dignity or constitute a similar impairment. The section does not, therefore, constitute unfair discrimination.[354] The *Harksen* case sets out the basis for any enquiry as to whether the equality provision has been violated; it is authoritative in regard to the analytical process to be undertaken when a provision of an act is being challenged. This is so even though it concerned the provisions of the interim Constitution.[355]

The test for whether a provision constitutes unfair discrimination, therefore, lies at the heart of the equality enquiry. This test primarily assesses the impact of the discrimination from the point of view of the person alleging the discrimination.[356] The test as pronounced in *Harksen* is largely based on a Canadian judgment which states that the nature of the group which is adversely affected by the discrimination must be taken into account as well as the nature of the interest in question.[357]

[351] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 58.
[352] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 59.
[353] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 62.
[354] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 68.
[355] Clegg, Arendse, Williams 'Silke on Tax Administration' Lexis Nexis Online at 3.9.
[356] Freedman 'Understanding the Right to Equality' (1998) South African Law Journal 115 at 250.
[357] Freedman 'Understanding the Right to Equality' (1998) South African Law Journal 115 at 250.

Kruger commended the court's approach to unfair discrimination for its focus on the impact of the unfair discrimination on the person alleging the harm in that the person must show that the differentiating treatment impaired his or her dignity or that it affected him or her in a comparably serious manner.[358] This approach reflects a substantive view of equality as opposed to a formal approach which takes social and economic conditions of groups and individuals into consideration when determining the meaning of equal treatment. Substantive equality takes into consideration the lived realities of people and not just a more theoretical approach which may have been the case if a more formal approach was adopted.[359]

Another case which deals with the equality clause is the matter of *Prinsloo v Van der Linde*.[360] The applicant in this matter challenged the constitutionality of section 84 of the Forest Act.[361] This section creates a presumption of negligence where a fire occurs on land outside of a fire control area. This matter came about as a result of action that was instituted against the applicant by the first respondent in the trial court. It was alleged by the first respondent that a fire that originated from the taxpayer's farm caused damage on the first respondent's farm.[362] The court dealt with the issue of equality in depth in this matter.

Counsel for the applicant argued that there is a differentiation between defendants (the applicant in this court) in veld fire cases and ordinary delictual matters; in ordinary delictual matters the plaintiff must prove his case and there is no presumption of guilt on the part of the defendant whereas the onus is reversed in certain veld fire cases.[363] The second point argued by counsel for the applicant was that the Forest Act differentiated between fires that originated in fire controlled areas, where there is no presumption of negligence, and fires which originated outside of fire controlled areas, where there is a presumption of negligence.[364]

The court, in referring to section 8 of the interim Constitution, stated that the concept of equality is referred to in two different ways. Firstly, section 8(1) is described positively as the right to equality before the law. Section 8(2) is framed negatively in that no person may be unfairly discriminated against.[365] In other words, differentiation is dealt with in two ways; firstly,

[358] Kruger 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) South African Law Journal Vol. 128 at 489.
[359] Kruger 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) South African Law Journal Vol. 128 at 490.
[360] CCT 4/96.
[361] 122 of 1984.
[362] *Prinsloo v van der Linde* CCT 4/96 at para 3.
[363] The opposite holds true for ordinary veld fires.
[364] *Prinsloo v van der Linde* CCT 4/96 at para 16.
[365] *Prinsloo v van der Linde* CCT 4/96 at para 22.

differentiation which does not involve unfair discrimination and secondly differentiation which involves unfair discrimination.

This case also dealt with the concept of substantive equality where it stated that a government must regulate the affairs of its people for the common good and that this could only be done with differentiation which treats different classes of people differently and impacts on them differently.[366] In order for mere differentiation, that is differentiation without unfair discrimination, to infringe the equality clause in the Constitution, it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which it is meant to achieve.[367]

Relating this to the matter at hand, I must establish whether there is differentiation that results in the equality clause of the Constitution being infringed; that there is no rational relationship between the different treatment of resident and non-resident taxpayers and the purpose which this differentiation is meant to achieve is not justifiable. I must consider the important principle which this case dealt with in relation to the matter at hand. If there is differentiation and no legitimate governmental purpose for the differentiation then the provision would be unconstitutional, subject to the limitation clause as contained in section 36 of the Constitution.[368] However, even if there is a rational relationship between the differentiation and the provision, the provision may still constitute unfair discrimination and be unconstitutional.

The case goes on to deal with the unfair discrimination provision, section 8(2) of the interim Constitution. The court held that while the section lists certain grounds which, if present, would result in a presumption of unfair discrimination, the listed grounds are not the only grounds which would constitute unfair discrimination.[369] The words 'without derogating from the generality of this provision' make it clear that the specified grounds are not exhaustive. It was held that unfair discrimination is present where people are treated differently in a way which

[366] *Prinsloo v van der Linde* CCT 4/96 at para 24. See also Jagwanth in 'Expanding equality' (2005) Acta Juridica Vol. 1 at 133 where it was stated that related to the concept of indirect discrimination is the notion of asymmetry inherent in substantive equality. This entails the non-identical treatment of different groups to address the differences between them. Further, that equality is not only breached when people in analogous situations are treated differently but also in the failure to treat persons with significantly different circumstances differently. Not all differentiations or distinctions are, therefore, problematic and may in certain circumstances be necessary to ensure equal treatment of persons.
[367] *Prinsloo v van der Linde* CCT 4/96 at para 26.
[368] *Prinsloo v van der Linde* CCT 4/96 at para 26.
[369] *Prinsloo v van der Linde* CCT 4/96 at para 28.

impairs their fundamental dignity as human beings who are inherently equal in dignity.[370] In addition, other forms of differentiation which adversely affect people in a comparably serious manner may also constitute a breach of section 8(2) of the interim Constitution.[371]

The court stated that it was necessary to first enquire whether the necessary rational relationship existed between the purpose sought to be achieved by section 84 of the Forest Act and the means sought to achieve it.[372] An attack on the constitutionality of a provision will not succeed if it simply relies on the fact that the governmental objective could have been achieved in a different manner.

Relating these principles to this scenario it would need to be shown, in order to prove unfair discrimination, that the different effective tax rates for residents and non-residents impairs the fundamental human dignity of the resident taxpayer. In addition, the party alleging the breach of the right to equality would need to show more than the government could have achieved their objectives in another manner. It would need to be shown that their rights have been infringed.

It was held that the purpose of the Forest Act is to prevent fires. The state was said to have a strong and legitimate interest in preventing veld fires. This is achieved by setting up fire control areas which are regulated in terms of the Forest Act. This Act establishes what needs to take place to ensure a reduction in the risk of fires starting and spreading; this is achieved in a non-controlled area by inducing relevant parties to perform tasks, on a voluntary basis, so as to reduce the risk of the start and spread of veld fires.[373]

The logic behind reversing the onus to that of the defendant in the case of a fire outside of a controlled area was stated as being that it would be very difficult for a plaintiff to show where a fire originated; the person whose land a fire spreads from is in a much better position to show how and where the fire originated and the manner in which the fire was dealt with. In addition, a person who has suffered damage as a result of a fire that has spread from neighbouring land will not be in a position to conduct an investigation as the origin of the fire.[374]

[370] *Prinsloo v van der Linde* CCT 4/96 at para 31.
[371] *Prinsloo v van der Linde* CCT 4/96 at para 33.
[372] *Prinsloo v van der Linde* CCT 4/96 at para 35.
[373] *Prinsloo v van der Linde* CCT 4/96 at para 39.
[374] *Prinsloo v van der Linde* CCT 4/96 at para 40.

The court held that there can be no doubt that a rational relationship has been demonstrated between the purposes sought to be achieved by section 84 and the means chosen to do so.[375] However, the court still needs to decide whether unfair discrimination was present. It was stated that the above-mentioned differentiation cannot be said to impair the dignity of the owner of land outside of a fire control area. Nor could it be said that the differentiation adversely affects these landowners in a comparably serious manner. As such there was no unfair discrimination and no breach of section 8(1) or 8(2) of the interim Constitution was established.[376]

As stated above, the *Prinsloo* case stated that unfair discrimination would need to impair a person's dignity or affect people in a manner that is comparable to the undermining of their fundamental dignity. However, this case did not provide clarification of what was meant by this statement.[377]

Kruger argues that the statement in *Prinsloo* could be elaborated on in order to get a proper understanding as to what is meant by affecting a person's dignity; the bald statement as provided in *Prinsloo* does not provide sufficient detail that would enable a person to determine whether they would pass this test of the offending provisions affecting them in a way that is comparable to impairing their dignity. Kruger[378] states that in order to determine whether the dignity of a person has been harmed in a constitutionally objectionable fashion, one needs to ascertain the following:

a) Whether the discriminatory provision is based on a stereotype or prejudice;
b) Whether it perpetuates oppressive power relations; or
c) Whether it diminishes the feelings of self-worth of the affected person.

A third case relating to the equality clause that is worthwhile considering is the matter of *President of the Republic of South Africa v Hugo*.[379] This matter relates to an application brought by a male prisoner who challenged the President of the Republic of South Africa's decision to give an early release to female prisoners who had minor children under the age of 12 years.[380] It was alleged that by not extending the same early release conditions to male prisoners who had children under the age of 12 years, the male prisoners were being unfairly

[375] *Prinsloo v van der Linde* CCT 4/96 at para 40.
[376] *Prinsloo v van der Linde* CCT 4/96 at para 41.
[377] Kruger 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) South African Law Journal Vol. 128 at 501.
[378] Kruger 'Equality and Unfair Discrimination: Refining the Harksen Test' (2011) South African Law Journal Vol. 128 at 509.
[379] CCT 11/96.
[380] *President of the Republic v Hugo* CCT 11/96 at para 2.

discriminated against. This contention was brought on the grounds that the male prisoner's right to equality had been contravened.[381]

While this case had nothing to do with tax, there were some important statements that were made regarding a person's right to equality and unfair discrimination in terms of the Constitution that are relevant to this thesis.

Goldstone J stated the following:

> 'The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that.' [382]

In other words, just because the individuals who were discriminated against do not belong to a group that was not historically disadvantaged does not necessarily mean that the discrimination is fair.[383] It was held that in order to determine whether discrimination is unfair one needs to not only look at the group who have been disadvantaged but also at the nature of the power in terms of which the discrimination was effected as well as the nature of the interests which have been affected by the discrimination.[384]

In this light the court considered the purpose of the presidential pardon and the importance that it serves in society. It was stated that the pardon is important in order to correct mistakes made in convicting a person, reduce excessive sentences and that it may be used as a means to confer mercy upon individuals when the President thinks it will be in the public interest for a pardon to be given.[385] In this case, the President felt that it was in the public interest to release mothers who had minor children under 12 years so as to enable the mothers to take care of their children. It was held that it would be have been nearly impossible for the President to extend the pardon to fathers who had children under 12 years. This is because male prisoners out number female prisoners almost fiftyfold; a release of fathers would have meant a very large number of male prisoners gaining early release. This would not have been in the public interest to do so as many fathers play a secondary role in child rearing and the purpose of the President's pardon was

[381] *President of the Republic v Hugo* CCT 11/96 at para 3.
[382] *President of the Republic v Hugo* CCT 11/96 at para 41.
[383] *President of the Republic v Hugo* CCT 11/96 at para 40.
[384] *President of the Republic v Hugo* CCT 11/96 at para 43.
[385] *President of the Republic v Hugo* CCT 11/96 at para 45.

essentially for the benefit of the children who would greatly benefit in having their mothers at home to take care of them.[386]

While male prisoners were said to be at a disadvantage in comparison to female prisoners, it could not be said that this disadvantage fundamentally impaired their rights as fathers in any permanent manner or sense of equal worth. This discrimination was held not to be unfair.[387]

O' Reagan J, in her minority judgment, added some important thoughts on the concept of unfair discrimination. She stated that it is necessary to look at the groups being discriminated against and the effect that this discrimination has had on them; in this regard, the more vulnerable the group affected, the more likely the discrimination will be regarded as being unfair.[388] She held that the impact of the discrimination in this instance that was suffered by the fathers was far from severe. It must be kept in mind that it was the fathers' own actions that put them in prison in the first place; an early remission from a prison sentence is not a right they are entitled to. She concurred that the discrimination was not unfair.

Relating these principles to the matter at hand, it is obvious that resident taxpayers have not done anything wrong to have resulted in being taxed at higher rates than non-residents; they are being taxed at higher rates as a result of an inherent characteristic. Further, the nature of the residents' rights affected relate to their right to equality being impaired as they are required to pay more tax on the same amount of taxable income as a non-resident. This is a severe constraint on the residents' rights; it is not a minor infringement and can be said to fundamentally impair their rights.

The other consideration to be extracted from this case is the public interest. Is it in the public interest to tax residents at higher effective tax rates to non-residents? The state would probably argue that it is in the public interest to encourage foreign investment in the country by way of reduced tax rates for non-residents taxpayers. However, as is shown below, tax incentives are generally not a major reason for people to invest in a country; on the other hand it is most certainly in the public interest that people living in South Africa do not suffer tax discrimination because they consider South Africa to be their home.

[386] *President of the Republic v Hugo* CCT 11/96 at para 46.
[387] *President of the Republic v Hugo* CCT 11/96 at para 47.
[388] *President of the Republic v Hugo* CCT 11/96 at para 114.

4.4 Tax cases dealing with the Constitution

There have been a limited number of cases that have dealt with the constitutionality of various sections of one of the tax acts;[389] one relates directly to the Constitution and equality although it does not deal directly with a tax act. The principles dealt with in this case are relevant to the matter being dealt with in this chapter. I now discuss the case of *The City Council of Pretoria v Walker*[390] in detail.

This case dealt with an individual (Walker) living in a predominantly white area in Pretoria (old Pretoria) who felt aggrieved by the systems that were being implemented by the city council which he alleged treated people from the predominantly black areas of Pretoria (Mamelodi) better than people from old Pretoria.

Walker essentially attacked two processes that the city council had undertaken since the beginning of the democratic era. These were as follows:

a) The people in old Pretoria areas were being charged local government services at a metered rate, whereas the people in Mamelodi were being charged for government services at a flat rate. It was alleged that this meant that the people in old Pretoria were charged more for these services than the people living in Mamelodi; and
b) The city council only took recovery steps against people who owed the city council from old Pretoria, whereas the city council did not institute legal action against people in Mamelodi no matter how much was owed.[391]

On the basis of the above two points, Walker alleged that the conduct of the city council amounted to unfair discrimination in breach of section 8 of the interim Constitution. The question that the court had to decide, therefore, was whether unfair discrimination existed in this matter.

The court set out that the decision by the city council not to apply the consumption-based method in Mamelodi, but rather to operate on a flat basis was a temporary measure whilst the local government set about installing metres in the homes of those living in Mamelodi. These

[389] The other cases relating to the Constitution will not be dealt with in detail, but the principles will be applied later in this chapter in the application of the principles to this scenario. These include *Metcash Trading Ltd v Commissioner for South African Revenue Service*, *Hindry v Nedcor Bank Ltd* and *Law Society of Zimbabwe v Minister of Finance.*
[390] CCT 8/97.
[391] *The City Council of Pretoria v Walker* CCT 8/97 at para 6.

metres were set up in old Pretoria but not in Mamelodi at this point.[392] The council was at this point in the process of attempting to install metres in all of the houses in Mamelodi.

The court held that in determining whether section 8 of the interim Constitution has been breached, the court must keep in mind the wording of the section as well as the constitutional and historical context of developments in South Africa.[393] It went on further to state that not all differentiation amounts to discrimination.[394] The court had to decide whether the differentiation in this case violated the rights protected by section 8 of the interim Constitution.[395] The court referred with approval to *Prinsloo,* as mentioned above, where it was stated that differentiation needs to serve a legitimate governmental purpose and that the state must act in a rational manner.[396] The court then held that the differentiation in this matter was rationally connected to a legitimate governmental purpose. This was because the measures implemented were temporary and that this process was needed to ensure that there would eventually be equality in terms of facilities and resources between old Pretoria and Mamelodi.[397]

As stated in *Harksen,* what then needed to be determined was whether there was unfair discrimination in terms of section 8(2) of the interim Constitution. The court stated that section 8(2) specifically states that both direct and indirect discrimination is prohibited and that this was the first time that the courts have had to deal with the distinction between direct and indirect discrimination.[398] Importantly for the purposes of this thesis, the court went on to state the following:

[392] *The City Council of Pretoria v Walker* CCT 8/97 at para 21.
[393] *The City Council of Pretoria v Walker* CCT 8/97 at para 26.
[394] *The City Council of Pretoria v Walker* CCT 8/97 at para 26.
[395] There was no debate on whether the actions by the city council amounted to differentiation. It was accepted that there was differentiation.
[396] *The City Council of Pretoria v Walker* CCT 8/97 at para 27.
[397] *The City Council of Pretoria v Walker* CCT 8/97 at para 27.
[398] *The City Council of Pretoria v Walker* CCT 8/97 at para 27. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 238 where it they state that the prohibition of indirect discrimination is based on the fact that although, on the fact of it, discrimination may appear to have no impact, that the actual impact of effect of the discrimination is discriminatory.

> 'The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinces a concern for the consequence rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of section 8(2).'[399]

Langa DP went on to state that the conduct of the council which resulted in the different treatment of residents of Mamelodi, which is predominantly a black area, and old Pretoria, which is predominantly a white area, constituted indirect discrimination on the grounds of race. The fact that the differential treatment resulted from people's living in different geographic locations rather than persons of a particular race meant the discrimination was indirect rather than direct.[400] The concept of direct and indirect discrimination is very important to this thesis, as the discrimination that is being suffered by residents is as a result of indirect discrimination in that it seems, on face value, that they are being taxed at the same statutory rates as non-residents.

The discrimination was held to be on a listed ground, even though it was indirect indiscrimination. There was a presumption that the discrimination was unfair and it was for the council to rebut this presumption.[401]

Another important point that was made by Langa DP was that there is no provision in section 8(2) of the interim Constitution that requires that the party alleging unfair discrimination to prove that there was an intention on the part of the legislature to discriminate. Proof of an intention to discriminate is not a requirement to prove that there has been 'unfair discrimination'.[402]

The court went on to consider whether unfair discrimination was prevalent in this matter. The following factors were considered:

a) The position of the respondent in society;[403] and
b) The nature and the purpose of the power.[404]

[399] *The City Council of Pretoria v Walker* CCT 8/97 at para 31. This principle was approved by Jagwanth in 'Expanding equality' (2005) Acta Juridica Vol. 1 at 133.
[400] *The City Council of Pretoria v Walker* CCT 8/97 at para 32.
[401] *The City Council of Pretoria v Walker* CCT 8/97 at para 35-37.
[402] *The City Council of Pretoria v Walker* CCT 8/97 at para 43.
[403] *The City Council of Pretoria v Walker* CCT 8/97 at para 45.
[404] *The City Council of Pretoria v Walker* CCT 8/97 at para 49.

The court took all of the relevant factors of the matter into account and stated that factors, such as there was no reasonable alternative than to charge a flat rate to Mamelodi residents and that to have charged a flat rate to both Mamelodi and old Pretoria residents at a time where not all residences in Mamelodi had metres would have been unscientific and would have resulted in a far greater prejudice to individual users than the application of the flat rate only in Mamelodi.[405] The use of a flat rate in Mamelodi as a temporary measure until every property had metres was the only practical solution to this entire issue.

The court concluded, with regard to the flat rate, that Walker was not adversely affected in any material way by the flat rates being utilised in Mamelodi but not Pretoria. There was no invasion of his dignity nor was he affected in a manner comparably serious to an invasion of his dignity.[406] However, the court saw the issue of selective enforcement of city council debts in a different light.

As mentioned above, the city council instituted legal action for non-payment of services to residents of old Pretoria but not of Mamelodi. The decision not to sue anyone from Mamelodi was a blanket decision; it did not matter whether a resident of Mamelodi actually had the finances to pay for the services or not.[407]

In essence the court held that the city council was treating white residents of its jurisdiction differently to black residents to the detriment of the white residents. As such, the actions of the city council would have affected the white residents in a manner which is at least comparably serious to an invasion of their dignity. This action was, therefore, held to amount to unfair discrimination within the meaning of section 8(2) of the interim Constitution.[408]

Sachs J wrote the dissenting judgment in this case. He discussed indirect discrimination in some detail and while his judgment of the matter as a whole does not carry the weight of the majority judgment, it is worth noting some of his comments on indirect discrimination as the potential discrimination dealt with in this thesis constitutes indirect discrimination.

Sachs J stated that while it is not a requirement of proving indirect discrimination that intention to discriminate is required, the measure which may constitute unfair discrimination must impose identifiable disabilities, burdens or inconveniences or threaten to touch on or reinforce

[405] *The City Council of Pretoria v Walker* CCT 8/97 at para 53.
[406] *The City Council of Pretoria v Walker* CCT 8/97 at para 68.
[407] *The City Council of Pretoria v Walker* CCT 8/97 at para 78.
[408] *The City Council of Pretoria v Walker* CCT 8/97 at para 81.

patterns of disadvantage or threaten a person's dignity in a concrete manner.[409] He went on further to state:

> 'The concept of indirect discrimination, as I understand it, was developed precisely to deal with situations where discrimination lay disguised behind apparently neutral criteria…'[410]

The principles that have been dealt with in this case are of utmost importance in the matter at hand; determining whether it is constitutionally permissible to tax residents and non-residents at different effective tax rates. While this case does not deal directly with a tax law, the principles can be easily and appropriately applied to a tax law as it deals with a similar type of discrimination that may be suffered by a taxpayer. The principles as stated in this case will be applied to the scenario at hand below.

The *City Council* case was the first time that the Constitutional Court had to consider the difference between direct and indirect discrimination and whether such a difference had a bearing on the equality clause.[411] The judgment stated that the conduct of the council amounted to indirect discrimination on the basis of race; the fact that the differential treatment was applicable to geographic areas rather than persons of a particular race meant that the discrimination was not direct.[412]

However, the court drew artificial comparisons by looking at the issue solely from the basis of geography; the effect of apartheid laws meant that geography and race are linked.[413] In addition, the court questioned for the first time whether intention has any relevance in determining unfairness. The majority held that intention in the determination of fairness would not be considered in South Africa; instead what is to be concentrated on is the interplay between the discriminatory measure and the person or group affected by it.[414]

[409] *The City Council of Pretoria v Walker* CCT 8/97 at para 113.
[410] *The City Council of Pretoria v Walker* CCT 8/97 at para 115.
[411] Agherdien 'City Council of Pretoria v Walker 1998 (2) SA 363 (CC)' (1999) 15 South African Journal on Human Rights at 248.
[412] Agherdien 'City Council of Pretoria v Walker 1998 (2) SA 363 (CC)' (1999) 15 South African Journal on Human Rights at 251.
[413] Agherdien 'City Council of Pretoria v Walker 1998 (2) SA 363 (CC)' (1999) 15 South African Journal on Human Rights at 251.
[414] Agherdien 'City Council of Pretoria v Walker 1998 (2) SA 363 (CC)' (1999) 15 South African Journal on Human Rights at 252.

Agherdien states further that Walker's requested remedy could be seen under the umbrella of his right to equality and equal protection before the law. It should not have mattered whether Walker was seeking the enforcement of debt collection or the non-enforcement thereof. Both scenarios lead to the same conclusion.[415]

The Constitutional Court was correct in not defining the concept of indirect discrimination due to the complexity of the issue; the definition of indirect discrimination will always depend on the circumstances of the case. The court added to our jurisprudence on indirect discrimination by stating that intention to discriminate is not necessary and each case must be decided objectively on its own facts.[416]

The court in this case chose to categorise the differentiation between the parties on the listed ground of race, rather than the unlisted ground of geographical location. This distinction was crucial to the court's finding that there had been unfair discrimination as the council was unable to rebut the presumption of unfairness that was triggered as a result of the differentiation being on a listed ground.[417]

While a taxpayer in theory has the right to challenge the constitutionality of any income tax provision that it feels will not pass constitutional muster, none of the cases brought before the Constitutional Court to date have gone in the way of the taxpayer.[418]

Silke states that our courts have taken the view that the provisions of the Income Tax Act that are contrary to the provisions of the constitutional rights of the taxpayer are often justifiable as the state needs to recover taxes promptly and allow the state to gain access to the assets of the taxpayer.[419] There is a fine line between the taxpayer's rights under the Constitution and the need for the state to be able to collect taxes due to them.

[415] Agherdien 'City Council of Pretoria v Walker 1998 (2) SA 363 (CC)' (1999) 15 South African Journal on Human Rights at 254.
[416] Agherdien 'City Council of Pretoria v Walker 1998 (2) SA 363 (CC)' (1999) 15 South African Journal on Human Rights at 255.
[417] Jagwanth 'What is the Difference – Group Categorisation in Pretoria City Council v Walker 1998 (2) SA 363 (CC)' (1999) 15 South African Journal on Human Rights 200.
[418] Van Schalkwyk 'Constitutionality and the Income Tax Act' (2001) 9 Meditari Accountancy Research at 294. This point is still true to this day, no taxpayer has successfully had a provision of a tax act declared unconstitutional.

[419] Silke 'Tax Payers and the Constitution: A Battle Already Lost' (2002) Acta Juridica at 334.

4.5 The right to equality in terms of tax laws

There are very few South African judgments dealing with a taxpayer's rights in terms of the Constitution.[420] Only the *City Council* case, to an extent, deals with a taxpayer's right to equality.[421] Croome deals with the right to equality in relation to tax in some detail and has considered various sections of various tax acts which may breach this right to equality.

Croome states the following:

> 'If the legislature wishes to limit any right contained in the Constitution the right must be limited in such a way that the limitation applies equally to all citizens. It is submitted that it is not lawful, for example, for taxing regulations to be introduced where the regulations only apply to a section of the community.'[422]

Croome states further[423] that it is critical that all taxpayers are treated equally and that no group is preferred over another; ideally taxpayers in the same position should be treated in the same way.[424] However, it must be noted that just because a fiscal statute differentiates between taxpayers on some or other basis does not mean that the differentiation constitutes unfair discrimination.[425] If a fiscal statute results in different consequences for taxpayers, that provision will not violate the equality clause where the provision has a legitimate purpose and there is a rational connection between that purpose and the differentiation.[426] Further to this, if the purpose of a provision is to achieve a valuable societal goal it will not constitute unfair discrimination.[427]

Croome deals with various aspects of our tax laws that may, upon further consideration, infringe a taxpayer's right to equality. While these areas of tax are not directly related to the type of tax that is being discussed in this thesis, these scenarios set a good background and establish a point of departure for considering the relationship between the right to equality and our tax laws. It is useful to consider how other authors deal with the topic of whether a tax

[420] The *City Council* judgment as detailed above does not deal specifically with a piece of tax legislation, but rather with local council rates. These rates are not levied in terms of one of the tax Acts so it cannot be considered to be a case dealing with equality in terms of a tax Act.
[421] Goldswain 'Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law' (2011) Vol 15 No.2 1 at 2.
[422] Croome 'Constitutional law and Taxpayers' rights in South Africa – an Overview' (2002) Acta Juridica 1 at 8.
[423] Croome 'Constitutional law and Taxpayers' rights in South Africa – an Overview' (2002) Acta Juridica 1 at 15.
[424] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 80.
[425] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 78.
[426] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 78.
[427] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 79.

provision may be said to breach the right to equality. Certain of these relevant to this work are as follows:[428]

i. Do the concessions made to persons over 65 unlawfully violate the right to equality?

Not all taxpayers are treated equally. For example, persons over the age of 65 are entitled to certain tax benefits that are not available to people under the age of 65 years. The following tax benefits are available to people over the age of 65 years:

a) An increased rebate,[429] known as a secondary rebate, for persons over the age of 65 years and a tertiary rebate for persons over 75 years;
b) A person over 65 years is entitled to an additional medical credit;[430] and
c) An increased interest exemption threshold.[431]

While it is obvious that the above provisions discriminate against taxpayers under the age of 65 years, these provisions are probably constitutional as older persons need additional tax benefits as a result of their probable reduced levels of income as discussed earlier.[432] In addition, as a person grows older, the more likely it is that their medical expenses will increase. This combined with the fact that these medical expenses may have a greater financial burden than on younger working taxpayers warrants the government taking measures to protect these taxpayers.[433]

[428] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 84. Croome deals with scenarios that could be compared to the aim of this chapter. All of the scenarios which Croome deals with were considered for inclusion, however most of the scenarios were deemed to not add value to the purpose of this chapter. Examples of other scenarios that were detailed by Croome but were not considered to add value to this chapter are: Does the current definition of 'spouse' in the Income Tax Act comply with the right to equality? Does the wide definition of 'connected person' in the Income Tax Act breach the right to equality? Does the difference in treatment of interest paid to and by SARS violate the right to equality? Does the failure to publish all Tax Court decisions violate the right to equality? Does the purchase of property which costs less than R500 000 from a VAT registered vendor not unfairly discriminate? The scenarios which Croome deals with that would add value to the aim of this chapter have been considered.

[429] A rebate is a reduction in a natural person's tax liability. In terms of section 6 of the Income Tax Act, every individual is automatically entitled to a primary rebate which reduces the amount of tax payable for that person for the tax year; this is in the sum of R14 220 for the 2020 tax year. The secondary rebate increases the primary rebate by R7713 for the tax year and the tertiary rebate increases the rebate a further R2574 for the tax year.

[430] In terms of section 6B of the Income Tax Act a natural person over the age of 65 years is entitled to an additional medical expenses tax credit. This entitles the person to an increased medical credit in comparison to persons under 65 years which reduces a person's tax liability if certain requirements are met.

[431] In terms of section 10(1)(i) of the Income Tax Act, natural persons under 65 years are entitled to receive R23 800 interest per tax year which is exempt from taxation. Persons over 65 years are entitled to receive R34 500 interest per tax year which is exempt from taxation.

[432] Goldswain 'Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law' (2011) Vol 15 No.2 1 at p15.

[433] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 101.

Given that these sections of the Income Tax Act that differentiate on the basis of age are discriminatory, I must consider whether this discrimination is unfair. In this regard, the purpose of the relief in terms of both the additional medical credit and the secondary and tertiary rebates is to confer relief on those taxpayers who are in need of assistance. Croome holds the view that the limitations are justifiable in an open and democratic society. In further support of this argument is that the younger taxpayer who is being discriminated against today will be provided with that relief when he or she reaches 65 years; it is therefore a temporary limitation.[434]

Finally, with regard to the increased interest threshold, Croome states that such relief is also justifiable as it assists taxpayers in their twilight years and that older people are more likely to derive a greater amount of interest than other taxpayers.[435]

It is my view that if the above provisions were to be subjected to constitutional scrutiny that they would be found to discriminate on a listed ground and there would therefore be a presumption of unfairness. However, the provisions would probably be justifiable under section 36 of the Constitution due to the need to provide an increased tax benefit to older persons as has already been discussed.[436] If the state does not provide greater tax benefits to retired persons, the state will be forced to take care of these people through government institutions such as hospitals. As most South Africans have not saved enough for retirement, [437] it is justifiable for this group of people to be given additional tax benefits.

It is important to consider other aspects of our tax law where people are not treated equally in order to get a more holistic view of the current situation. By considering other scenarios, it can be determined the type of arguments that can be considered in arguing both for and against a provision which treats taxpayers differently.

[434] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 102.
[435] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 102.
[436] This view is supported by Van Schalkwyk 'Constitutionality and the Income Tax Act' (2001) 9 Meditari Accountancy Research at 294.
[437] Businesslive 'Two out of three of us are not saving for retirement' available at http://tiny.cc/xfwscz, accessed 15 September 2019.

ii. Does the difference in treatment of trusts with regard to non-resident beneficiaries illegitimately violate the right to equality?

A South African discretionary trust cannot distribute a capital gain made by the trust to a non-resident beneficiary.[438] This results in the non-resident beneficiary indirectly paying more tax on the distribution of a capital gain from the disposal of a fixed property than a resident beneficiary.[439]

Section 9(3) does not list the taxation of residents and non-residents as a ground of discrimination.[440] This discrimination does not, therefore, violate a listed ground of discrimination.

In this regard Croome states that while the discrimination is not on a listed ground, the taxpayer may be able to show that the discrimination occurs on an analogous ground.[441] The taxpayer could argue that para 80(2) of the Eighth Schedule is unjustifiable on the basis that there should be no distinction between residents and non-residents in this regard. However, the state would probably be able to show that the provision is reasonable. It is the norm for global tax authorities to have special provisions relating to trusts[442] and that the state seeks to extract more from trusts than other taxpayers. A taxpayer would, therefore, have difficulty in showing that the limitation was unjustifiable in terms of section 36 of the Constitution.[443]

This example provided by Croome deals with a non-resident taxpayer being discriminated against in terms of our tax laws. While this is the opposite to what I consider in this thesis, it is relevant to consider aspects of our tax law which result in the differing tax treatment of people based on their tax residency as well as the possible arguments that could be used to justify such a discrimination. The state may attempt to use the argument for our scenario that it is the norm in international tax to treat tax residents and non-residents on a different basis. However, the government would struggle to successfully use this particular argument in this scenario as the non-resident is being taxed at higher rates as opposed to residents. This type of tax

[438] Paragraph 80(2) of the Eighth Schedule to the Income Tax Act.
[439] This is because the inclusion rate of a capital gain into taxable income for an individual is 40 per cent whereas it is 80 per cent for a trust; this is in terms of paragraph 10 of the Eighth Schedule to the Income Tax Act. This will result in the non-resident paying more tax than the resident taxpayer on a capital gain that is earned by a trust and distributed to a beneficiary as the trust will pay tax on the capital gain as opposed to the individual who is a resident.
[440] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 103.
[441] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 103.
[442] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 103.
[443] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 103.

differentiation which is to the detriment of non-residents is actually in favour of the argument put forth in this thesis. This is because non-residents are being taxed at higher rates of taxation than residents on gains made from the disposal of immovable property under this law.

As part of this thesis deals with tax rates payable by non-residents on the disposal of immovable property, this particular type of tax on non-residents supports the argument that non-resident taxpayers should certainly not be paying less tax on the disposal of immovable property than residents as there is already a law in existence which results in non-residents paying more tax than residents are paying on the disposal of immovable property; albeit that the gain is being made through a trust.

iii. Does the exemption of interest earned by non-residents violate the right to equality?

South African taxpayers are liable to tax in South Africa on their worldwide income.[444] However, non-resident taxpayers are exempt from paying tax on interest earned in South Africa in terms of section 10(1)(h) of the Income Tax Act.[445]

The decision to exempt non-residents from tax on interest in South Africa does not discriminate on a prohibited grounds in terms of section 9(3) of the Constitution. However, the exemption takes account of the tax residency status of an individual to determine whether tax is payable in South Africa. Croome states that this constitutes discrimination on an analogous ground as it takes characteristics of the taxpayer into account; whether the individual is tax resident in the country or not.[446]

It is therefore important to consider this provision; by considering an area of our tax law which also potentially discriminates on a ground that is not listed as well as a ground which treats resident taxpayers differently to non-resident taxpayers. It must consider how other areas which differentiate in a similar manner compares with our scenario.

It is submitted that this type of discrimination is unfair as people are being treated differently as a result of their tax residency; the non-resident taxpayer receives a financial advantage over

[444] As per the definition of 'gross income' as contained in section 1 of the Income Tax Act.
[445] This is provided that the non-resident is a natural person and does not spend more than 183 days in South Africa during that year.
[446] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 112. As per the definition of 'resident' as contained in section 1 of the Income Tax Act, a person can either be ordinarily resident in South Africa or a resident in terms of the physical presence test. The general rule is that a person is considered ordinarily resident if he or she considers South Africa as their home. As per the definition of 'resident', the physical presence test is dependant on the individual staying a certain amount of days within South Africa but a person cannot be a tax resident of South Africa if he or she is tax resident of another country in terms of a double taxation agreement.

a resident taxpayer of South Africa. There is currently a fifteen per cent withholding tax on interest paid to non-residents which is separate to the interest exemption mentioned above.[447] However, there is also an exemption from the withholding tax for interest earned from a South African bank or the South African government.[448]

Croome states that if there were a final withholding tax of, say, ten per cent on interest derived by non-residents that this would largely remove the unfairness of the exemption.[449] Due to the exemption from the interest withholding tax on interest received from South African banks and the South African government, the argument made by Croome pertaining to the exemption constituting unfair discrimination is, therefore, still relevant.

Croome considers whether this interest tax exemption is justifiable in terms of section 36 of the Constitution. National Treasury's argument would be that it is fair to not levy a tax on a non-resident for interest earned in South Africa as it is international practice to do so.[450] A more important basis of justification is that if a tax were levied on non-residents on interest earned in South Africa that interest rates in South Africa would rise.[451]

Croome argues that while the distinction made between residents and non-residents constitutes unfair discrimination under the right to equality, there is a rational reason for maintaining this exemption. Section 10(1)(h) would be saved by section 36 of the Constitution and would not be unconstitutional.[452]

The author disagrees with Croome's views on this matter. While there may be a rational reason for taxing residents and non-residents at different rates, the discrimination that is suffered by the resident outweighs the argument that it is international practice to do so. A person's fundamental right to equality is more important than international practice. The better argument would be that interest rates would rise in South Africa if this exemption was scrapped; this is discussed more fully under 4.6 below.

[447] In terms of section 50 of the Income Tax Act.
[448] Section 50D of the Income Tax Act.
[449] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 112. Section 50 of the Income Tax Act was introduced after Croome published his book.
[450] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 112.
[451] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 112. This is because foreign lenders would require a greater gross rate of interest to preserve their after-tax position. There would in addition be further detrimental effects to the South African economy such as an increase in financing costs to business in the country.
[452] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 113.

iv. If non-residents enjoy treaty relief on the new dividend withholding tax, does that not unfairly discriminate against resident taxpayers?

There currently is a dividends withholding tax that is payable on a dividend received from a South African company;[453] it doesn't matter whether the dividend is paid to a resident or to a non-resident, the withholding tax is levied at the same rate. However, this may change where the individual receiving the dividend is resident of a country which South Africa has a double taxation agreement with, and the double taxation agreement reduces the amount of dividends withholding tax that is payable. For the purposes of this thesis, it would be useful to consider the dividend tax rates for the countries of comparison.

a) Australia

In terms of Article 10 of the double taxation agreement between South Africa and Australia,[454] if a South African company pays dividends to an Australian tax resident South Africa has taxing rights on this dividend but with the following restrictions:

i. The dividend tax may not exceed five per cent if the beneficial owner of the dividend is a company which directly holds at least ten per cent of the voting power of the company paying the dividends;

ii. The dividend tax may not exceed fifteen per cent in all other cases.

In other words, if an Australian individual holds shares in a South African company and the South African company pays a dividend to that individual, the dividends withholding tax would be fifteen per cent.

[453] This withholding tax is payable at a rate of twenty per cent in terms of section 64E of the Income Tax Act.
[454] South African Revenue Service 'Protocol Amending the Agreement between the Government of the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.' 2008.

b) Botswana

In terms of Article 10 of the double taxation agreement between South Africa and Botswana,[455] if a South African company pays dividends to a Botswana tax resident, South Africa has taxing rights on this dividend but with the following restrictions:

i. The dividend tax may not exceed ten per cent if the beneficial owner of the dividend is a company which directly holds at least 25 per cent of the voting power of the company paying the dividends; or

ii. The dividend tax may not exceed fifteen per cent in all other cases.

In other words, if a Botswana individual holds shares in a South African company and the South African company pays a dividend to that individual, the dividends withholding tax would be fifteen per cent.

c) The United Kingdom

In terms of Article 10 of the double taxation agreement between South Africa and The United Kingdom,[456] if a South African company pays dividends to a tax resident of the United Kingdom South Africa has taxing rights on this dividend but with the following restrictions:

i. The dividend tax may not exceed five per cent if the beneficial owner of the dividend is a company which directly holds at least ten per cent of the voting power of the company paying the dividends; or

ii. The dividend tax may not exceed fifteen per cent of a dividend paid by a property investment company; or

[455] South African Revenue Service 'Convention between the Government of the Republic of South Africa and the Government of the Republic of Botswana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains' 2004.
[456] South African Revenue Service 'Protocol Amending the Agreement between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Ireland to amend the convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains' 2012.

iii. The dividend tax may not exceed ten per cent in all other cases.

In other words, if an individual resident of the United Kingdom holds shares in a South African company and the South African company pays a dividend to that individual, the dividends withholding tax would be ten per cent.

As can be seen, non-resident shareholders from Australia, Botswana and the United Kingdom of South African companies who receive dividends from the South African company will pay a dividends withholding tax of either fifteen per cent (Australia and Botswana) or ten per cent (The United Kingdom). This is in contrast to a South African tax resident who would pay dividends withholding tax on the same dividends of twenty per cent. There is an obvious differentiation between resident taxpayers and non-resident taxpayers.

The question that arises is whether the reduction of the dividends withholding tax rate payable by non-residents discriminates unfairly against South African tax residents.[457] The distinction between a resident taxpayer and a non-resident taxpayer does not constitute discrimination on a listed ground in terms of section 9(3) of the Constitution. However, this type of distinction constitutes discrimination on an analogous ground.[458]

It is obvious that the non-resident is being treated preferentially in comparison with the resident; the question is whether this unfair discrimination can be justified in terms of the limitation clause as contained in section 36 of the Constitution.[459]

As the reduction in tax is as a result of the double taxation agreement, it is necessary to consider the purpose of the double taxation agreement. The double taxation agreement seeks to enhance and facilitate trade between states and this requires each state to yield certain taxing powers in favour of the other country which is party to the agreement.[460] It also requires both countries to negotiate tax rates in an effort to encourage bi-lateral trade.

The reduction in the dividends withholding tax rate is evidently unfair on the South African government as it reduces the amount of tax that it would have otherwise collected; it therefore probably increases the burden borne by resident taxpayers.[461] It is also manifestly unfair on

[457] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 118.
[458] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 118.
[459] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 118.
[460] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 118.
[461] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 118.

South African tax residents who are subject to higher tax rates on the same dividend than non-residents are.

As tax treaties are commonplace in international relations, a court may be satisfied that the right of equality has been violated but that the violation is not unlawful. This is because the conclusion of double taxation agreements by open and democratic societies often results in non-resident taxpayers incurring lower tax rates than resident taxpayers.[462]

Croome is of the view that it is unlikely that a taxpayer would be successful in convincing a court that a reduction in the rate of the dividend withholding tax unlawfully violates the taxpayer's right to equality. Section 36 will provide assistance to the state in establishing that the treatment is reasonable and justifiable as it relates to the relationship between states aimed at encouraging bi-lateral trade.[463]

This is another provision of our tax laws that discriminates against people based on their tax residency and is worthy of consideration. I posit that while the government would have a decent argument in terms of section 36 that double taxation agreements are the norm in international relations and such agreements often result in non-residents paying lower tax rates than residents, the stronger argument is that a person's right to equality outweighs the state encouraging trade and following international norms. The constitutional rights of the individual should outweigh the aspirations and practices of the state in this instance. The application of section 36 to a situation where an individual's right to equality has been infringed at the expense of the state is dealt with under 4.5. The argument made under 4.6 would also be applicable to this situation.

In addition, merely because other open and democratic societies implement certain tax rates does not in of itself justify South Africa doing the same thing. The state must show that the reasons for and results of taxing residents at lower rates are justifiable in the South African context taking into account the South African Constitution and the importance of the rights contained in the Bill of Rights. I believe that the state is unlikely to be able to show this and that if this type of provision were to be challenged it can be shown that the reduced taxation of dividends on non-residents would not be constitutionally justifiable.

[462] In an extreme example, the double taxation agreement between South African and Kuwait states that a dividend paid by a resident of South Africa to a resident of Kuwait is only taxable in Kuwait. In other words, South Africa would have no taxing rights at all to a dividend paid from a South African company to a Kuwaiti resident.
[463] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 119.

Goldswain has also set out a list of provisions of the Income Tax Act which *prima facie* appear to be discriminatory.[464] He does not go into detail as to why he thinks these provisions may be discriminatory but has set forth the following possible provisions which may be discriminatory:

a) The denial of deductions to employees who earn remuneration other than mainly in the form of commission;
b) The different tax treatment of restraint of trade receipts and deductions for an individual as opposed to a company;
c) The taxation of farmers in comparison with other businessmen; and
d) The taxation of small business corporations as opposed to other companies.

These provisions will not be considered in any detail as they are not comparable or applicable to this chapter.

4.6 Analysis of the taxation of residents and non-residents at the same statutory rates in terms of the Constitution

This part of the chapter will now consider whether the taxation of residents and non-residents at different effective rates of taxation unjustifiably infringes a resident's right to equality in terms of the equality provision of the Constitution. The starting point of this enquiry is to consider the status quo in relation to the various cases on the equality clause as discussed above.

As discussed above, the *Harksen* case details what needs to be established in order to determine whether the equality clause has been contravened. What needs to be determined are the following four points:

a) Was there differentiation?
b) If so did the differentiation amount to discrimination?
c) If so was the discrimination unfair discrimination?
d) If so was the unfair discrimination justified in terms of the limitation clause as per section 36 of the Constitution?

The starting point for this analysis is, therefore, to determine whether there has been differentiation. Hence what needs to be determined in this regard is whether people have been treated differently.[465]

[464] Goldswain 'Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law' (2011) Vol 15 No.2 1 at 21.
[465] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 43.

As was set out in Chapter 3, residents who own immovable property in South Africa are taxed at higher effective rates of taxation than non-residents on both the rental income and the capital gains upon disposal of that property. It is evident, therefore, that residents are treated differently to non-residents in terms of the amount of tax that they are liable for in South Africa on income from these two sources. What then needs to be determined is whether there is a rational connection between the differentiation and the legitimate governmental purpose that the provision causing the differentiation is designed to achieve.[466]

In the *Harksen* matter the court stated that the section that allowed for the attachment of the solvent spouse served a legitimate governmental purpose in that it assisted in the liquidation process of the insolvent spouse. The spouse's rights are not severely affected as the attached goods are not usually removed from the solvent spouse's home and the limitation on the right was temporary in nature and ensured that the section did not violate section 8(1) of the interim Constitution.[467] In other words, while the section amounted to differentiation it was justifiable.

The case of *City Council* held that as the measures implemented were temporary and the process was needed to ensure that there would eventually be equality in terms of facilities meant that the differentiation was rationally connected to a legitimate governmental purpose.[468] Both *Harksen* and *City Council* provide a consideration of how the courts have dealt with the concept of a legitimate governmental purpose and are important cases to apply to this chapter.

Croome states that the government's plans of achieving economic objectives, by taxing small business corporations at lower rates than normal businesses, constituted a valid governmental purpose.[469] Croome also states that the government needs to have flexibility on tax rates to determine fiscal policy in order to achieve its overall economic objectives.[470] These are further considerations of whether a tax provision may constitute a legitimate governmental purpose; that the government can treat taxpayer's differently to achieve a legitimate governmental purpose and that there does not need to be complete uniformity with taxation.

[466] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 43. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 220 where they state the same principle that was stated in *Harksen;* that the courts will evaluate the reason given by the government for the law in order to determine whether the law has a legitimate purpose. The court must then consider whether there is a rational relationship between the purpose of the law and the differentiation caused by the law.
[467] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 59.
[468] *The City Council of Pretoria v Walker* CCT 8/97 at para 27.
[469] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 88.
[470] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 101. This was in relation to the differentiation between the tax rates for individuals as opposed to companies.

In the context of the above considerations I must now determine whether taxing residents and non-residents at the same tax rates, resulting in unequal effective taxing rates, serves a legitimate governmental purpose. The aspects of the South African tax system which result in the different effective tax rates for residents and non-residents are: the rebates, the individual tax table, the capital gain inclusion rate and the annual capital gain exclusion.[471]

The first important consideration in determining whether the taxation of residents and non-residents at different effective tax rates serves a legitimate governmental purpose are the rebates that are afforded to taxpayers. Vivian deals with the background to why rebates are prevalent in the tax system. To recap, the purpose of a tax rebate is to ensure that people have enough money to pay for necessities of life without paying tax on the amount needed.[472] Vivian is correct. It is nonsensical for a non-resident to be afforded the same rebates as a resident. This is because a non-resident who owns fixed property in South Africa but lives in another country will not have to pay for their necessities of life in South Africa; they will be paying for these in the country in which they live.[473]

I believe the rebates afforded to non-residents would not easily be proven to serve a legitimate governmental purpose and would not be able to pass constitutional muster in terms of section 9(1) of the Constitution. This would however still be subject to the limitation clause as contained in section 36 of the Constitution.

I must now consider the three other aspects of our tax system to determine whether they serve a legitimate governmental purpose.

It is a possibility that the government has never considered this question of taxing residents and non-residents at different effective tax rates in terms of the individual tax table. This is due to a consideration of personal income tax rates from 1979 to current day where residents and non-residents were always taxed according to the same tax tables.[474] From as far back as 1979 the South African tax tables have taxed residents and non-residents at the same tax rates, the only differentiations were between married and unmarried as well as married women. At no point has there ever been any kind of a distinction between resident and non-resident regarding

[471] These were all discussed in detail in Chapter 3.
[472] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 91.
[473] It cannot be expected of the South African government to assist an individual with paying for their necessities of life when their necessities are purchased in another country.
[474] South African Reserve Bank 'Tax Chronology of South Africa: 1979 – 2017' (2017).

personal income tax rates.[475] It is also a possibility that the government has never considered the annual capital gain exclusion nor the capital gain inclusion rate in light of the taxation of residents and non-residents. However, the taxation of residents and non-residents in terms of the same income tax table, the capital gains tax annual exclusion and the inclusion rate may be said to serve a legitimate governmental purpose, even if these have not actively been considered by the government.

This can be stated in the light of the non-resident shareholder's tax that used to exist. As detailed above the non-resident shareholder's tax was a tax that was imposed on non-residents investors in South African equities. This tax was levied on non-residents but not on residents. This tax was scrapped in 1995 with the reasoning that this tax was a disincentive to investment in the country.[476] Foreign investment in South Africa is of utmost importance in assisting the economy to grow.[477]

The government would have a strong argument that providing non-residents with these tax incentives, even if they have not been implemented intentionally, encourages foreign investment in the country and serves a legitimate governmental purpose. I am of the view that the government would be able to pass the requirement to prove that these three tax concessions (excluding the rebate) would be able to be shown to serve a legitimate governmental purpose.

I must consider the next stage of the equality enquiry as it can be stated that for at least three of the four tax aspects which enables non-residents to pay a lower effective tax rate than residents serve a legitimate governmental purpose and does not contravene section 9(1) of the Constitution.

The differentiation of individuals based on their tax residency status is not on a listed ground in terms of section 9(2) of the Constitution and discrimination must, therefore be proven.[478] This requires a determination of whether the ground of differentiation is based on attributes and characteristics which have the potential to impair the fundamental dignity of a person or affect them adversely in a comparably serious manner.[479]

[475] Besides from the non-resident shareholder's tax which was removed in 1995. This will be discussed below.
[476] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 223.
[477] National Treasury 'Economic transformation, inclusive growth, and competitiveness: Towards and Economic Strategy for South Africa' (2019) at 15.
[478] If it were on a listed ground then discrimination will have been established; *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 54.
[479] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 46.

In the *City Council* case it was held that there was no invasion of dignity of the residents of the area of Pretoria who were charged on a metered basis nor were they affected in a manner comparably serious to an invasion of their dignity.[480] However, with regard to the other issue in question in this matter, namely that legal action for non-payment of municipal services was only instituted against residents in certain areas of Pretoria and not others, that the negatively affected residents were being treated in a manner which is at least comparably serious to an invasion of their dignity.[481]

As differentiation on a tax residency is not on a listed ground it must be shown that resident taxpayers are affected in a manner which has the potential to impair the fundamental dignity of the tax residents or affect them adversely in a comparably serious manner. The principles as stated in the *City Council* case dealing with a person's fundamental dignity can be applied to this case; whether a taxpayer's fundamental dignity has been infringed by the different treatment of residents and non-residents.

I believe that there is discrimination against resident taxpayers. They are paying higher effective tax rates than non-residents on the same taxable income. While it may not negatively affect the dignity of the tax residents, it can be said that it has adversely affected them in the sense that they are having to pay more tax than another group of people solely on the basis of their situations which inadvertently result in residents paying more tax than non-residents. This amounts to discrimination. This discrimination can be said to exist for all four aspects of the tax system under consideration; namely: the tax rebate, the individual tax table, the annual capital gain exclusion and the capital gain inclusion rate. This is because all four of these aspects result in non-residents paying less tax than residents.

As discrimination is said to exist, the next stage of the enquiry must be dealt with; whether the discrimination amounts to unfair discrimination.

The final step in determining whether a provision has breached section 9 of the Constitution is to determine whether the discrimination that has been established amounts to unfair discrimination.[482] The starting point in determining whether there is unfair discrimination is to establish whether the discrimination is on a listed ground. As already mentioned, tax residency

[480] *The City Council of Pretoria v Walker* CCT 8/97 at para 68.
[481] *The City Council of Pretoria v Walker* CCT 8/97 at para 81.
[482] Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 225 where they state that unfair discrimination is discrimination which has an unfair impact. Unfair impact constitutes a significant impairment of the individual's dignity.

is not a listed ground. There is, therefore, no presumption of unfair discrimination in terms of section 9(5) of the Constitution; the onus is on the complainant to establish that the provision is unfair. The following was stated in *Harksen* in regard to establishing unfairness:

> 'The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.'[483]

In the *Harksen* case the inconvenience suffered by the complainant was held not to be unreasonable and did not impair the dignity of the complainant. This inconvenience suffered by the complainant was the type of inconvenience that any citizen may face when resort to litigation becomes necessary. Unfair discrimination was not shown by the complainant to be present in this scenario.[484] The discrimination suffered by the resident taxpayer in this matter is more than a mere inconvenience; they are being taxed at higher effective tax rates. The state would not be able to show that the taxpayer's discrimination is fair as a result of them merely suffering an inconvenience.

Another important case to consider in determining whether a provision amounts to unfair discrimination is the *Prinsloo* case. This case dealt with a provision in the Forest Act which differentiated between people with land in fire-controlled areas and those with land outside these areas. People outside the fire-controlled areas bore a far greater onus of proof in delictual matters than those within the areas.[485] The court stated that unfair discrimination is present when people are treated differently in a way which impairs their fundamental human dignity or affects them in a comparably serious manner.[486] This is relevant to the matter at hand, as resident taxpayers are paying more tax than non-residents on the same amount of taxable income. Resident taxpayers are being treated differently in a manner that is comparably serious to an impairment of their fundamental dignity.

In the case of *President of the Republic of South Africa,*[487] Goldstone J stated that in order to determine whether discrimination is unfair, one needs to not only look at the group who have been disadvantaged but also at the nature of the power in terms of which the discrimination was effected.[488] It is important to consider the nature of the power which results in the

[483] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 54.
[484] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 68.
[485] *Prinsloo v van der Linde* CCT 4/96 at para 16.
[486] *Prinsloo v van der Linde* CCT 4/96 at para 33.
[487] *President of the Republic v Hugo* CCT 11/96.
[488] *President of the Republic v Hugo* CCT 11/96 at para 43. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 224 where it they state that although there was discrimination it was not

discrimination against the taxpayer; as stated above, the increased tax rates for residents do not have a minor effect on the resident taxpayer, there is a public interest in ensuring that resident taxpayers are not taxed at higher rates as resident taxpayers have not done anything wrong to result in themselves being taxed at higher rates.

In *City Council* the court dealt with the issue of indirect discrimination. It was held that while a provision may appear to be neutral and non-discriminatory it may nonetheless result in discrimination.[489] The case was clear that indirect discrimination may also constitute unfair discrimination.

This case is important for this thesis as the discrimination that is suffered by tax residents in contrast with non-tax residents constitutes indirect discrimination. On the face of it, by taxing residents and non-residents at the same statutory rates of taxation there is no differentiation or discrimination. However, upon looking deeper into the matter and determining by way of calculations[490] it has been shown that the taxation of residents and non-residents at the same statutory rates of taxation actually results in tax residents paying a higher rate of effective taxation. This case confirms that such a resultant discrimination may constitute unfair discrimination; the law does not have to specifically discriminate against a group of people.

The case is also important as it stated that the position of the aggrieved in society as well as the nature and the purpose of the power must be looked at. As has already been stated, resident taxpayers investing in immovable property in South Africa are suffering an increased rate of taxation solely as a result of their tax residency. While it is important to encourage foreign investment in the country, it is also important that local investment is also encouraged and that people are not being discriminated against as a result of an inherent quality such as tax residency.

I proceed to consider the two scenarios Croome deals with in relation to unfair discrimination. Firstly, is the differentiation in treatment between taxpayers who are over 65 and taxpayers who are under 65. Persons over the age of 65 years are given preferential tax treatment to those under 65; discrimination is present but Croome states the objective is to assist older taxpayers who may have increased medical expenses and to enable them to continue living constructive

unfair. Further, that the fathers who were not afforded the same treatment as the mothers did not have their sense of dignity or self-worth impaired.

[489] *The City Council of Pretoria v Walker* CCT 8/97 at para 31.

[490] As encompassed in chapter 3.

lives.[491] These provisions would probably therefore not constitute unfair discrimination and pass constitutional muster. Croome is correct in this regard; this type of discrimination cannot be said to be unfair as it serves a legitimate societal purpose.

This example of Croome's shows the type of discrimination in a tax law, where one group of persons is paying more tax than another group of persons, which could be shown to have a legitimate purpose and does not amount to unfair discrimination even though it is discriminatory. It is important to consider other examples of what may be justifiable discrimination in deciding whether the matter at hand amounts to unfair discrimination.

The other aspect Croome considers is the different rates of withholding tax on dividends received by residents in comparison with non-residents.[492] Croome states that the double taxation agreements which are the cause of the reduced dividends withholding taxes are normal in international relations and that the double taxation agreements are the norm in an open and democratic society. It would be likely that the government would be able to prove that while there is discrimination that it is not unfair.[493]

It may be argued by the government that the taxation of residents at higher effective tax rates than non-residents is normal in international relations and appropriate in an open and democratic society. While this may make for a decent argument, the three countries of comparison in this thesis have shown that other countries which are comparable with South Africa have different rates of tax for residents and non-residents and such an argument by the state would not be a sufficient argument for taxing residents at higher rates.

Residents are treated differently to non-residents in a manner that adversely affects them; they have to pay more tax on the same amount of taxable income in comparison with a non-resident.

The reasons given in the above cases for stating that unfair discrimination does not exist are not present in this matter. The resident taxpayer has suffered much more than an inconvenience, the harm to them is permanent in nature as they are deprived of their money through an increased rate of taxation in comparison to a non-resident. The discrimination was not caused by any action of the residents (other than choosing to live in South Africa and considering South Africa to be their home).[494] The non-residents do not need assistance in order to maintain

[491] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 15.
[492] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 118.
[493] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 119.
[494] As dealt with above, an individual may also be a tax resident in South Africa by means of the physical presence test. However, the physical presence test would not be applicable in situations where the individual is tax resident

their living standards as they do not live in South Africa and the increased effective tax rates are not as a result of a double taxation agreement.

Resident taxpayers should have the right to be taxed at the same effective rates as non-residents on the same amount of taxable income, or at the least, to not have such a vast difference in the amount of tax that they pay in comparison with non-residents as was detailed in Chapter 3.

The counter argument is that as non-residents do not spend as much time in South Africa as a resident (a non-resident investor in fixed property in South Africa could spend a minimal amount of time in South Africa) that they should not pay as much tax as residents who live in South Africa and who have greater access to services provided by the government as a result of their tax paid. This argument is valid as a non-resident would not need access to South African hospitals or public transport; they would not have access to all of the governmental services that are provided to people living in South Africa. They would, however, have a fair amount of governmental services provided to their fixed property such as infrastructure including roads, electricity and water; all of which are essential if the non-resident is to let their property and earn income. While there is a good argument that a non-resident would not need to pay as much tax as a resident as they do not receive full government services, they should still be required to pay a fair amount of tax as the rental of their property and the capital gain on its disposal is dependent on the government providing essential services to their South African property. It is my argument that the current gap between what is paid by residents and non-residents is far too big; as per the table under 6.1.4 below, a non-resident will only pay ten per cent of the tax paid by a resident on the same taxable income from rental and 47 per cent of the amount paid by a resident for capital gains tax. While it is probably fair to say that a non-resident should not pay as much tax as a resident as they do not receive the same access to government resources, the current difference is too large and there is scope to narrow this gap.

In my view, all of the individual tax provisions this thesis deals with, that are the same for both residents and non-residents and which result in an increased effective tax rate for residents, namely: the rebate, individual tax table, annual capital gain exclusion and capital gain inclusion rate, constitute unfair discrimination. This is especially so considering how big the gap is between the amount of tax paid by a resident in comparison with a non-resident on the same

in any of the countries of comparison of this thesis as South Africa has double taxation agreements with Australia, Botswana and the United Kingdom; in terms of the definition of 'resident' as contained in section 1 of the Income Tax Act, a person cannot be a tax resident in South Africa if they are exclusively a tax resident of another country in terms of a double taxation agreement.

amount of taxable income. To discriminate against residents on the basis of their tax residency status therefore constitutes unfair discrimination.

If a provision of an act is found to be in breach of section 9 of the Constitution, it must then be considered whether this breach is justifiable in terms of section 36 of the Constitution; this is the final test as to whether a provision may be said to be constitutionally justifiable or not. Section 36 of the Constitution reads as follows:

> 'Limitation of rights – (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> a) The nature of the right;
> b) The importance of the purpose of the limitation;
> c) The nature and extent of the limitation;
> d) The relation between the limitation and its purpose; and
> e) Less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

As it has been argued that the provisions under question constitute unfair discrimination, I must now determine whether the provisions are justifiable in terms of section 36 of the Constitution and can therefore be saved from a determination of being unconstitutional.[495] There is a need to deal with both the nature and scope of a right provided in the Constitution in terms of the rights analysis stage and the limitation stage of the section 36 enquiry. The rights stage is contained in section 36(1) which deals with the right being reasonable and justifiable in an open and democratic society; this analysis also includes a consideration of the nature of the right.[496] The limitation stage of the analysis, being section 36(1)(a)-(e), deals with all the

[495] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 54. See also Iles 'A Fresh Look at Limitations: Unpacking Section 36' (2007) South African Journal on Human Rights Vol. 23 at 79 - 82 where he states that the justification enquiry under section 36 is premised on the basis that one right will have to yield to another right. Determining which right takes precedence is always fact dependant and can never be in terms of a hard rule; in addition, one right cannot be categorised as more important than another. In other words, there is no one size fits all solution, each matter needs to be decided on its merits. Further, that at the justification stage it needs to be determined how important it is to protect against incursions into that right. Once it has been determined that a right has been violated, the court must then decide whether the right in question should be limited by the offending provision.

[496] *State v Makwanyane* CCT 3/94 at 104.

relevant factors to be considered, such as the nature of the right and the importance of the purpose of the limitation.

Iles states that the following is the best way to approach the limitation clause. Firstly, an examination of the purpose, nature and extent of the limitation.[497] Once these three factors have been understood it needs to be decided whether the limitation, taking into account its nature and purpose, passes the rational connection test. If there is no rational connection, this is the end of the enquiry and the violation of the right cannot be justified. However, if the limitation passes this threshold test, the court must then continue to consider the nature of the right and balance this against the importance of the limitation. This enquiry must also consider whether there is a less restrictive means to achieve the purpose sought to be achieved by the offending provision.

The reason the courts have provided for such a repetition of the analysis of the nature of the right leads one to consider why so much emphasis is placed on determining the nature and scope of a right.[498] It is possible that the reason for this is that for core rights such as equality the courts have held that a court which is reviewing such a right's potential infringement must ensure that the object that the government wishes to achieve is so overwhelmingly important that is justifies the infringement of such rights or that the means used to achieve the governmental purpose must be no more restrictive of the protected activity than is absolutely necessary. Alternatively, that the benefits to be realised by the governmental objective significantly outweigh the burdens imposed upon the rights holder.[499]

The second part of section 36 deals primarily with the purpose of the limitation. This is a threshold question. If the objective of the limitation cannot justify the infringement of a fundamental right, that is the end of the limitation enquiry; the limitation cannot be justified.[500]

There have been two tax related cases that have dealt with section 36 of the Constitution. While the facts of the cases are not relevant for the purposes of this chapter, the principles dealt with in these cases are worth considering.

[497] Iles 'A Fresh Look at Limitations: Unpacking Section 36' (2007) South African Journal on Human Rights Vol. 23 at 86.
[498] Woolman 'Out of order – out of balance – the limitation clause of the final Constitution' (1997) South African Journal on Human Rights vol. 13 102 at 108.
[499] Woolman 'Out of order – out of balance – the limitation clause of the final Constitution' (1997) South African Journal on Human Rights vol. 13 102 at 108-109.
[500] Woolman 'Out of order – out of balance – the limitation clause of the final Constitution' (1997) South African Journal on Human Rights vol. 13 102 at 109.

The first case is *Metcash Trading Ltd v Commissioner for South African Revenue Service*.[501] In this case the court dealt with various sections of the VAT Act which the taxpayer had challenged on the grounds of being unconstitutional. The court held that section 40(2)(a) of the VAT Act which forces a taxpayer to pay a debt to SARS even though the amount may be under dispute unfairly limited the taxpayer's right of access to the courts and was unconstitutional. However, the court then considered section 36 of the Constitution and stated that the limitation of the taxpayer's rights was very limited and was a temporary limitation.[502] It was also held that there was a significant public interest in the full and speedy settlement of tax debts particularly with VAT which is a self-assessment system. It was further held that the 'pay now argue later' principle is adopted in many open and democratic societies and is commonly regarded as a reasonable limitation of a taxpayer's rights. Lastly the rule is not absolute as SARS has the discretion whether to implement the power. The limitation was held to be justifiable in terms of section 36.[503]

It is important to consider how a court would deal with the application of section 36 in relation to a tax act and the kinds of issues that they might find important. What has transpired in the *Metcash* case is that in considering section 36 and a tax provision, the court will consider the public interest element to the tax provision, whether similar provisions have been adopted in other open and democratic societies and the extent of the limitation of the taxpayer's rights. Relating this to the matter at hand, if this matter were to be argued before a court in terms of section 36 of the Constitution, the state may take a similar line of argument and state that other democracies have similar provisions and whether there is a public interest in taxing residents and non-residents at different effective tax rates.

While the state would have an argument that other countries also tax residents and non-residents at different effective tax rates the state would not have a strong argument on the public interest of the limitation or the extent of the limitation as residents are being treated in a different manner to non-residents that materially affects them in a serious manner.

Relating these principles to the matter at hand, the government might try and use this case as another example that a justifiable argument in terms of section 36 limiting a taxpayer's right to equality is that the current manner of taxation is in the public's interest. They could maintain a

[501] 63 SATC 13.
[502] *Metcash Trading Ltd v Commissioner for South African Revenue Service* 63 SATC 13 at para 62.
[503] *Metcash Trading Ltd v Commissioner for South African Revenue Service* 63 SATC 13 at para 62.

possible argument that it is in the public interest to encourage foreign investment in South Africa.

Given that encouraging foreign investment in South Africa would probably be the strongest argument that the South African government could make for retaining the current reduced tax rates for non-residents, it is worth delving into the validity of this argument in more detail. Foreign investment in South Africa is widely acknowledged as one of the key factors that can substantially assist in the creation of jobs in the country as well as with economic development.[504] It is conceivable that while foreign investment into fixed property in South Africa is not going to bring a large amount of direct jobs, such as the opening of a manufacturing plant by a foreign entity in South Africa, such an investment could create jobs for people such as estate agents who assist in obtaining people to rent the property as well as attorneys who deal with the transfer of the property. However, what is not as clear is the impact that rates of taxation have on foreign investment. Historical research has indicated that the relationship between taxation and foreign investment is insignificant.[505] While more recent research indicates that tax incentives can induce companies to invest in countries with low tax rates in knowledge-based industries such as banks, insurance companies and internet related businesses.[506]

From a more global perspective, the OECD states that tax and investment incentives generally play a limited role in determining whether a country will receive foreign investment.[507] Other factors such as market characteristics, resource availability and production costs play a more important role. In terms of tax, the transparency, simplicity and certainty in the application of the tax law and tax administration are ranked higher by investors than tax incentives. In addition, control of government finances and a stable economy are considered more important

[504] Kransdorff 'Tax Incentives and Foreign Direct Investment in South Africa' '(2010) Consilience: The Journal of Sustainable Development 3 (1) 68 at 70. See also Price Waterhouse Coopers 'What foreign investors want: South African insights from a global perspective on factors influencing FDI inflows since 2010', available at https://pwc.to/3ddtZhW, accessed 4 May 2020. See also the Davis Tax Committee 'Second interim report on base erosion and profit shifting (BEPS) in South Africa: Introduction (2016) at 34-35.
[505] Kransdorff 'Tax Incentives and Foreign Direct Investment in South Africa' '(2010) Consilience: The Journal of Sustainable Development 3 (1) 68 at 71.
[506] Kransdorff 'Tax Incentives and Foreign Direct Investment in South Africa' '(2010) Consilience: The Journal of Sustainable Development 3 (1) 68 at 71. The foreign investment being discussed in the available articles primarily relates to investments made by companies in South Africa, but the some of the principles can be applied to this scenario.
[507] OECD 'Tax Incentives for Investment – A Global Perspective: experiences in the MENA and non-MENA countries' (2007) at 4.

determinants of whether a country will receive greater or less foreign investment.[508] Evidence has shown that tax incentives are generally not sufficient to attract major investment flows.[509]

While this OECD paper deals with foreign investment and whether a foreign company will invest money in another country, these principles can be applied to whether an individual will invest his or her money into South African fixed property.[510] While the current reduced tax rates may encourage investment in South African fixed property,[511] other factors play a far larger role; such as the state of the South African economy, property rights and politic factors.[512] Foreigners are much more likely to be affected by these three factors in deciding whether to purchase immovable property in South Africa than whether they will receive a reduced tax rate, particularly seeing that their own tax payable would not be affected even if

[508] OECD 'Tax Incentives for Investment – A Global Perspective: experiences in the MENA and non-MENA countries' (2007) at 5.
[509] OECD 'Tax Incentives for Investment – A Global Perspective: experiences in the MENA and non-MENA countries' (2007) at 10.
[510] OECD 'Tax Incentives for Investment – A Global Perspective: experiences in the MENA and non-MENA countries' (2007).
[511] If these reduced tax rates for non-residents are even understood by those investing in South Africa.
[512] When an investor is looking to invest in a country, they consider factors such as uncertainty in policy, political instability as primary factors in the decision of whether to invest in a country or not. Tax incentives on their own cannot overcome these negative factors as per Holland and Vann 'Income Tax Incentives for Investment' (1998) Tax Law Design and Drafting Vol. 2 Chp 23 at 2. The Davis Tax Committee states that although tax is a factor in investment decisions, there are other factors that are key determinants that a potential investor will take into account. These include infrastructure, labour stability, economic prospects and political stability. Further, that tax rates operate at the margins of investment decisions where it may tip a decision in favour of one country over another; it will not, however, be the deciding factor. Davis Tax Committee 'Second interim report on base erosion and profit shifting (BEPS) in South Africa: Introduction (2016) at 3. While this report deals with corporations and their investments, the same factors will be important to a non-resident thinking of investing in fixed property in South Africa. The United Nations states that for an investor to decide where they should invest is a complex decision and that tax is one of a myriad of factors that will be considered. Other factors which play a more important role include: whether there is a stable macroeconomic and fiscal policy framework, whether there is adequate physical, financial, legal and institutional frameworks, whether there are foreign exchange rules that allow for the repatriation of profits as well as language and cultural conditions. Further, that the most important decision to be made is which country would be the best for achieving a particular business objective. A less important factor is whether activities can be structured to minimize tax liabilities for the investor. United Nations 'Design and Assessment of Tax Incentives in Developing Countries' (2018). Price Waterhouse Coopers state that the most important factors that a potential investor will consider are: trade openness, efficiency of government regulation, investor protection, state stability, invest freedom, ease of trading across borders, rule of law, exchange rate stability, policy continuity and very importantly for this chapter are property rights. Price Waterhouse Coopers 'What foreign investors want: South African insights from a global perspective on factors influencing FDI inflows since 2010', available at https://pwc.to/3ddtZhW, accessed 4 May 2020. There are therefore other factors that the South African government could work on to improve investor sentiment towards the country that are not related to tax and are more important than tax incentives. A reduced rate of tax for non-residents is most certainly not the only method to encourage foreign investment in the country nor is it the most effective. It is safe to say that if a foreign investor wants to invest in fixed property in South Africa that they would need to have security of their property rights and not feel that their property may be expropriated without compensation and due cause. It was the United Nations that the empirical evidence on the benefits of tax incentives for promoting foreign investment and economic growth is sparse and inconclusive and that their cost effectiveness has been challenged considering the tax revenue that the country has lost as a result of the tax breaks provided. United Nations 'Tax Incentives and Tax Base Protection in Developing Countries' (2017).

they are paying no or a reduced rate of tax in South Africa.[513] The Davis Tax Committee also states that tax incentives should not erode the tax base and apply in circumstances where the investment into South Africa would have occurred in any event.[514] The argument that tax incentives play a large role in encouraging investment is, therefore, an incorrect argument and cannot be used as a justification for taxing resident's at higher rates than non-residents. However, as has already been stated, a taxpayer's fundamental right to equality is more important than a tax scenario which may encourage foreign investment in the country. The other principle of this case, that the taxpayer can approach a court if they are not happy with the circumstances is obviously not an argument that the state would be able to utilise in this matter.

The final case to be considered in terms of section 36 of the Constitution is *Law Society of Zimbabwe v Minister of Finance.*[515] While this is a Zimbabwean case its consideration of the term 'reasonably justifiable in a democratic society' is important in the context of determining whether a provision has breached section 36 of the Constitution. Section 36 of the Constitution reads that a right in the Bill of Rights may only be restricted in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It was stated that the following must be taken into account in determining whether a provision is reasonably justifiable in a democratic society: whether the legislative objective is sufficiently important to justify limiting the right, whether the measures designed to meet the legislative objective are rationally connected to it and whether the means used are no more than is necessary to accomplish the objective.[516]

[513] As they would need to declare their worldwide income in Australia or the United Kingdom, although as mentioned in Chapter 4 Botswana residents are only taxed on Botswana sourced income.
[514] Davis Tax Committee 'Second interim report on base erosion and profit shifting (BEPS) in South Africa: Introduction (2016) at 34.
[515] 61 SATC 458. In this case the Zimbabwean government introduced a new system of capital gains withholding tax whereby a ten per cent withholding tax on the value of the property was levied on the sale of all immovable property. This type of indiscriminate tax was stated as being unjustifiable as it imposed an unfair burden on certain sellers of immovable property. For example, a seller of a primary residence is allowed to roll over any gain until the second property is sold; with this new withholding tax, a taxpayer would have a withholding tax taken from their proceeds even though they are not actually required to pay tax on the sale of their property. Or if a property was sold at a loss, a person would have to pay a withholding tax even though no tax is due on the sale of the property. The tax was held to be irrational, unfair and unconstitutional.
[516] *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458 at 461.

This is the same wording as is used in section 36 of the Constitution; that a right in terms of the Bill of Rights may only be limited in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society.

Croome deals with two instances where section 36 would be a consideration in determining whether a tax provision is constitutional. The first one is that a South African discretionary trust cannot distribute a capital gain to a non-resident beneficiary. As a result, the non-resident would pay more tax on the same capital gain distributed to a resident beneficiary.[517] Croome states that a non-resident would probably be able to argue that the distinction between residents and non-residents is unjustifiable in terms of section 9 of the Constitution.[518] However, the state would probably be able to show that the provision is reasonable as it is the norm for tax authorities to have special provisions relating to trusts and seek to extract more from trusts than other taxpayers. The limitation would probably be able to be shown by the state to be justifiable in terms of section 36.[519]

While the matter at hand is not dealing with the taxation of trusts, it is worth noting that the state would not successfully be able to use an argument to the effect that other tax authorities tax residents and non-residents at different effective rates; as has already been shown, all three countries of comparison in this thesis have different effective tax rates for residents and non-residents where the tax rates of residents and non-residents are far more equal. In addition, a taxpayer's rights in terms of the Bill of Rights must trump the argument that other jurisdictions are doing it the same way as us. In addition, as stated earlier, the increased taxation of non-residents on the disposal of fixed property in South Africa in terms of this law supports the argument advanced in this thesis as it shows that other parts of our tax laws tax non-residents more than residents which is the opposite to what it happening in the scenario discussed in this thesis.

The other scenario Croome discusses is the interest exemption afforded to non-residents. This discrimination differentiates on an analogous ground to the listed grounds in terms of section 9 of the Constitution. The state would argue this discrimination is justifiable as it is international practice to provide such an exemption to non-residents and that if this exemption did not exist then interest rates in South Africa would rise.[520] Croome argues that there is a

[517] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 103.
[518] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 103.
[519] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 103.
[520] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 112.

rational reason for the exemption and it would be justifiable in terms of section 36 even though there is unfair discrimination.

As stated above, in my view, the argument that it is international practice to do something in a certain way is not a strong argument in justifying the limitation of a taxpayer's rights in terms of the Bill of Rights. Another argument for the state would be that they need to encourage foreign investment in the country and that this is a legitimate and widespread practice amongst nations, although it is the view of this author that this should not trump a resident taxpayer's right to equality.

A stronger argument for the state would be that if the exemption did not exist then South African interest rates would rise.[521] The state could illustrate that residents would be directly negatively affected if the exemption did not exist. If the state could manage to show that residents are benefitting from non-residents paying reduced tax rates to residents, the state may be able to justify the differing effective tax rates for residents and non-residents. While a resident's right to quality might have been infringed, if they are directly benefitting from this discrimination it could be shown to be justifiable. I am unable to determine whether there would be any valid arguments that the resident is benefitting from the different effective tax rates for residents and non-residents.

In considering the constitutionality of the different tax tables for married persons and non-married persons the Katz Commission stated that differentiation based on marital status constituted unfair discrimination as it was based on immutable and personal characteristics without any other clear justification.[522] While the recommendations of the Katz Commission are rejected, as tax tables that differentiate actually result in more equality in taxation and not the other way round, the concept that it is unfair discrimination to tax someone on an immutable concept such as tax residency is, generally speaking, correct. This is subject to the proviso that this thesis must consider the tax effects of the differentiation the Katz Commission did not explore when they recommended the removal of the different tax tables based on marital status.

The Katz Commission deals with section 33 of the interim Constitution in the light of this consideration. It states that the only plausible argument in favour of maintaining the distinctions based on marital status is that the husband is the major breadwinner and therefore

[521] For the purposes of this thesis it is presumed that this statement is correct; it goes beyond the scope of this thesis to deal with economic issues such as this.
[522] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 71.

should be entitled to tax concessions.[523] The report states that such an approach had not been successful in other jurisdictions.[524] While the Katz Commission did not favour this argument as it recommended changes to the tax tables be made, they were on the right track with this argument. Families with one breadwinner should be entitled to additional tax relief as their expenses are the same as families with more than one income. The Katz Commission should have delved further into this argument that they merely alluded to in order to determine whether they should have maintained separate tax tables depending on personal circumstances so as to ensure a fairer tax system in South Africa.

As stated above, the purpose of a rebate is to ensure that people do not pay tax until they have paid for their necessities. This is a strong argument for why non-residents should not have access to rebates in South Africa and illustrates that the state would not successfully argue that allowing rebates to non-residents is justifiable in terms of section 36 as non-residents do not purchase their necessities in South Africa.

An evaluation of the South African system of taxation of residents in contrast with the countries of comparison is an important consideration in determining whether the unfair discrimination is justifiable. As detailed in chapter 3, the countries of comparison all tax residents and non-residents on different scales. The United Kingdom does not allow non-residents access to the personal allowance and Australia and Botswana both have different tax tables for residents and non-residents. As contained in Chapter 3, the following table illustrates the differences in tax rates between residents and non-residents for the countries of comparison:

> *Percentage tax paid by non-resident in comparison to resident – rental income and capital gains tax*

	Rental Income		**Capital Gains Tax**	
	Example 1	*Example 2*	*Example 1*	*Example 2*
South Africa	8%	7%	46%	45%
Australia	100%	93%	51% (more)	56% (more)
Botswana	20%	20%	100%	100%
United Kingdom	100%	65%	97%	75%

[523] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 71.
[524] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 71.

As can be seen by the above table, South Africa is unique amongst the countries of comparison in that it taxes residents at much higher rates than non-residents.

While this thesis only deals with three other countries, the South African government would find it difficult to justify the taxation of residents at higher rates on the basis that it is the international norm to do so. Particularly taking into consideration that Botswana is a comparable country with South Africa in terms of also being a developing country in need of foreign investment.

The other argument that the state may use in justifying such a differentiation between residents and non-residents is that the decreased tax on non-residents is essential to encouraging foreign investment into the country. Masipa states that South Africa's capacity to grow, develop and create jobs for its citizens also depends on the country's ability to enhance GDP growth and attract more foreign direct investment.[525] The Katz Commission also deals with the effect that tax may have on people investing in South Africa. It states that while tax is an important consideration in investment consideration, it ranks well down the list of priorities unless it poses a specific and actual inhibition. As such, tax is unlikely to be a major positive factor to encourage investment, but it may be a material negative factor.[526] It states further that while any potential investor would welcome any tax benefit, other factors such as the business environment are more important and that if the business environment is unfavourable then no tax break is likely to trigger an investment.[527]In this light, the Katz Commission did not recommend that any incentives be introduced purely to encourage foreign investment. However, it also states that the possibility of encouraging foreign investment through tax measures be considered from time to time. [528]

In my opinion, while it is important to encourage foreign investment in the country, this should not be to the detriment of resident taxpayers. While the government would have a strong argument in attempting to justify the unfair discrimination against resident taxpayers, these do

[525] Masipa 'The relationship between foreign direct investment and economic growth in South Africa: Vector error correction analysis' (2018) Acta Commercii 18(1) at 466.
[526] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 213.
[527] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 215.
[528] Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 215.

not outweigh a person's right to equality. In other words, a person's right to equality is more important than encouraging foreign investment in the country.

Other arguments in favour of increasing the tax rates for non-residents are that the South African government has the right to protect its tax base and its domestic economy. Raising revenue remains the most important function of taxes which serve as the primary means for financing public goods such as maintenance of law and order and public infrastructure.[529]

The United Nations states that one of the most significant policy challenges facing developing nations is establishing and maintaining a sustainable source of revenue to pay for domestic expenditure;[530] one of the most important facets of this is protecting the domestic tax base. While this paper primarily deals with multi-national enterprises that move profits to lower tax jurisdictions to reduce their tax burden, some of these principles are applicable to the matter at hand. Multi-nationals artificially shift profits to low tax jurisdictions which results in less tax being paid in the countries where their main operations which earn the profit exist. In essence, the government of the country in which main operations operate is receiving less tax than they should.[531] In a similar vein, it can be argued that a non-resident individual who owns fixed property in South Africa but is paying minimal or reduced tax rates in comparison with residents can be said to not be paying his or her fair share of taxation in South Africa where the fixed property is located and where the income is earned.

National Treasury has given the example of multi-nationals who artificially move company debt from a holding company outside of South Africa to the South African subsidiary or artificially increase interest rates paid by the South African subsidiary so that the South African subsidiary's profit and subsequent tax liability decreases.[532] This results in the holding company in a lower tax jurisdiction having a higher profit but lower tax liability. Such a practice reduces the domestic tax base and shifts profits out of the country artificially. While the current scenario is different to a multi-national enterprise which is purposefully shifting profits to a low tax jurisdiction to lessen their tax burden, it is the same in the sense that the country where the profits are being made are not receiving their fair share of taxation.

[529] The Organisation for Economic Co-operation and Development 'Fundamental Principles of Taxation'. See also Fritz 'An appraisal of selected tax-enforcement powers of the South African Revenue Service in the South African Constitutional context' (2017) LLD Thesis at 19-20.
[530] United Nations 'Protecting the Tax Base of Developing Countries' (2017) 2nd ed at 1.
[531] United Nations 'Protecting the Tax Base of Developing Countries' (2017) 2nd ed at 1 - 2.
[532] National Treasury 'Budget Review 2020' 26 February 2020 at 42.

The United Nations states that it is of vital importance that developing countries protect their tax base through the sufficient taxation of capital gains made on a disposal of property in that country.[533] This is so because tax on other types of income, such as rent or royalties, may be crystalized in the form of a capital gain on the disposal of an income generating asset. The taxing of capital gains is needed to ensure that income from assets is properly taxed in the source country. Capital gains taxation of non-residents on the disposal of an asset in that country is a measure to ensure the protection of that country's tax base.[534]

This is prevalent in South Africa where the tax that is paid by non-residents on rental income is low and may amount to no tax payable (if the taxable income from the rental property is below the tax threshold). South Africa has a right to protect its tax base particularly on the disposal of fixed property based in South Africa; this is so because the tax on rental for non-residents is so low. In addition, the capital gain that a person makes from the disposal of a fixed property is as a result of conditions within that country which allow the value of the property to increase. That country therefore has the right to protect its tax base by properly taxing non-residents on the disposal of their properties, failing which the non-resident will pay tax on this capital gain in their country of tax residency, where the capital gain was not made.[535]

This is another justification for the South African government to increase the capital gains tax payable by non-residents upon the disposal of their property and a further indication that it is unfair to tax residents at higher rates on their capital gains tax than non-residents. In other words, that there is no justification for the unequal treatment of residents on the disposal of fixed property in comparison with non-residents.

In addition, non-residents who own immovable property in South Africa benefit from the services of the government, such as infrastructure, they should be required to contribute in a fair manner to South Africa's tax base. For example, there may be a non-resident whose taxable

[533] United Nations 'Protecting the Tax Base of Developing Countries' (2017) 2nd ed at 127.
[534] United Nations 'Protecting the Tax Base of Developing Countries' (2017) 2nd ed at 127.
[535] This is because the individual will pay tax on worldwide income in their country of tax residency. The individual will be liable for tax on the capital gain in their home country but will be entitled to a credit in their home country for tax paid in the source country. This is per the double taxation agreements between South Africa, the United Kingdom, Botswana and Australia which were discussed in detail in Chapter 2. In other words, while the individual may pay a small amount of tax on the disposal of the property in South Africa, they will pay the remainder of the tax on the disposal in their home country. South Africa therefore loses out on the capital gains tax as the country where the person is tax resident will tax that person on the full amount of the capital gain and South Africa will only receive a small amount of capital gains tax. The individual's home country has the benefit of receiving tax from the individual even though the gain was made in another country. South Africa has justification for taxing non-residents at higher tax rates than they are currently so as to ensure that the South African tax base is correctly protected.

income derived from letting their South African property falls below the tax threshold and this person may not pay any tax at all in South Africa. This is so even though they are benefiting from South African governmental services which enable them to let their property, such as roads to their property. While non-residents are investing capital into the country, they are not making a fair contribution to the running of the South African state. As mentioned earlier, a non-resident will not receive access to all of the state resources that are available as a result of the payment of taxation, but there is currently a massive gap between the amount of tax paid by a resident and a non-resident; there is scope to narrow this gap to something which is fair.

This is a strong argument for the South African government to increase the tax rates that are payable by non-residents on rental income from fixed property as well as the proceeds from the disposal thereof. These arguments add to the argument that there is no justifiable limitation of a person's right to equality in terms of section 36 of the Constitution.

Another argument in favour of increasing tax rates for non-resident in terms of tax on rental income as well as proceeds from the disposal of fixed property is the concept of the distribution of wealth. As was mentioned earlier, the first canon of taxation as set out by Adam Smith is that of equality.[536] This entails that people with the ability to pay tax must do so. The redistribution of wealth can also be used to redistribute resources when they are not evenly distributed.[537]

In the case of a non-resident who has purchased fixed property to let in South Africa, it can be said with certainty that this person will be wealthy. This person will not be living in the property and it will have been purchased for investment purposes. This person would, therefore, have a greater ability to pay tax as the income that this person receives is unlikely to be needed by that person to pay for necessities of life. There is accordingly scope in terms of the equity canon of taxation for this person to pay a rate of tax that he or she can afford; in this case this would be a high rate of taxation. As has been illustrated in Chapter 3, a non-resident is paying a low amount of tax on both the income from letting the property as well as on the proceeds from its

[536] Smith 'An inquiry into the nature and Causes of the Wealth of Nations' (1776) Bantam at 1043.

[537] Fritz 'An appraisal of selected tax-enforcement powers of the South African Revenue Service in the South African Constitutional context' (2017) LLD Thesis at 20. See also Croome *et al* 'Tax Law: An Introduction' (2013) Juta at 8-9 where he states that liberal ideas put forth a legal system which values political liberty, equality of opportunity and fairness in distribution so that all people may have a fair opportunity to pursue their economic dreams. The redistribution of resources can assist with the achievement of these three values by reducing the political and economic power of the wealthy and raising the status of the poor. See also Moosa 'Fulfilling human rights through taxation in South Africa' (2017) *Insurance and Tax Journal* Vol 32(1) pg 9 where he states that one of the primary functions of tax is to redistribute resources so as to lessen and set right social inequalities.

disposal. This person is not paying tax according to their ability to pay considering how much less tax they are paying on the same amount of taxable income as a resident taxpayer and that they are wealthy individuals. It would be fair to increase the tax rates for non-residents on rental income and income from the disposal of fixed property on the basis that it would result in a fair distribution of wealth.

This is yet another argument in favour of increasing the rate of taxation that non-residents are currently paying on income from letting and disposal of fixed property in South Africa and adds weight to the conclusion that the violation of a resident taxpayer's right to equality cannot be justified by section 36 of the Constitution.

In addition, the following tax provisions already exist to assist in encouraging foreign investment in the country:

a) The non-resident interest exemption which exempts interest earned by non-resident taxpayers who meet certain requirements from taxation on this income in South Africa;[538]
b) The reduced dividends withholding tax that was dealt with in this chapter;
c) The fact that non-residents are only taxable on capital gains made in South Africa on a capital gain made on fixed property or on the disposal of shares where 80 per cent or more of the market value of the shares is based on fixed property.[539] In other words, if a non-resident holds shares in a South African company and not more than 80 per cent of the value of the shares in that company are based on fixed property, a non-resident would not pay capital gains tax on the disposal of those shares.

Non-residents therefore already have significant tax advantages for investing in South Africa. In any event, as stated in the Katz Commission report, there are other more important factors that a potential investor will consider before considering any tax incentives to invest in a country.

If the rates of taxation of resident and non-residents as this thesis deals with were to come before a court and be argued in terms of section 36 of the Constitution, it is argued that the state would not be able to put forth a valid argument that can justify the taxation of residents and non-residents at different effective rates (for rebates, the capital gains tax inclusion, the

[538] Section 10(1)(h) of the Income Tax Act.
[539] Paragraph 2 of the Eighth Schedule to the Income Tax Act.

individual tax tables and the annual capital gain exclusion). Furthermore, it would not be able to be shown that this discrimination is reasonable and justifiable in an open and democratic society. These provisions would, therefore, be held to be unconstitutional in that a resident taxpayer's right to equality has been violated and cannot be saved by section 36 of the Constitution.

4.7 Comparison with Botswana, Australia and the United Kingdom

I must now consider the right to equality in the light of the countries of comparison – Botswana, Australia and the United Kingdom.

Australia's Constitution does not enshrine the right to equality.[540] There are, however, acts that have been passed that deal with discrimination on certain grounds, such as race, sex, disability and age.[541] The laws dealing with anti-discrimination for the above grounds only provide a piecemeal protection to non-discrimination, do not actively promote equality in Australia and do not address all grounds of discrimination. The Australian acts dealing with equality as well as the various international conventions to which Australia is a party set out the following as characteristics which a person may not be discriminated against on: race, sex, disability, age, colour, language, religion, political opinion, national or social origin, property, birth, nationality, marital status, place of residence within a country or sexual orientation.[542]

At first glance some of these grounds may appear to be applicable to the current scenario; such as national origin or nationality. However, these do not deal with a person's tax residency. For example, a person may be a national of South Africa but a tax resident of Australia. That Australian tax resident would possibly suffer discrimination based on their tax residency and not on their nationality. In other words, their nationality would not affect the amount of tax that they need to pay.

Considering the above it would be difficult to see how a taxpayer may successfully allege that their right to equality has been violated in that one group pays less tax than another group on the same amount of taxable income. There is no provision in the Australian Constitution which provides for the right to equality; the limited acts promulgated only deal with a very small

[540] National Association of Community Legal Centres 'Equality and Non-Discrimination' available at https://bit.ly/39SBMQP, accessed 17 February 2020. Commonwealth of Australia Constitution Act, 1900.
[541] This is in terms of the Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992 and Age Discrimination Act 2004.
[542] Australian Government 'Rights of equality and non-discrimination', available at https://bit.ly/2P7KTF8, accessed 19 February 2020.

range of rights in terms of which people may be discriminated against. None of these can be read to deal with the right to not be taxed more on the same amount of taxable income as a person from another group.

In addition, the purpose of this chapter is to determine whether a taxpayer may successfully illustrate that their right to equality has been violated by virtue of them paying more tax on the same amount of taxable income as a non-resident. The purpose of this chapter is not to illustrate whether any acts have been breached, but the Constitution. It is therefore of limited value to delve into whether one of the Australian acts relating to equality may have been breached; in any event the types of discrimination that may occur as set out in Australian law would not encompass the right to equality being breached by a resident paying more tax than a non-resident.

The United Kingdom does not have a single constitutional instrument [543] and lacks a constitutional equality guarantee to underpin statutory equality rights and provide background principles to interpret statutes and there is no constitutional basis for the principle of equality.[544] A challenge to United Kingdom tax legislation on grounds of incompatibility with constitutional norms would not be possible.[545] However, the United Kingdom has developed laws dealing with anti-discrimination and equality in terms of the Equality Act of 2010. In terms of equality of taxation in the United Kingdom, Baker QC states that there is no equality principle in United Kingdom taxation law.[546] Baker gives the example of the United Kingdom enacting a law to the effect that slightly balding, red-headed, over-weight tax lawyers were to pay a tax rate twice that applicable to other people, that this provision could not be challenged.

As a person alleging that their right to equality has been breached cannot rely on a constitution in the United Kingdom, they would need to attempt to rely on the Equality Act. As the purpose of this thesis is to determine whether a taxpayer's constitutional right to equality has been breached with the differing tax rates, and not whether their statutory rights have been breached, it does not add value to delve into depth into the Equality Act. In any event, the protected grounds in terms of the Equality Act are: age, disability, gender reassignment, marriage and

[543] British Library 'Britain's unwritten Constitution' available at https://bit.ly/2V7KlTG, accessed 20 February 2020.
[544] Oxford Human Rights Hub 'The Potential Challenges to Equality Law in the UK', available at https://bit.ly/3bSBmeV, accessed 20 February 2020.
[545] Baker QC 'The Equality Principle in United Kingdom Taxation Law', available at https://bit.ly/2HFwEU4, accessed on 20 February 2020.
[546] Baker QC 'The Equality Principle in United Kingdom Taxation Law', available at https://bit.ly/2HFwEU4, accessed on 20 February 2020.

civil partnership, race, religion or belief, sex and sexual orientation.[547] A person would not be able to prove that they have a right to be taxed at the same rates on the same taxable income in terms of the Equality Act.

Unlike Australia which does not have a clause in their Constitution dealing with the right to equality or the United Kingdom who does not have a codified Constitution, the Botswana Constitution deals with the right to equality; although not directly.

Section 3 of the Constitution of Botswana deals with a person's fundamental rights and freedoms.[548] This section affords individuals fundamental rights and freedoms in terms of their race, place of origin, political opinions, colour, creed or sex subject to the rights and freedoms of others and for the public interest. The right to equality lies at the heart of the Constitution of Botswana.[549] An individual is entitled to these rights to the extent that they do not prejudice the rights and freedoms of others or the public interest. However, it is evident that this section does not deal directly with the right to equality. The section of the Constitution of Botswana that deals with discrimination is section 15; this section is entitled protection from discrimination on the grounds of race, tribe, place of origin, political opinions, colour, creed or sex. This section states that no law, subject to certain exceptions, shall make any provision that is discriminatory either of itself or in its effect. In addition, that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law.

Section 15(3) states that 'discriminatory' in this regard refers to affording restricted or disabled treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex. The underlying factor in the definition of 'discriminatory' as pronounced in section 15(3) is the failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.[550] However, it is obvious that the word 'equality' is not found in this definition of 'discriminatory'.

[547] United Kingdom Government 'Equality Act 2010' available at https://bit.ly/3bMYkEh, accessed 20 February 2020.
[548] 1966.
[549] Fombad 'The Constitutional Protection against Discrimination in Botswana' (2004) The International and Comparative Law Quarterly 53 at 141.
[550] Fombad 'The Constitutional Protection against Discrimination in Botswana' (2004) The International and Comparative Law Quarterly 53 at 139.

The Botswanan case of *Attorney-General v Dow*[551] held that section 3 of the Constitution of Botswana complements section 15 and that the two read together guarantees the right to equal treatment. It stated further that the provisions of section 3 confer on the individual the right to equal treatment before the law; this section is the umbrella provision under which all rights and freedoms must be subsumed.

Further, that section 3 encapsulates the total of an individual's rights and freedoms in general terms; these may be expanded upon in the other sections of the Constitution, such as section 15 or vice versa.[552] The judge in this case read into section 15 the word 'sex' that was omitted as a form of discrimination on the basis that section 15 could not be read on its own and that the words included in the definition of 'discriminatory' as contained in section 15 are more by way of an example than exclusive items.

It has been stated that the *Attorney General* case illustrates that a judge will probably have more freedom in reading unmentioned groups into a constitutional provision than they would with a statute.[553] In addition, that constitutions are regarded as requiring generous and purposive approaches. However, the reading of the term 'sex' into section 15's definition of 'discriminatory' is not a far stretch seeing that this term was already included in section 3 and fits in with the other types of characteristics that a person may not be discriminated against.[554] For example, race, colour, place of origin; characteristics that a person is born with.

The learned judge in *Attorney General*[555] dealt with the issue of where the line must be drawn as to which categories of persons must be read in that are not specifically stated. It was stated that the only general criterion for which types of rights may be read in were rights which a right thinking man would consider as outrageous treatment only or mainly because of membership of a certain class; in addition, what other nations have come to adopt as unacceptable behaviour.[556] This is a high burden for a person wishing to show that a class of person's should not be discriminated against and read into the defined list of 'discriminatory' characteristics as defined in section 15(3) needs to show.

[551] [1992] BLR 119 at 122.
[552] *Attorney General v Dow* [1992] BLR 119 at 134.
[553] Fombad 'The Constitutional Protection against Discrimination in Botswana' (2004) The International and Comparative Law Quarterly 53 at 141.
[554] Fombad 'The Constitutional Protection against Discrimination in Botswana' (2004) The International and Comparative Law Quarterly 53 at 141.
[555] *Attorney General v Dow* [1992] BLR 119 at 148.
[556] *Attorney General v Dow* [1992] BLR 119 at 149.

It is worth pointing out at this point the difference between the South African Constitution in terms of equality and the Constitution of Botswana. Section 9 of the South African Constitution states that no one may be unfairly discriminated against on one or more grounds; in other words, it is an open list which may be added to.

On the other hand, as has been mentioned above, the Constitution of Botswana has a closed list of characteristics which a person may not be discriminated against on and as per the *Attorney General* case, if discrimination against another group of persons were to be added to the closed list in section 3 and section 15, it would need to be shown that a right thinking man would consider as outrageous treatment if someone is treated differently due to the group which they belong and that other nations have come to adopt as unacceptable.

As has been shown above, it is possible in the South African context to prove that a person's right to equality has been unfairly discriminated against as a result of them paying a higher rate of taxation than another group of persons. However, it would be extremely difficult for a tax resident in Botswana to show that the right to equality of taxation must be read into section 3 and/or section 15 of the Constitution of Botswana.

An argument may be made, in terms of the definition of 'discriminatory', as contained in section 15(3) that the term 'place of origin' may be used to illustrate that a tax resident of Botswana should not be subject to differing treatment to a non-tax resident.[557] It is important to note that this section states that every person in Botswana is entitled to the fundamental rights and freedoms as contained in this section. In other words, a person must be present in Botswana in order to be afforded the rights as contained in section 3 of the Constitution of Botswana.

A non-resident taxpayer living in another country but investing in fixed property in Botswana would not be afforded the protections as set out in section 3 of the Constitution of Botswana. A non-resident would therefore not be able to successfully state that they are being discriminated against in terms of paying a higher rate of taxation than residents.[558]

[557] As per Chapter 3, a non-resident will pay less tax in Botswana than a resident on rental income in the examples provided.

[558] This is not, however, a practical issue as per chapter 3, a non-resident in Botswana will only pay a fraction of the amount of tax paid by a resident on rental income and will pay the same amount of capital gains tax as a resident upon the disposal of a fixed property. In addition, the thesis is considering whether a South African tax resident can state that are being unfairly discriminated against and not a non-resident alleging the same thing. This concept of a non-resident not having the right to equality in Botswana does not add to the purpose of the thesis but is worth noting.

4.8 Conclusion

The purpose of this chapter is to establish whether it is constitutionally justifiable to tax residents and non-residents at different effective tax rates in terms of a resident's right to equality. The answer to this query lies in whether resident taxpayers' right to equality, due to the fact that they receive the same taxable income as the non-resident but are taxed at higher tax rates on the same income, has been breached.

The chapter begun by considering the Katz Commission as this was the first instance where the interim Constitution was considered in respect of South African tax laws. A consideration of the Katz Commission along with a critique of the Katz Commission written by Vivian served as a good background and point of departure to consider the constitutionality of provisions of the tax act as well as the purpose of some aspects of our tax laws, such as the rebates from tax.

An important point deduced was that the Katz Commission failed to understand the logic behind tax rebates and why they exist. This is significant as it is argued later in the chapter that non-residents should not be entitled to tax rebates as they do not pay for their necessities of life in South Africa; which should be the purpose of the tax rebates. There can be no legitimate governmental purpose for allowing non-residents access to rebates in South Africa.

This chapter has provided a detailed discussion of the court cases that deal with section 9 of the Constitution, the equality clause. These cases provide what needs to be proven by a person wishing to show that a particular provision of a law is contrary to section 9 of the Constitution and therefore unconstitutional. Such an enquiry must consider equality in terms of a substantive equality perspective; the actual effects of the offending provision and whether there is justification for treating people differently. Not merely that all people in similar circumstances must be treated equally as in the case of formal equality.

The seminal case of *Harksen v Lane* provides all the steps that a person wishing to show that a provision is unconstitutional must follow. These steps include: showing that there is differentiation, showing that there has been discrimination, showing that there has been unfair discrimination and showing that the state would not be able to justify the unfair discrimination with section 36 of the Constitution which provides for circumstances where a right in terms of the Constitution may be limited.

In addition, this chapter dealt with various tax related cases where a taxpayer had challenged a particular section of the Constitution. Of particular importance was the *The City Council of Pretoria v Walker.* These cases were then applied to the scenario at hand and it was found that the taxing of residents and non-residents at different effective tax rates would be able to be shown to amount to differentiation, discrimination as well as unfair discrimination. This would be the case for the rebate, the individual tax table, the annual capital gain exclusion as well as the capital gain inclusion rate. The final stage of the enquiry would involve considering the provisions of section 36 of the Constitution.

The person wishing to show that this effective rate of taxation is unconstitutional may have a more difficult time in disproving a governmental argument that the differentiation in tax rate is not a justified limitation that is needed in order to encourage foreign investment in the country. In this regard Dlamini states that forms of discrimination are permissible as our society encourages certain practices or values as being in the overall interest or benefit to society.[559] It is therefore important to carefully consider section 36 of the Constitution in detail as was done in the chapter.

As stated above, the rights in the Bill of Rights may only be limited in terms of a law of general application to the extent that it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom considering all of the following factors:

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

Dealing with all of the above, it is clear that the unfair discrimination results from a law of general application as the Income Tax Act applies to all people. With regard to the limitation being reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom it can be stated that it is unfair to discriminate against people purely on an immutable property such as a person's tax residency. To tax someone detrimentally as a result of their tax residency is analogous to discriminating against them on one of the listed grounds as contained in section 9 of the Constitution.

[559] Dlamini 'Equality or justice? Section 9 of the Constitution revisited – Part I' (2002) Journal for Juridical Science 27 (1) 14 at 33.

The nature and extent of the limitation is quite severe as it results in individuals paying more tax than non-residents; this has a direct and serious effect on an individual and is permanent in nature. I must now consider whether the purpose of the limitation, which it is assumed if the government were to argue it that it would be to encourage foreign investment, is more important than a person's right to equality. Tax incentives for individuals would not be the primary reason why a person would invest in a country.[560]

The government should rather spend time and effort in making South Africa more investor friendly in order to attract foreign investment than impose a tax on its taxpayers that is to their detriment. There are other avenues which the government can utilise to achieve the same goal of encouraging foreign investment in the country rather than allowing reduced tax rates to non-residents. In addition, the rights of individuals, in particular the fundamental right to equality, should trump the state wishing to encourage foreign investment in the country.

While it may be argued that a non-resident who does not live in South Africa does not receive access to governmental services and should not, therefore, pay tax in South Africa, this argument is not convincing. While a non-resident who does not live in South Africa will not have access to the same services as a resident living in the country, they still have access to services such as roads and electricity which enable them to let their South African property.

The state would be hard pressed to argue that the limitation of the taxpayer's right to equality is justifiable in terms of section 36. The taxpayer would have a stronger argument to the effect that their fundamental rights in terms of the Bill of Rights is more important than any of the arguments which the state may put forth regarding encouraging foreign investment, that this is the international norm to do so or what is being done in other open and democratic societies or that the infringement of the taxpayer's rights is limited or inconsequential.

It is submitted that the issue of the rebate, individual tax table, annual capital gain exclusion and capital gain inclusion rate goes too far and unfairly infringes on the right to equality of South African tax residents. The provision which results in the different effective tax rates for residents and non-residents can therefore said to be unconstitutional. These provisions should therefore be adjusted so that that residents and non-residents rates of tax are more in line with each other; it is not necessary that non-residents are taxed at the same effective rates as

[560] Kransdorff 'Tax Incentives and Foreign Direct Investment in South Africa' '(2010) Consilience: The Journal of Sustainable Development 3 (1) 68 at 71 and Katz 'Interim report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa' (1994) Government Printer at 215.

residents, but there needs to be a move towards the rates being closer, especially considering that a non-resident not living in South Africa has access to some of the governmental services that a person living in South Africa does.

Chapter 5 – The Constitutionality of taxing residents and non-residents at different effective tax rates in terms of the right to property

5.1. Introduction

While it has been established that the taxation of residents and non-residents at different effective tax rates falls foul of the equality clause as contained in section 9 of the Constitution, it is still prudent to consider other sections of the Constitution which may also be violated by the different effective tax rates. In this light, I must also consider section 25 of the Constitution.

Section 25 of the Constitution of South Africa, 1996 deals with a person's right to property. Of particular interest to this chapter is section 25(1) which reads 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.'

In other words, I must determine for the purposes of this thesis, whether the taxation of residents and non-residents at different effective tax rates which results in residents paying higher amounts of tax than a non-resident on the same taxable income from letting fixed property in South Africa and higher amounts of capital gains tax on the disposal of fixed property in South Africa is permissible in the light of section 25. Alternatively, I must establish whether taxpayers are being deprived of their property in an unconstitutional manner and consequently whether the law must be changed so that residents and non-residents are taxed at equal rates.

In order to answer this, I must establish the exact scope and meaning of section 25(1). This can only be done by considering applicable case law and articles that deal with the meaning of the words and phrases contained in section 25(1). The important words that this chapter must deal with in detail are:

1. Law of general application;
2. Property;
3. Deprivation; and
4. Arbitrary.

If a law encompasses all of these aspects, that a person's property is arbitrarily deprived in terms of a law of general application, then it can be said to fall foul of section 25(1) of the Constitution.

If it is established that a law has infringed section 25(1) of the Constitution, it must then be determined whether this infringement is justifiable in terms of the general limitation clause as contained in section 36 of the Constitution. If a law does not infringe section 25(1) it is not unconstitutional and the enquiry will end; this may be so where there is no deprivation of property or where there is a deprivation, but it is not arbitrary.

I must also consider section 25(2) of the Constitution which deals with the expropriation of property and apply this section in order to determine whether it is applicable to the differentiated tax rates between residents and non-residents. This section becomes applicable where there is a deprivation that is not arbitrary.

This chapter also deals with section 22 of the Constitution which details an individual's right to choose their trade, profession or occupation. It is important to consider this section of the Constitution in order to determine whether the higher tax rates paid by residents breaches an individual's rights.

Lastly, this chapter will consider the right to property in terms of the applicable Constitutions of the countries of comparison, Botswana, Australia and the United Kingdom. The final aspect of the right to property will deal with the African Charter on Human Rights and whether this provides for greater safeguards to the protection of property for South African citizens.[561]

5.2. The law of general application

The first and simplest part of this enquiry is to establish whether the property has been deprived in terms of a law of general application. As the property in question, being the tax paid by an individual, is levied in terms of the Income Tax Act,[562] it is levied in terms of a law of general application. The first part of the enquiry into whether the law which imposes different effective tax rates on residents in comparison with non-residents breaches section 25 of the Constitution has been passed.

[561] As was explained in Chapter 4, the Bill of Rights is only applicable to South African citizens or foreign nationals lawfully in the country; it does not apply to non-resident taxpayers who do not live in South Africa but merely invest in the country. A non-resident taxpayer is not, therefore, protected by any provisions in the Bill of Rights but that is not an issue for this chapter as it is the resident taxpayer who may suffer a violation of their right to property due to higher rates of taxation on income from fixed property than non-residents.

[562] No 58 of 1962. Section 5 of the Income Tax Act makes a taxpayer liable to pay tax on taxable income received. See also Currie & De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 539 where they state that the term 'law of general application' means that the limitation is only permissible when it is authorised by law and where that law is impersonal in the sense that the burden that it imposes is on an abstract class. Currie & De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 540 also referred to case law where they state that an act of parliament clearly constitutes a law of general application.

5.3. The meaning of 'Property'

The second part of the section 25(1) enquiry is whether the property in question constitutes property that is worthy of constitutional protection. When a resident individual pays more tax on the same amount of taxable income as a non-resident the result is that they are paying more money to SARS than a non-resident would. I must determine whether the concept of property for the purposes of section 25 encompasses money. In other words, are resident taxpayers being deprived of their property in the form of money in terms of section 25.

It is both practically impossible and judicially unwise to attempt an all-encompassing definition of 'property' for the purposes of section 25 of the Constitution.[563] There are, however, numerous cases which have dealt with the issue of whether money is capable of constitutional protection. These are discussed below to determine whether the tax that a resident will pay constitutes property that is worthy of constitutional protection.

The first question that must always be asked in a constitutional property clause enquiry is whether the property in question can be considered a constitutional property interest. This must be answered with reference to the Constitution; even where the literal meaning is clear, the Constitution must be interpreted purposively with reference to the underlying values of the Constitution.[564]

The only textual guidance in the Constitution is section 25(4)(b) which states that property is not limited to land. The inclusion of this provision in the Constitution is a clear indication that movable property must also be afforded protection under the property clause; this is also a strong suggestion that property protection should be extended to intangible assets. This would include assets such as real rights in both movable and immovable property as well as personal rights to certain types of performances; it would also include both corporeal and incorporeal property. Section 25 does not, however, make it clear which types of these rights are to be afforded constitutional protection.[565]

[563] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at para 51. See also Cheadle, Davis and Haysom 'South African Constitutional Law: The Bill of Rights' Lexis Nexis Online edition at chp 20.3 where they state that the court in this matter refused to develop a definition of property.
[564] Cheadle, Davis and Haysom 'South African Constitutional Law: The Bill of Rights' Lexis Nexis Online edition at chp 20.3
[565] Cheadle, Davis and Haysom 'South African Constitutional Law: The Bill of Rights' Lexis Nexis Online edition at chp 20.3

In the absence of any other starting point to determine whether a type of property is worthy of protection under section 25, I must determine whether the interest is recognised under the common law, customary law or legislation as a right in property. At common law 'property' will incorporate both the object of real rights (corporeal[566] and incorporeal) and real rights themselves.[567]

It was held in *Samsudin v Berrange N.O*. that:

> 'the transfer of a balance owing to a debtor by his bank to another bank would be tantamount to a transfer of actual money, a corporeal, represented by the credit' [568]

In other words, money that a person has in his or her bank account (the credit) if transferred to a debtor of that person would constitute the transfer of actual money which is corporeal property. This is similar to the payment of a tax debt in that SARS would be a debtor of the taxpayer who would make a bank transfer to pay the tax owing.

Real rights, which in this case is the corporeal property of money, are recognised at common law and should enjoy constitutional protection under section 25; this view is supported by South African case law.[569] Money should, therefore, be protected by the Constitution. It is prudent, however, to consider relevant case law which deals with this issue for further clarity.

A case worthy of consideration is *National Credit Regulator v Opperman and others*.[570] In this case Opperman had lent a sum of R7 million to his friend Boonzaaier.[571] Application was made by Opperman to the effect that section 89(5) of the National Credit Act was unconstitutional

[566] Corporeal property is something which have a physical existence, whereas incorporeal property is something which is abstract and does not have a physical existence. The Law of South Africa Lexis Nexis Online para 17.
[567] Cheadle, Davis and Haysom 'South African Constitutional Law: The Bill of Rights' Lexis Nexis Online edition at chp 20.3
[568] [2006] SCA at para 45. See also the The Law of South Africa Lexis Nexis Online para 17 where it states that a claim for money or a bank credit is an incorporeal right which can be transferred and then referred to this case as reference for this statement. For the purposes of this thesis, I do not believe it matters whether a bank credit is labelled as corporeal property or incorporeal property; the important point is that it is property which is capable of constitutional protection. Both corporeal and incorporeal property have the capability of being protected by the Constitution.
[569] Cheadle, Davis and Haysom 'South African Constitutional Law: The Bill of Rights' Lexis Nexis Online edition at chp 20.3 See also Croome 'Taxpayers' Rights in South Africa' (2010) Juta at pg 18 where he states that property not only refers to land but also to several different rights held by taxpayers. If legislation sought to remove certain benefits or rights, these rights would also constitute 'property' as envisaged in section 25(1) of the Constitution.
[570] CCT 34/12.
[571] Opperman was not a registered credit provider in terms of the National Credit Act at the time of providing the loan to his friend.[571] Section 40 of the National Credit Act requires that a credit provider that provides a loan in excess of R500,000 must register as a credit provider with the National Credit Regulator. As Opperman did not register with the National Credit Regulator, the credit agreement was unlawful in terms of the National Credit Act. *National Credit Regulator v Opperman and others* CCT 34/12 at para 8.

on the basis that it was in violation of section 25 of the Constitution.[572] In order to decide this, the court began by considering the question of whether the rights of the credit provider constituted property. Section 89(5)(c) of the National Credit Act deprives a credit provider of his or her goods or money as they cannot claim restitution of the money that was lent. Such a claim has a monetary value and can be disposed of and transferred. It was further determined that it can be counted as part of one's estate and patrimony. The court concluded that the right that was removed by this section of the National Credit Act constituted property.[573]

This statement that the claim has a monetary value and can be disposed of and transferred are important principles of the concept of property. As the taxpayer will be deprived of money, an asset that obviously has a monetary value, and money can be disposed of and transferred lends significant weight to the argument that money in hand constitutes property capable of constitutional protection. In addition, money can be counted as part of a taxpayer's estate.

The case of *Chevron SA (Pty) Ltd v Wilson and others*[574] must also be considered. The first issue that the court had to decide was whether money constitutes property. The court held that it cannot be denied that money in hand constitutes a property interest protected by section 25 of the Constitution.[575] Badenhorst states that it is Chevron's ownership of such money or a personal right to claim payment of money from the bank which constitutes constitutional property.[576]

[572] *National Credit Regulator v Opperman and others* CCT 34/12 at para 6.
[573] *National Credit Regulator v Opperman and others* CCT 34/12 at para 57-58.
[574] *Chevron SA (Pty) Ltd v Wilson's Transport and others* CCT 88/14. This is a case which dealt with a provision of the National Credit Act which provided for the repayment of money to a customer by a credit provider (a business in this case) if the credit provider was not registered with the National Credit Regulator.
[575] *Chevron SA (Pty) Ltd v Wilson's Transport and others* CCT 88/14 at para 16. See also *Hindry v Nedcor Bank Ltd and another* 61 SATC 163 at 180 where it was stated that a monetary debt can be considered as constitutional property worthy of protection.
[576] Badenhorst 'An arbitrary deprivation of property? The South African Constitutional Court's decision on s 89(5)(b) of the National Credit Act, 34 of 2005, in Chevron (Pty) Ltd v Wilson's Transport (2016) Canterbury Law Review Vol. 22 at 104.

It is also worth briefly dealing with the case of *Troskie v Von Holdt and others*.[577] The court stated that the money advanced in terms of the loan agreements constitutes property.[578] This case is further confirmation from our courts that money constitutes property capable of protection in terms of section 25 of the Constitution.

The case of *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape*[579] is a Constitutional Court matter that dealt with whether a commercial trading licence, along with the opportunity of selling wine in a grocery store, constitutes property under section 25 of the Constitution; and if so whether a legislative termination of the licence amounted to a deprivation. The final consideration after deprivation had been established would then be what would constitute sufficient reason for the change to escape being arbitrary.[580] It was held that a concept of property that accords with the founding values of the Constitution, being dignity, freedom and equality, must play an important role in determining the kind of property that deserves protection.[581] These values necessitate a conception of property that allows for individual self-fulfilment in the holding of property and on the other hand the recognition that the holding of property also carries with it a duty not to harm the public good.[582] In addition, where the ownership of property is connected to the exercise, protection or advancement of particular rights under the Bill of Rights, the level of protection provided to that ownership will be stronger than when no connection exists.[583]

[577] *Troskie v Von Holdt and others* 2074/2012 [2013] ZAECGHC 31. In this case, the plaintiff made loans to the defendant in terms of oral and written loan agreements and sued for the recovery of those loan amounts. The court was posed with the question whether the section of the National Credit Act which states that a credit agreement is void and unenforceable if the credit provider should have registered as a credit provider in terms of the National Credit Act but failed to do so is unconstitutional. *Troskie v Von Holdt and others* 2074/2012 [2013] ZAECGHC 31 at para 36.

[578] *Troskie v Von Holdt and others* 2074/2012 [2013] ZAECGHC 31 at para 37.

[579] CCT 34/12.

[580] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 1. Under old regulations, Shoprite was allowed to sell wine with food in its grocery stores. The Eastern Cape Liquor Act No. 10 of 2003 allowed the holder of a grocer's wine licence to continue with these sales for a period of ten years after the commencement of this Act. The Eastern Cape Liquor Act no longer allowed shops to sell grocery and wine on the same premises after the ten-year period elapsed. An affected party needed to acquire a new licence in order to sell liquor, but this had to be at a separate premises to any groceries being sold. Shoprite argued that this amounted to a deprivation of its property. *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 3 & 9.

[581] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 44.

[582] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 50.

[583] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 50.

The court, in terms of the judgment written by Froneman J, agreed that the holding of a grocer's wine licence constituted property worthy of constitutional protection. This was on the basis that the right to sell liquor is clearly definable and identifiable by persons other than the holder, the licence has value, is capable of being transferred and is sufficiently permanent.[584] With regard to the determination of whether money constitutes property, these factors would lend to the fact that money does constitute property as it has value, is capable of being transferred and is permanent.

Marais states that the core purpose of constitutional property protection is to enable a person to achieve self-development as an individual in the social sphere and not the creation of wealth.[585] However, wealth-maximization is one of the peripheral purposes of property protection since material well-being is viewed as essential to personal autonomy. As such, property interests that serve economic interests qualify as constitutional property although they will not enjoy as strong a protection as property which is essential to a person's self-development.[586] Marais states that an interest which merely serves to increase someone's wealth should still be afforded constitutional protection but the level of protection that it receives would be at a lower level than other property rights. Therefore, it serves no purpose to restrict the meaning of what constitutes constitutional property. The purpose of the property clause is to afford protection to a wide range of interests including those that serve purely commercial purposes.[587] Marais concludes by stating that the court's ruling in *Shoprite* that a wine licence amounts to property is in line with the Constitutional Court's tendency of recognising a wide range of interests as constitutional property and is, therefore, welcomed.[588]

[584] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 68 – 70.
[585] I disagree with this statement as protection of property is essential in the creation of wealth, particularly with regard to security of fixed property. A person can and should have the ability to invest in fixed property with the aim of creating wealth for themselves through the increase in value of the property. While the increase in the value of property is obviously not guaranteed, a person must have security of their property rights in order to grow their wealth through investment in fixed property.
[586] Marais 'Expanding the Contours of the Constitutional Property Concept' (2016) Journal of South African Law 576 at 585.
[587] Marais 'Expanding the Contours of the Constitutional Property Concept' (2016) Journal of South African Law 576 at 588.
[588] Marais 'Expanding the Contours of the Constitutional Property Concept' (2016) Journal of South African Law 576 at 591.

The two seminal cases regarding section 25 of the Constitution are the *First National Bank of South Africa Ltd v Commissioner for South African Revenue Services and another* High Court[589] and Constitutional Court cases.[590] A detailed discussion of these cases is, therefore, of utmost importance in a determination of whether the taxation of residents and non-residents at different effective tax rates falls foul of section 25 of the Constitution. I begin by considering the case heard in the High Court.

In this case, SARS detained the applicant's property (motor vehicles) that was in the possession of a third party. The third party had hire purchase agreements with the applicant for vehicles that were not paid off; the applicant, therefore, still owned the vehicles. The applicant had a secured claim for the payment of the money owing to them as a result of their ownership of the motor vehicles. In other words, the applicant's property was detained by SARS for a debt owed by a third party. The detention of the property was as a result of customs duties owed to SARS by the third party.[591]

Section 114 of the Customs and Excise Act[592] allows the state to attach goods, in terms of monies owed for a customs debt, on the premises of the person owing money. This is done in terms of a statutory lien. The section does not require that the person owns the assets that are subject to attachment, but merely that the goods are on their premises. Such goods may be detained and subject to a lien until the debt is paid. The section also allowed SARS to sell the goods held under attachment after a certain period of time.[593]

The effect of this statutory lien is that SARS obtains a preferent claim over the motor vehicles in question; the claim of First National Bank, the credit grantor, is superseded by the preferent claim of SARS.[594] It was in respect of this loss of a secured claim that First National Bank sought an order of constitutional invalidity in terms of the constitutional right to economic activity and property under section 25(2) of the Constitution.[595] The court took the view that this form of property is worthy of constitutional protection and that the form of security that the applicant lost amounted to a deprivation.[596] The view of the court that this preferent claim amounts to property is an important consideration on whether money in hand, which a taxpayer

[589] 63 SATC 432.
[590] 2002 (4) SA 768 (CC).
[591] *First National Bank v Commissioner of the South African Revenue Service 63 SATC 432* at 437.
[592] 91 of 1964.
[593] *First National Bank v Commissioner of the South African Revenue Service 63 SATC 432* at 448.
[594] *First National Bank v Commissioner of the South African Revenue Service 63 SATC 432* at 448.
[595] *First National Bank v Commissioner of the South African Revenue Service 63 SATC 432* at 438.
[596] *First National Bank v Commissioner of the South African Revenue Service 63 SATC 432* 450.

may be deprived of in the case of taxation, constitutes property. The aspects dealing with deprivation will be discussed below under 5.4.

The Constitutional Court case was an appeal by First National Bank from the High Court decision as dealt with above.[597] The Constitutional Court stated that the applicant's contention in the High Court and the Constitutional Court was that the detention and sale by SARS, under the provisions of section 114 of the Customs Act and Excise Act, of the motor vehicles owned by First National Bank under circumstances where First National Bank was not a customs debtor amounted to an expropriation of the motor vehicles. This was in terms of section 25(2) of the Constitution. Further, that section 114 does not provide for payment of compensation for the expropriation under section 25(2)(b) of the Constitution. The applicant submitted that the expropriation was inconsistent with section 25(1) of the Constitution.[598] It seems that the applicant changed the basis of their challenge in the Constitutional Court to the provision being in breach of section 25(1) of the Constitution and not section 25(2) as in the High Court application. The court held that section 114 of the Customs and Excise Act does not establish any significant connection between the creditor (SARS) and the non-debtor third party over whose property the lien is created (First National Bank). It was held that this section is so expansive that it can embrace goods of third parties under circumstances where there is no legal relationship or any relationship at all between First National Bank and SARS or First National Bank and the customs debtor.[599]

The Constitutional Court disagreed with the High Court's view that this section makes First National Bank into a customs debtor. It makes the goods of that party liable for seizure in execution of another party's customs debt. First National Bank does not become a co-debtor and has no liability to SARS. The issue for the court to decide was whether it is permissible to seize a third party's property for another person's customs debt,[600] and whether SARS has the power to deprive the applicant of all its rights and benefits in the vehicles on a permanent basis.[601]

[597] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC).*
[598] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 485-486.
[599] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 489.
[600] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 489.
[601] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 489.

The crucial issue for the court to decide was whether, in the absence of a relevant connection between the motor vehicles and the customs debtor (in that the motor vehicles are not the subject of the customs debt), the sale of goods by SARS of goods owned by someone else who is not a customs debtor amounts to an unjustifiable infringement of the owners right to property as contained in section 25 of the Constitution.[602] In order to determine whether the applicant's right to property had been infringed, the court asked the following questions:

a) Does that which is taken away from First National Bank by the operation of section 114 of the Customs and Excise Act amount to 'property' for the purposes of section 25?
b) Has there been a deprivation of such property by SARS?
c) If there has, is such deprivation consistent with the provisions of section 25(1) of the Constitution? i.e. is it arbitrary;
d) If not, is such deprivation justified under section 36 of the Constitution? i.e. if it is arbitrary is it justifiable under section 36.
e) If it does, does it amount to expropriation for purpose of section 25(2) of the Constitution? i.e. if it is not arbitrary does it amount to expropriation;
f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b) of the Constitution? i.e. if it is expropriation does it comply with section 25(2)(a) and (b);
g) If not, is the expropriation justified under section 36? i.e. if it does not comply with section 25(2)(a) and (b) is it justifiable under section 36.[603]

Section 25 embodies a negative protection of property in that it does not expressly guarantee the right to acquire, hold and dispose of property.[604] The protection of property as an individual right is, accordingly, not absolute but subject to societal considerations. The purpose of section 25 has to be seen as both protecting existing private property rights as well as serving the public

[602] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 489.
[603] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* 491. See also Currie & De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 534 where this approach set out by the court in *First National Bank* was approved.
[604] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 492.

interest, mainly in the sphere of land reform, but not limited thereto, and also as striking a proportionate balance between the two functions.[605]

The first issue that the court had to deal with was whether what was taken away from the applicant constituted property. The court stated that it is judicially unwise to attempt to provide a comprehensive definition of property for the purposes of section 25. However, it was held that ownership of corporeal property[606] must lie at the heart of our constitutional concept of property.[607] It has already been established that an amount of money in a person's bank account constitutes corporeal property.

In addition, neither the subjective interest of the owner in the thing owned nor the economic value of the right of ownership can determine the characteristic of the right. In other words, it does not matter if the economic value of the right of ownership might be small when the hire purchase contract draws to an end or if the purchaser would rather have the purchase price instead of the vehicle; the right of ownership that First National Bank has in the vehicles in question constitutes property for purposes of section 25.[608]

This concept is applicable to the purpose of this chapter. It has already been illustrated that money in hand and the resultant tax that is paid by a taxpayer amounts to property, but if the government were to attempt to argue that the amount of tax that a taxpayer is being deprived of is too small to constitute property that is worthy of protection, this argument would not be successful.

The cases of *Chevron*, *National Credit Regulator*, *Troskie*, *Shoprite* and the *First National Bank* cases confirm that money is considered property for the purposes of the Constitution. In this light, the first step of the enquiry into whether section 25(1) of the Constitution has been breached can be confirmed. Money, in the form of payment of taxes, constitutes property in

[605] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 493.
[606] Corporeal property incorporates all tangible things that can be touched. It also encompasses property which is perceptible through sight and touch and that the object may occupy space. It must also be capable of being sensed by means of an individual's senses. These objections may be movable or immovable. Njotini 'Re-Positioning the Law of Theft in View of Recent Developments in ICTS – the Case of South Africa' (2016) Vol. 19 PER/PEJL 3.
[607] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 493.
[608] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 495. See also Currie & De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 536 where they state that in this case the fact that the bank had made no use of the vehicle and had reserved rights of ownership only for the purpose of securing payment was irrelevant to the determination of whether the motor vehicle constituted property. Further, that the usefulness of value of a thing is inconsequential to its classification as property.

terms of section 25(1) of the Constitution. I am of the view that this is correct. Money is an important part of people's lives and it has substantial value to a person. It is correct to regard money as property and it is worthy of protection in terms of section 25(1) of the Constitution.

5.4. The Meaning of 'Deprivation'

The third part of the consideration of section 25(1) of the Constitution is what is meant by the term 'deprivation'. It was stated in the *First National Bank* Constitutional Court case that deprivation encompasses all types of deprivation whereas expropriation would only apply to a narrower sense of interference. Expropriations are, therefore, a subset of deprivations; section 25(1) deals with all types of deprivations including expropriations.[609] It is also worth nothing at this point that a deprivation may amount to a total loss of ownership of property without it constituting an expropriation as explained in this chapter where tax is shown to amount to a deprivation but it is not also an expropriation.[610]

The concepts of deprivation and expropriation will, therefore, be discussed under separate sub-headings.

5.4.1. Deprivation

A good starting point for determining whether taxation may amount to deprivation is a statement made by the High Court in the *First National Bank* case:

> 'Taxation does not amount to a deprivation of property. Nor is there anything which is expropriated. No one would think of claiming compensation for having been taxed. Freedom from taxation is not a fundamental right. Nothing protects the subject against taxation. Not even death. I consequently do not consider that the taking of the property of an affected owner (i.e. who is not by definition an importer) is, in principle, a violation of section 28 of the interim Constitution or s34 of the Constitution. *It may*

[609] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 495. See also Cheadle, Davis and Haysom 'South African Constitutional Law: The Bill of Rights' Lexis Nexis Online edition at chp 20.4 where they state that expropriation constitutes a sub-set of deprivation. See also *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 31 where Goldstone J held that expropriation constitutes a form of deprivation. See also Currie & De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 534 where they state that all expropriations are deprivations of property, but the converse is not true.

[610] See Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 548 where they state that in contrast to an expropriation, 'mere deprivation' does not result in the right-holder being dispossessed of their rights. I disagree with this view as it will be shown below that taxation amounts to a deprivation, yet taxation does not also amount to an expropriation. This means that taxation, which results in total loss of ownership rights in money, constitutes a deprivation but is not also an expropriation.

> *be different where the impugned tax is oppressive or partial and unequal in its operation*.'[611] (emphasis added)

This is a very important statement that has been made by the court. The court held that there is no deprivation of property as a result of taxation but that if the tax is oppressive or unequal this situation could be altered. This leaves open the possibility that if a tax is unequal that it may amount to a deprivation of property in terms of the property clause in the Constitution. Our courts have not, therefore, closed off this possibility. It will, however, be shown below that the court is incorrect in stating that taxation does not amount to a deprivation. This determination will begin with a consideration of the meaning of the term 'deprivation'.

The definition of 'deprivation' can be found in case law and in particular the *First National Bank* Constitutional Court judgment. As it had been decided by the Constitutional Court in *First National Bank* [612] that the property in question was worthy of constitutional protection, the court then continued to determine what the concept of deprivation entails and whether there was deprivation under these circumstances. Deprivation does not necessarily entail the taking away of property and deprivation must be distinguished from the narrower term expropriation. Deprivation entails any interference with the use, enjoyment or exploitation of private property in respect of the person having title or right to or in the property concerned. The court also stated the following:

> 'Dispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation in both its grammatical and contextual sense.'[613]

Another important case dealing with the concept of deprivation and arbitrary deprivation is that of *Mkontwana v Nelson Mandela Metropolitan Municipality and another*.[614] In this case, the applicants were home owners whose ability to dispose of their fixed property was restricted by

[611] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another* 63 SATC 432 at 435.
[612] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 496.
[613] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)*) at 496. See also Mostert & Badenhorst 'Property & the Bill of Rights' in Lexis Nexis' Bill of Rights Compendium online at 3FB7.1 where it they state that the definition of 'deprivation' as provided in *First National Bank* Constitutional Court judgment is a general description of the term rather than a comprehensive definition indicating that practically any interference with the use, enjoyment or exploitation of private property involves some sort of deprivation in relation to the owner's entitlements to the property in question.
[614] CCT 57/03. This case was a combination of other cases dealing with very similar facts.

section 118(1) of the Local Government: Municipal Systems Act.[615] This section states that the registrar of deeds may not effect transfer of any property without a certificate issued by the municipality to the effect that the consumption (water and electricity) charges due during a period of two years before the date of issue of the certificate has been paid.

The issue that this created for the applicants was that they had let their properties to tenants and the tenants had failed to pay municipal charges. The owners were prevented from disposing of their properties unless the municipal charges were paid in full.[616] The applicants challenged this section on the ground that it resulted in arbitrary deprivation of their property in terms of section 25(1) of the Constitution.[617] The court first dealt with the issue of 'deprivation'; it was stated that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.[618]

The court stated that the right to alienate property is an important aspect of its use and enjoyment. The restriction of a person from transferring their property unless consumption charges, that are due by people other than the owner and for which they are not liable, have been paid is a substantive obstacle to alienation and constituted a deprivation of property within the meaning of section 25(1) of the Constitution.[619] The deprivation aspect of the section 25(1) enquiry was passed and the court then continued to determine whether the deprivation was arbitrary.

Applying this case to the thesis it can be stated that there is substantial interference with the taxpayer's rights when considering the higher tax rate paid by a resident in comparison with a non-resident on the same amount of taxable income. Resident taxpayers are forced by law to pay a higher rate of tax than non-resident taxpayers on the same amount of taxable income. This certainly amounts to more than a limited limitation as the taxpayer pays over his or her money to the government. This also goes far beyond any normal restriction on property use as the person is deprived of their property. This case lends weight to the argument that the resident

[615] No. 32 of 2000.
[616] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 18-22. The owners had lease agreements with the tenants to the effect that the tenants would be liable for the municipal charges.
[617] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 2.
[618] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 32. See also *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 (2) BCLR 189 (CC) at para 39 where this view on deprivation was approved by the Constitutional Court.
[619] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 33.

taxpayer is deprived of his or her property with the imposition of a tax that is higher than that paid by non-resident taxpayers.

The court in *South African Diamond Producers*[620] dealt with the subject of whether the ownership of diamonds and licences to sell diamonds has been deprived. The court quoted *Mkontwana's* statement on deprivation; that a substantial limitation that is beyond the normal expected restrictions on property would constitution deprivation.[621] The court held in this matter that the term 'substantial' meant that the intrusion must be so extensive that it has a legally relevant impact on the rights of the affected party.[622] The court stated that the extent of the interference with the diamond owner's right needed to be considered and that it was impossible to quantify the alleged loss of market value as alleged by the applicant on behalf of its members; there was nothing concrete put before the court to accurately back up this assertion.[623] As such, the court could not make a finding that there has been an interference which would constitute deprivation; further that it was not clear from what was before the court whether the interference has any impact on the value of the applicant's members' property at all.[624]

The state would not be successfully able to utilise what was stated by the court with regard to the inability of the applicant to prove that the property in question is quantifiable. It is obvious that an amount of tax payable would have a definite amount attached to it and would be easily quantifiable. This lends weight to what has already been stated that the taxation of a person at a higher rate than another person would amount to a deprivation of property.

The court further stated in *Diamond Producers* that even if the alleged loss was proved by the court, there will still be no deprivation as no legally protectable interest or entitlement is removed by section 20A of the Diamonds Act. Producers and dealers are still permitted to sell their diamonds and to realise full market value for them. What is limited is the way in which

[620] CCT 234/16. In this case the South African Diamond Producers Organisation (a voluntary association of diamond producers) made an application for the invalidity of a section of the Diamonds Act No. 56 of 1986 which changed the way the diamond sellers could conduct their business. It was alleged that the change which resulted in them no longer being allowed to use unlicensed diamond experts during the selling process resulted in a large reduction in the sale price the diamond producers were able to obtain for their diamonds. The court had to decide whether this resulted in an arbitrary deprivation of the diamond producer's property.
[621] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* CCT 234/16 at para 43.
[622] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* CCT 234/16 at para 48.
[623] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* CCT 234/16 at para 50.
[624] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* CCT 234/16 at para 50.

diamonds are sold, not the right to sell itself.[625] The limitation on the manner of sale is not sufficiently substantial to constitute a deprivation of property. As a result, the limitation imposed by section 20A does not constitute substantial interference with rights of ownership in diamonds and no deprivation of property has occurred.[626] There is, therefore, no infringement of section 25(1) of the Constitution. This is relevant to the scenario in this thesis as money is a legally protectable right.

The court in *Chevron SA*[627] discussed the concept of deprivation. The section of the National Credit Act in question forced a credit provider to repay to their customer all amounts paid under the credit agreement, with interest. It was held that to force someone by operation of law to part with payment already received from their customer is the very essence of deprivation of property. In addition, that it is a substantial deprivation as the applicant is divested of all monies which it had previously received from its customer.[628] This part of the judgment is also of importance to differentiated tax rates for residents and non-residents owners of property. While the court is discussing money paid by a credit provider to a customer, the principles are still applicable. The court stated that the repayment of monies received amounted to a deprivation and further that this deprivation was substantial. While a person paying a tax is not refunding money already paid to a third party, they are being divested of their money that they have earned. What was held in the court in this case is another indicator that taxation amounts to a deprivation of a person's property for the purposes of section 25 of the Constitution.

The court held in *National Credit Regulator*[629] that the deprivation under consideration before the court is not of a partial nature. The section of the National Credit Act in question removes an unregistered credit provider's right to restitution of their property. In order to justify such a deprivation, persuasive reasons must be provided for the deprivation.[630] It was submitted by the government that the limitation is important because it protects the public against unscrupulous money lenders and that the punitive nature of the provision should act to deter

[625] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* CCT 234/16 at para 52.
[626] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* CCT 234/16 at para 53-54.
[627] *Chevron SA (Pty) Ltd v Wilson's Transport and others CCT 88/14* at para 18.
[628] *Chevron SA (Pty) Ltd v Wilson's Transport and others* CCT 88/14 at para 18.
[629] CCT 34/12.
[630] *National Credit Regulator v Opperman and others* CCT 34/12 at para 70.

unregistered credit providers from advancing credit to consumers outside of the provisions of the National Credit Act.[631]

What the court held with regard to deprivation can be applied to the higher tax rate paid by residents in comparison with non-residents in that the potential deprivation, the loss of money through taxation, is permanent in nature. Once the taxpayer has paid the money to the revenue authority, that money is no longer that of the taxpayer. The taxpayer's right to that property has been removed permanently.

The case of *Shoprite Checkers*[632] the court dealt with deprivation and agreed with previous decisions that in order for there to be deprivation, the applicant must have been deprived of something legally substantial. In this regard it was held that Shoprite lost the right to sell wine and groceries on the same premises ten years after the commencement of the Eastern Cape Liquor Act. While this loss of legal entitlement was held as not being a significant loss of rights, the loss still amounted to a deprivation under section 25(1) of the Constitution.[633]

This is a further indication that the taxation of residents at higher rates than non-residents will amount to deprivation of property. If this minimal loss of legal entitlement was held as amounting to a deprivation, the payment of money in terms of a tax which is higher than what others are paying on the same amount of taxable income would certainly amount to a deprivation as this is a legally substantial, permanent loss of property.

Marais states that the term deprivation has a specialised meaning in constitutional property law and forms part of the state's police power to regulate the use, enjoyment and exploitation of property in the public interest.[634] This is specifically related to the protection of public health and safety and the settling of civil disputes although it is obviously not limited to these. Deprivation, accordingly, restricts property entitlements and might cause diminution in property values which could be drastic or total.[635]

[631] *National Credit Regulator v Opperman and others* CCT 34/12 at para 70.
[632] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14.
[633] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 75-76.
[634] Marais 'Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection' (2018) 34:2 South African Journal on Human Rights at 175.
[635] Marais 'Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection' (2018) 34:2 South African Journal on Human Rights at 175.

Swemmer also considers the term deprivation. She states that the wide definition of deprivation in *First National Bank* Constitutional Court case is problematic as it ignores the weight of the word and allows for judges to choose which words in the Constitution they want to emphasise and which words can be over looked.[636] In addition, by having an expansive test for deprivation a lot of matters where the infringement should not have amounted to deprivation must be considered on the basis of whether the provision is arbitrary. This will unnecessarily take up the courts' resources.[637]

Taxation constitutes a deprivation of property by the state.[638] The payment of tax by taxpayers is an involuntary act that is required by force of law.[639] This constitutes a deprivation of the taxpayer's property. An example is the portion of a taxpayer's salary that is received for services rendered to an employer and is subject to tax or the profits made by an entrepreneur from the carrying on of a business which is also subject to tax.[640] I agree with Croome that taxation amounts to a deprivation of property.

Money in hand is a legally protectable interest and the payment of tax results in the permanent removal of entitlement to that money. The limitation on a person's right to their property in terms of increased taxation rates has a legally relevant impact on a person's property and is a sufficient substantial limitation to constitute a deprivation of property. The High Court in the *First National Bank* case was, therefore, incorrect in stating that taxation does not amount to a deprivation of property.

[636] Swemmer 'Muddying the waters – the lack of clarity around the use of s25(1) of the Constitution: *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape* (2017) South African Journal on Human Rights 33:2 at 294.
[637] Swemmer 'Muddying the waters – the lack of clarity around the use of s25(1) of the Constitution: *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape* (2017) South African Journal on Human Rights 33:2 at 294.
[638] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 17.
[639] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 22.
[640] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 23.

5.4.2. Expropriation

I now discuss the concept of expropriation in order to determine whether it is applicable to the circumstances this thesis deals with.

> 'The word 'expropriate' is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation.'[641]

Expropriation, therefore, involves the acquisition of rights in property by a public authority for a public purpose. This is different to deprivation which falls short of compulsory acquisition of property.[642]

Section 25(2) of the Constitution which deals with expropriation reads as follows:

> 'Property may be expropriated only in terms of law of general application –
>
> a) For a public purpose or in the public interest; and
>
> b) Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.'

If there is a deprivation but it does not infringe section 25(1)[643] or it infringes section 25(1) but is justifiable under section 36, it must then be determined whether is constitutes an expropriation.[644] Further, that if the deprivation amounts to an expropriation then it must pass scrutiny under section 25(2)(a) and make provision for compensation under section 25(2)(b).[645]

Mostert states that the requirement of compensation is a primary difference between deprivation and expropriation. Section 25(2) of the Constitution dealing with expropriations provides for the payment of compensation, while no such requirement is contained in section 25(1) of the Constitution.[646] Mostert also referred to the case of *Steinberg v South Peninsula*

[641] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 31.
[642] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 32.
[643] In other words, if it is in terms of a law of general application and is not arbitrary.
[644] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at para 59.
[645] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at para 59. Ackermann J also referred to the work of Chaskalson *et al* Constitutional Law of South Africa (1998) Juta where he states that an expropriation must meet two additional requirements to a deprivation. Firstly, that the act of deprivation is performed for a public purpose and secondly that it must be accompanied by just and equitable payment.
[646] Mostert 'The Distinction between Deprivations and Expropriations and the Future of the Doctrine of Constructive Expropriation in South Africa' (2003) South African Journal on Human Rights 567 at 573.

Municipality[647] where the court distinguished between deprivation and expropriation on the basis that payment of compensation is required for an act of expropriation.[648]

This is a clear indicator that in order for an act of deprivation to be considered an expropriation, there must be compensation payable by the government to the person whose property is acquired in order for the act to be considered expropriation.

The court in *First National Bank* [649] dealt with the concept of expropriation in the light of the matter before the court in terms of section 25(2). It was stated that the effect of an expropriation is to vest ownership (of land) in the government and that not every act of government which amounts to deprivation of a right in property amounts to an expropriation.[650] The court held that the placing of a lien upon and the sale of a credit grantor's goods subject to attachment does not amount to expropriation of those goods. Further, that recourse to the goods of owners of property who are not customs debtors is a justifiable measure in an open and democratic society.[651] The court rejected the argument put forth by the applicant that their property had been expropriated in terms of section 25 of the Constitution. The applicant approached this case incorrectly in that their application should have been based on section 25(1) in that the deprivation was arbitrary and not on the grounds of section 25(2) that the deprivation amounted to expropriation. If this were the case, the court would have had to have considered the application in greater detail and would have possibly come to a different conclusion.

Slade deals with the concept of expropriation and states that an expropriation must be compensated and that it usually involves the acquisition of property by the government for public purposes, such as building roads.[652] Slade continued to deal with the difference between deprivation and expropriation with regard to the imposition of tax. Slade states that in instances such as tax, the use of regulatory powers leads to the acquisition of property. However, that

[647] 2001 (4) SA 1243 (SCA).
[648] Mostert 'The Distinction between Deprivations and Expropriations and the Future of the Doctrine of Constructive Expropriation in South Africa' (2003) South African Journal on Human Rights 567 at 579. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 548 where they state that the difference between expropriations and deprivations is that expropriations must be compensated but this requirement does not attach to deprivations.
[649] *First National Bank v Commissioner of the South African Revenue Service 63 SATC 432* at 451.
[650] *First National Bank v Commissioner of the South African Revenue Service 63 SATC 432* at 451. This is an important statement as a tax may amount to a deprivation but that does not mean that it is automatically also an expropriation.
[651] *First National Bank v Commissioner of the South African Revenue Service 63 SATC 432* 451.
[652] Slade 'The Effect of Avoiding the FNB Methodology in Section 25 Disputes' (2019) Obiter Vol. 4 Issue 1 at 36 - 37.

such an acquisition is not regarded as expropriation.[653] Slade is correct in this regard, the imposition of a tax cannot amount to an expropriation as one cannot be compensated for taking a person's money through tax; but tax can amount to a deprivation of property.

It does not, therefore, matter whether expropriation is solely restricted to immovable property. Taxation can never amount to expropriation as there can be no form of compensation payable for a deprivation of a person's money. This would be non-sensical as if this were to happen, a taxpayer would pay money to the government in the form of tax which if it amounted to an expropriation would mean that the government must compensate the taxpayer for the tax paid and repay them their money. This is obviously not a plausible situation; expropriation is, accordingly, not applicable to the scenario that this chapter deals with.

It is clear from the above that the primary difference between an expropriation and a deprivation (in cases where there is a total loss of rights) is not whether there is a total loss of ownership of rights in property, but rather whether the total loss of rights, as is required with an expropriation, is subject to compensation or not. If no compensation is required, the deprivation will be just that and will not also amount to an expropriation.

5.5. *The meaning of 'Arbitrary'*

I must now deal with the final term, 'arbitrary', in order to determine whether a provision is contrary to section 25(1) of the Constitution. The meaning of the term 'arbitrary' in section 25(1) of the Constitution is the most important consideration in a determination of whether the taxation of residents and non-residents at different effective tax rates contravenes section 25(1) of the Constitution. This is because this is the part of the enquiry which is the least clear cut and there is room to argue that the deprivation suffered as a result of the increased tax rates is arbitrary and there is also room to argue that it is not arbitrary. In order to make this determination, this section sets out an in-depth analysis of the applicable cases to ensure that the best conclusion can be established.

[653] Slade 'The Effect of Avoiding the FNB Methodology in Section 25 Disputes' (2019) Obiter Vol. 4 Issue 1 at 46.

If the provision in question falls foul of section 25(1), in that it is an arbitrary deprivation, and cannot be justified in terms of section 36 of the Constitution, that is the end of the matter. The provision is unconstitutional.[654]

In terms of the South African Constitution, when interpreting the Bill of Rights, our courts have an obligation to promote the values that underlie an open and democratic society. In this regard, imposing taxes and securing payment will, in principle, be acceptable in a democratic society subject to the safeguards contained in the Bill of Rights.[655]

In terms of the Irish Constitution,[656] Croome states that Irish courts are reluctant to hold that tax laws amount to an unjust attack on property rights. Taxes would only fall foul of the constitutional guarantee of property rights if they are discriminatory or arbitrary.[657] Croome also referred, with approval, to an Irish case *Daly v Revenue Commissioners*.[658]

Croome states that if South Africa introduced a taxing measure that caused undue hardship to taxpayers that it would not pass constitutional muster under section 25 of the Constitution. Further, that taxation constitutes a deprivation of property but that the deprivation is generally lawful as the state requires funding from its citizens to meet its obligations.[659] In other words, while tax amounts to a deprivation, it would generally not be held to be arbitrary as there is

[654] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 495.
[655] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 23.
[656] While this thesis does not deal with Ireland as a country of comparison, the comments made by Croome and the Irish Constitution are worthwhile considering as they are applicable to the current situation.
[657] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 22 in reference to Kelly 'The Irish Constitution' (2003) 4 ed para 7.7.82.
[658] [1995] IEHC 2. In this case the taxpayer challenged the new tax law which resulted in business owners who earn fees have tax withheld at source on their gross fees before the amount is paid to them; this is already more tax than they would normally pay on this income as they are allowed to deduct expenses from their gross fees and pay tax on the net fees after expenses. They have, therefore, overpaid tax on the withholding tax. In addition, the taxpayers are not entitled to the credit from this withholding tax until the following year of assessment. In other words, a taxpayer is subject to withholding tax before fees are received but are only entitled to a credit for this tax that has already been paid when they file their final tax return in the following year of assessment. This obviously has a massive financial impact on the person as they are obliged to pay tax twice essentially in one year, once when the tax is withheld and then again upon filing their tax return when the tax is paid again on the income earned less applicable expenses. While the taxpayer would get the credit for the tax withheld in the following year of assessment, the taxpayer suffered financially in the current year having to pay tax on the same income twice. The taxpayer in this case had to borrow money to pay for the tax owed. This financial hardship was held to be a serious deprivation of the taxpayer's property. The court held that the state is obliged to protect its citizens from unjust property attacks and that this can be proven by showing that his infringement fails to pass a proportionality test. Further, that the object of the provision in question must be of sufficient importance to warrant overriding a constitutionally protected right. The means chosen to achieve the governmental objective must pass a proportionality test. It was held that this provision which allowed for this system as detailed above fails the proportionality test and is unconstitutional as the withholding tax would normally exceed total tax liability and that the provisions create a permanent interference with the taxpayer's rights.
[659] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 23.

generally sufficient justification for the tax being implemented.[660] Accordingly, in order for tax to be an unlawful and arbitrary deprivation, it must cause hardship to the taxpayer.

In respect of the higher tax rate paid by a resident in comparison with a non-resident, it can be said that the taxation imposed would amount to a deprivation of property. However, I must consider whether the taxation of residents and non-residents at different effective tax rates causes undue hardship on the taxpayer in terms of the constitutional protection of property. It is unlikely that the taxpayer would have the ability to show undue hardship. While they are being taxed at higher effective tax rates, they have still made a profit[661] on the income from the fixed property, either in the form of a taxable income from the rental or a capital gain on the disposal of the property. The government is entitled to tax someone on a profit they have made from a trade they have carried on so as to assist with the provision of services to people of South Africa. This is particularly true of people who own immovable property as they require roads to their properties, electricity and water to be available at the property so that it can be let. These people must be required to pay government taxes to contribute to the provision of these services that they receive.

Just because the taxpayer has paid more tax than a non-resident does not automatically mean that they have suffered undue hardship. It may well be that while there is deprivation of a person's property in terms of the taxation, that the government can justify the deprivation and that it may not be arbitrary and unlawful. A strong argument in favour of the government in these circumstances is non-residents do not have access to all the governmental services that a resident would have. For example, a non-resident investor in fixed property would benefit from government services such as roads, electricity and water services which will enable them to let and sell their properties in South Africa. They would not, however, have access to government hospitals and schools as they do not live in South Africa.[662] This would be a strong argument

[660] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 23. See also Moosa 'The 1996 Constitution and the Tax Administration Act 28 of 2011: Balancing efficient and effective tax administration with taxpayers' rights' (2016) LLD Thesis at 98 where he states that taxation is the financial cost of freedom and democracy.

[661] If the taxpayer makes a loss on the rental income, in other words the deductible expenses are greater than the income from the rental, they will obviously have no taxable income and not be subject to tax on the income from the rental property. In terms of the disposal of the fixed property, if the taxpayer sells the property for an amount lower than what it was purchased for they will have incurred a capital loss and also not be subject to tax on the disposal. In either of these two situations a resident would obviously not be subject to higher effective tax rates than a non-resident as they are not subject to tax at all.

[662] This is also in line with the equality canon of taxation as pronounced by Adam Smith in 'An inquiry into the nature and Causes of the Wealth of Nations' (1776) Bantam at 1043 where Smith states that the subject of each state must contribute towards the support of the government in proportion to the revenue which they respectively enjoy under the protection of that state. In other words, if one person in a state earns a large amount of income from sources within that state, he or she must pay an amount of tax which is commensurate with the income

for the government that the resident taxpayer is not being caused undue hardship as they have access to more governmental services than a non-resident investor who does not live in South Africa. In addition, the taxpayer is paying tax on a profit made from either their rental property or capital gains on a disposal. The taxpayer can be expected to pay tax when their trade of letting their property has made a profit or their asset has increased in value to result in a capital gain. It is not unreasonable to expect payment of tax in such circumstances. If the law forced residents to pay tax when they have made a loss on their rental income or a capital loss on their fixed property, then there would be a strong argument that the deprivation is unlawful.

Croome states that where a taxing measure is implemented that applies equally to all citizens of South Africa, a taxpayer would not have the capability to persuade a court that the statute is invalid merely because it constitutes a violation of the right to property.[663] If the imposition of a tax constituted an arbitrary deprivation of property the taxpayer would seek to recover compensation from the state for the repayment of the taxes. In order to refund the taxpayer, the compensation would come from the taxes themselves. Croome, accordingly, states that the taxpayer would fail in challenging the constitutionality of taxing provisions on the grounds that they constitute an unreasonable and unjustifiable deprivation of property.[664]

It is my view that this is a weak argument as while the first taxpayer to challenge a taxing provision, presuming that he or she had already been subject to the tax and is trying to recoup it, would be repaid if successful from taxes collected by the government; the government would essentially simply be paying back the tax that was unjustly paid to the government in the first place. In addition, presuming that the court find that the provision in question is unjustifiable, the legislation must be changed so that no one would be taxed in the same manner again. There

earned. In the same vein, a person who has only received a small amount of income from a state must only pay an amount of tax that is commensurate with that income. This gives weight to the argument that a non-resident who is only earning a limited amount of income from either letting property in South Africa or earns a capital gain from the disposal of fixed property must pay a limited amount of tax in South Africa. This canon would justify an increased tax rate for a resident in comparison with a non-resident presuming that the non-resident earns less income in South Africa than the resident. See also Moosa 'Fulfilling human rights through taxation in South Africa' (2017) *Insurance and Tax Journal* Vol 32(1) at 9 where he states that the governmental purpose of taxation is to extract a fair amount from each citizen for the public benefit and to provide services to the public. While he speaks of a fair amount of tax from citizens, it is my view that this argument is also applicable to non-residents who are not citizens but who earn income within the state; such people must pay their fair share of taxes in a state where they receive governmental services.

[663] Croome presumably also meant for the purposes of this particular argument that any person who is affected by tax laws in South Africa, which would include non-resident taxpayers who own fixed property in South Africa, would not be able to argue that a statute is invalid merely because it violates their right to property. This is, however, of no importance as the non-resident taxpayer would not suffer a violation of their right to property as they pay tax at lower rates than resident taxpayers.

[664] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 23.

would, therefore, be no need for the government to repay the taxpayer from its taxes collected as the taxpayer would not be taxed on that income in the first place.

Croome concludes on this topic by stating that, in principle, the imposition of tax is a justifiable deprivation of a person's property. However, if the state were to introduce an unreasonable taxing measure or a tax with an ulterior purpose or not for a public purpose, a court should strike such a provision down as being unreasonable in an open and democratic society.[665]

I must consider whether the different effective tax rates that this thesis deals with are, amongst other factors, an unreasonable taxing measure which causes undue hardship to the resident taxpayer. If the tax is unreasonable and causes undue hardship, this would be a strong indicator that the provision is arbitrary.

The *First National Bank* Constitutional Court judgment sets out in detail what must be determined in a consideration of whether a provision is arbitrary.[666] As the court was satisfied that there had been a deprivation of the applicant's property, it needed to be determined whether the deprivation was arbitrary. It was held that the term arbitrary is not limited to non-rational deprivations in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality.[667] It is also not as broad as the limitation clause contained in section 36 of the Constitution which requires a standard based on 'reasonableness' and 'justifiability' where the standard in section 25 is 'arbitrariness'.[668] The nature and extent of the deprivation as well as the context in which the prohibition against arbitrary deprivation is applied is important. In certain instances, the deprivation might be such that no more than a rational connection between means and end would be required. In other situations, the ends

[665] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 23. The term 'unreasonable in an open and democratic society' is similar to the wording in section 36 of the Constitution. As will be discussed below, a determination of whether tax amounts to an arbitrary deprivation is close to the proportionality consideration under section 36. It is, therefore, appropriate to consider whether the tax provision amounts to an unreasonable taxing measure, a tax with an ulterior purpose or if it is not for a public purpose. If either of these are present, this would be a strong indication that the provision is arbitrary.

[666] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC).* The court in *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* CCT 234/16 approved the test as set out in the *First National Bank* Constitutional Court judgment regarding a determination of whether a provision is arbitrary.

[667] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 497.

[668] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 497.

would have to be more compelling to prevent the deprivation from being arbitrary.[669] In other words, the reasons for the deprivation must be more compelling than merely a rational connection between means and ends. The reasons for the deprivation need not be compelling, but rather more compelling than just a rational connection.

The court, after considering other jurisdictions,[670] as well as South African law came to the following conclusion regarding the meaning of the term 'arbitrary':[671] a deprivation will be arbitrary when the 'law' that is being considered under section 25(1) does not provide sufficient reason for the deprivation or is procedurally unfair.[672] Sufficient reason is established as follows:

i. By evaluating the relationship between means employed (the deprivation in question) and the ends sought to be achieved (the purpose of the law).

When considering the higher effective tax rate paid by the resident in comparison with the non-resident, the deprivation is the additional tax that is imposed on residents in relation to non-residents. It can be argued that the purpose of the lower tax rates for non-residents is to encourage foreign investment in the country. Although, as detailed in the previous chapter, it is unlikely that the South African government has ever considered this difference in effective tax rates and the purpose of the lower tax rates for non-residents. The government would be able to argue that this lower effective tax rate is to encourage foreign investment in the country if they were to try to justify this situation.

[669] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 497.
[670] This issue is discussed in further detail below.
[671] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 507. See also Cheadle, Davis and Haysom 'South African Constitutional Law: The Bill of Rights' Lexis Nexis Online edition at chp 20.4 where it states that in summary, the word 'arbitrary' has been interpreted by the Constitutional Court in the *First National Bank* matter as being a broader principle for testing the act of deprivation than mere rationality; the test is, however, narrower in scope than the proportionality evaluation required in terms of the limitation clause as contained in section 36.
[672] This was also approved in *Carmel Trading v Commissioner for South African Revenue Service* 70 SATC 1. In this case SARS wished to sell an aircraft that was not owned by the applicant but was under the control of another person who owed SARS a substantial amount of money. This court case was an appeal from the High Court which extended an earlier granted preservation order and anti-dissipation order and ordered the return of the aircraft to South Africa. The court held that the deprivation was not arbitrary as the decision to order the sale was taken after a procedurally fair hearing and the reason for the eventual sale would be to repay tax debt owed to SARS. The only effect of the preservation order is that the owner may not dissipate the aircraft pending the outcome of the main hearing dealing with the actual tax debt owed by the taxpayer which would be dealt with in separate cases. There was sufficient reason for the preservation order which was upheld by the Supreme Court of Appeal. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 543 where this process of determining sufficient reason was approved.

ii. A complexity of relationships must be considered.

iii. Regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected.

As the purpose could be argued as being to encourage foreign investment in South Africa, a resident taxpayer paying more tax than a non-resident has a connection to this purpose in the sense that they must essentially pay higher tax rates than non-residents in order to assist the South African economy. It may also be argued that by having increased foreign investment in the country that the South African economy will become stronger which would result in a benefit for the resident.

iv. In addition, the relationship between the purpose of the deprivation and nature of the property as well as the extent of the deprivation must be considered.

The nature of the property is the higher tax paid by residents in comparison with non-residents is money which is paid in the form of a tax to the government. The extent of the deprivation is absolute as the resident taxpayer is legally obliged to pay additional tax, in relation to the non-resident, which is a permanent loss of a valuable asset. This factor would be a strong indicator towards the deprivation being considered arbitrary.

v. If the property in question is ownership of land or corporeal moveable, a more compelling purpose than merely a rational connection between means and ends must be established to illustrate sufficient reasons for the deprivation than in the case when the property is something different and the property right less invasive.

As discussed earlier, money constitutes corporeal property and a more compelling purpose would, therefore, must be established to illustrate sufficient reasons for the deprivation.

vi. When the deprivation under consideration embraces all the incidents of ownership, there will need to be a more compelling purpose than merely a rational connection between means and ends for the purpose of the deprivation than when the

deprivation embraces only some incidents of ownership and those incidents only partially.

As the taxpayer loses ownership of his or her property the deprivation embraces all the incidents of ownership. The taxpayer permanently pays over money that was previously his or hers.

vii. Depending on the nature of the property and the extent of the deprivation, there may be circumstances where sufficient reason is established by no more than a rational relationship between means and ends. In others it may only be established by a proportionality evaluation closer to that required under section 36 of the Constitution;[673]

On the basis of what has been set out above, it is clear that the serious and permanent nature of this deprivation of a taxpayer's property must result in the need for a proportionality evaluation in order to establish sufficient reason. Merely considering the rational relationship between means and end would not be sufficient.

viii. Whether there is sufficient reason will always depend on the facts of each particular case.

In applying these principles to the matter before the court, it stated the following: the end sought to be achieved by the deprivation is to exact payment of a customs debt.[674] The court held that this was a legitimate and important legislative purpose that is essential for the well-being of the country and in the interest of all its inhabitants. However, section 114 of the Customs and Excise Act goes too far; it allows the total deprivation of a person's property where that person has no connection with the transaction giving rise to the customs debt and where such property has no connection with the customs debt. As there is no relevant connection between the

[673] As per paragraph 65 of this judgment, it was stated that a proportionality evaluation entails considering whether the limitation is reasonable and justifiable; this is in line with what is required in terms of section 36. This was held as being more onerous than the standard applied in section 25 which is based on arbitrariness. In other words, it is easier to show that a provision is not arbitrary rather than a limitation is reasonable and justifiable if someone is trying to show that a particular provision is not unconstitutional.

[674] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 511.

applicant and the customs debt as well as the motor vehicles and the customs debt, sufficient reasons do not exist for section 114 to deprive persons other than the customs debtor of their goods. Such deprivation is, accordingly, arbitrary for purposes of section 25(1) of the Constitution and constitutes an infringement of such person's rights.[675]

First National Bank's ownership of the motor vehicles in question is completely extinguished by the operation of section 114 of the Customs and Excise Act. SARS gains an execution object for someone else's customs debt. There is no connection between First National Bank or its vehicles and the customs debt in question. Under these circumstances the object achieved by section 114 of the Customs and Excise Act is grossly disproportionate to the infringement of the applicant's property rights.[676] The court held, therefore, that the infringement of section 25(1) of the Constitution is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The provision is, accordingly, invalid on constitutional grounds and is not justifiable in terms of section 36.[677]

The different tax rates between residents and non-residents has similarities to this case. In the thesis scenario, there is a weak connection between the purpose of the law and the taxpayer who is affected. The connection is that resident taxpayers must pay more tax than non-resident taxpayers so as to help encourage foreign investment in the country. While this connection is not as weak as in the *First National Bank* case where there is no connection between the customs tax and the person whose property is subject to attachment, it is still a weak connection. The findings of the court in *First National Bank* to the effect that a weak connection between the purpose of the law and the affected person and that the law goes too far is indicative of the deprivation being arbitrary. While it cannot be said that the law in the thesis scenario goes too far, as the resident taxpayer has made a profit on their rental property or a capital gain upon disposal and ought to be taxed on that profit, the weak connection between the purpose of the lower rates of tax for non-residents in comparison with residents must be one of the factors which I consider in determining whether the differentiated tax rate is an arbitrary deprivation.

[675] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 511. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 544 where they state that these factors set out by the court to determine sufficient reason indicate that the more extensive the interference with property, the more compelling the justification for that interference must be.
[676] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 512.
[677] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 512.

The court in *Mkontwana*[678] stated with approval what was held in the *First National Bank* Constitutional Court case pertaining to whether a provision is arbitrary; that if the law fails to provide sufficient reasons for the deprivation or the deprivation is procedurally unfair then it will be arbitrary.[679] The judgment in this matter emphasised a portion of the test as set out in *First National Bank* and stated that in order to determine whether sufficient reason is apparent, one needs to evaluate the relationship between the purpose of the law and the deprivation effected by that law. If the purpose of the law bears no relation to the property and its owner, the provision is arbitrary.[680] In addition, the *First National Bank* judgment sets out that if there is a connection between the purpose of the deprivation and the property or its owner there must be sufficient reason for the deprivation.[681]

The court in *Mkontwana* then delved into the purpose of section 118(1). It was held that the purpose of the section is to furnish a form of security to municipalities for the payment of amounts due in respect of the consumption of water and electricity (consumption charges). Further, that the ultimate effect of the law is that the property in connection with which the consumption charges have been incurred provides security for the payment of that consumption charge. This section, therefore, burdens the owner of the property.[682] The purpose of the provision is to place this risk on the owner. It was stated that this purpose is commendable and has the potential to encourage property owners to ensure that municipal charges are paid up to date by their tenants.[683] There is a connection between the consumption charge and both the property and the owner of the property. As the connection has been established, it must consequently be decided whether there is sufficient reason for the deprivation.[684] The same enquiry must be made in the case of differentiated tax rates for resident and non-resident owners of property

In respect of differentiating tax rates between residents and non-residents, it can be argued that the purpose of a lesser tax on non-residents is to encourage foreign investment. The purpose is connected to the property and its owner in the sense that the resident taxpayer is paying more tax than the non-resident taxpayer on the same taxable income. In other words, the resident taxpayer's property, in the form of money being paid as tax, is connected to the purpose of the

[678] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03.
[679] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 34.
[680] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 33.
[681] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 35.
[682] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 38.
[683] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 38.
[684] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 43.

law as the resident taxpayer pays more tax than the non-resident so that non-resident individuals can be encouraged to invest in immovable property in South Africa. The resident essentially makes a sacrifice of being taxed at higher effective tax rates than non-residents so as to assist the South African economy. This increased taxation on resident taxpayers cannot be said to be arbitrary on the basis that there is no connection between the purpose of the law and the property and its owner. I must, accordingly, determine whether sufficient reason exists for the deprivation in order to determine whether the deprivation is arbitrary.

The court continued in *Mkontwana* with the enquiry by delving into whether section 118(1) is arbitrary for not having an appropriate relationship between means and ends.[685] In other words, is there sufficient reason for the deprivation or is the deprivation arbitrary. The court stated the following in this regard: 'There are three interrelated steps to this enquiry. We must determine in turn:

a) The nature of the property concerned and the extent of the deprivation;
b) The nature of the means-end relationship that is required in the light of the nature and extent of the deprivation; and
c) Whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the section 25(1) deprivation.'[686]

The deprivation in this matter relates to the right to transfer property to complete alienation. However, the deprivation in this matter is temporary and only effects a single element of ownership (the ability to transfer the property); it is not however insubstantial. It requires the owner to bear the risk of non-payment of consumption charges by their tenants.[687] Importantly, the court stated that there would be sufficient reason for the deprivation if the government purpose for the deprivation was both legitimate and compelling and if it would not be unreasonable to expect the owner to take the risk of non-payment.[688]

The deprivation that is suffered by resident taxpayers paying higher rates of tax than non-residents results in a complete and permanent alienation of the resident taxpayer's property through the payment of tax which is in excess of the tax paid by a non-resident. However, I must determine whether the purpose for the deprivation, which could be argued as being to

[685] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 44.
[686] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 44.
[687] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 51.
[688] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 51.

encourage foreign investment in the country by taxing non-residents at low rates, is both legitimate and more compelling than merely a rational connection between means and end An initial consideration of the purpose of the law might lend one to take the view that the government has a more compelling reason to encourage foreign investment in the country. However, I must determine whether the difference in effective tax rates goes too far and unfairly infringes on the property rights of a resident taxpayer. There are of course other ways in which the government can encourage foreign investment in the country which would not result in residents being treated differently to non-residents in a negative manner. The strength of the connection between the purpose of the law and the taxpayer and his or her property must also be considered. I discuss this in further detail below after all of the relevant cases have been considered.

In relation to the first aspect of the enquiry in *Mkontwana*, the court stated that municipalities are obliged to provide water and electricity and it is, therefore, important for unpaid municipal debt to be reduced by all legitimate means. The purpose of section 118 is commendable and has the potential to encourage regular payment of consumption charges, contributes to the effective discharge by municipalities of their obligations and encourages property owners to fulfil their public responsibility.[689]

In the case of tenants of immovable property, there is a close connection between the consumption charge and the property as well as between the consumption charge and the owner. The supply of water and electricity enhance the use, enjoyment and value of the property; the supply of these services has a large impact on the amount of rental that may be charged. There is, accordingly, a strong connection between the consumption charges and the property and the consumption charges and the owner.[690] The sections under consideration are not, therefore, arbitrary in relation to consumption charges incurred by tenants on a property as there are sufficient reasons for the deprivation.

The principles that were laid out in *Mkontwana* are important for any consideration of an alleged infringement of section 25 of the Constitution and must be considered in detail in relation to the matter under investigation.

[689] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 52.
[690] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 51. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 546 where they state that *Mkontwana* turned on the existence of, and quality of, the connection between the purpose of the deprivation and the impact of that deprivation on the rights of the property owner.

Du Plessis has also written about section 25 of the Constitution in the light of *Shoprite* and other pivotal decisions that have dealt with this section.[691] Du Plessis begins with an analysis of the *First National Bank* case. He states that while the Constitutional Court set out the blueprint for the test for arbitrariness of a deprivation, it does not provide a definitive guideline that would make the outcome of similar constitutional challenges predictable.[692] Du Plessis states that it was not the intention of the court to provide a definitive guideline on the issue;[693] *First National Bank* was the first case on this issue which came before the Constitutional Court and the court was content with establishing general principles.[694] Such a method allows a court deciding on a section 25(1) dispute a wide discretion to determine whether there has been an arbitrariness of a deprivation. Further, that the test laid out provides little concrete guidance as to the meaning of the key terminology, the factors that a court may take into account and the level of scrutiny applied will depend on the circumstances. The level of scrutiny goes from one extreme to the other; on the lesser end of the scale is a rationality review and on the other end of the scale is something just short of a proportionality review. Which end of the scale is chosen will depend on the extent of the limitation.[695]

In respect of *Mkontwana*, Du Plessis states that the court had express regard to what is to be considered as the importance of the purpose of the provision in question. The *First National Bank* case allowed the court in *Mkontwana* the flexibility to deal with what it believed was an important and necessary provision of the act being considered notwithstanding its impact on property ownership.[696] In considering other cases which our courts have dealt with over the years, Du Plessis suggests that there are many differing judgments on the section 25 issue with no hard and fast rules, but that it may have been the intention of the courts to allow itself a large degree of flexibility and discretion so that the courts can take a wide view of any challenge based on section 25 and not be limited unnecessarily by previous judgments as these types of

[691]'Property rights and their continued open-endedness – a critical discussion of Shoprite and the Constitutional Court's property clause jurisprudence' (2018) Stellenbosch Law Review Vol 29 No. 1 at 73.
[692] Du Plessis 'Property rights and their continued open-endedness – a critical discussion of Shoprite and the Constitutional Court's property clause jurisprudence' (2018) Stellenbosch Law Review Vol 29 No. 1 at 73.
[693] Du Plessis 'Property rights and their continued open-endedness – a critical discussion of Shoprite and the Constitutional Court's property clause jurisprudence' (2018) Stellenbosch Law Review Vol 29 No. 1 at 77.
[694] Du Plessis 'Property rights and their continued open-endedness – a critical discussion of Shoprite and the Constitutional Court's property clause jurisprudence' (2018) Stellenbosch Law Review Vol 29 No. 1 at 77.
[695] Du Plessis 'Property rights and their continued open-endedness – a critical discussion of Shoprite and the Constitutional Court's property clause jurisprudence' (2018) Stellenbosch Law Review Vol 29 No. 1 at 78.
[696] Du Plessis 'Property rights and their continued open-endedness – a critical discussion of Shoprite and the Constitutional Court's property clause jurisprudence' (2018) Stellenbosch Law Review Vol 29 No. 1 at 78.

issues are very context specific.[697] Du Plessis concluded by stating that the test for arbitrary deprivation is far too open-ended and judges in lower courts do not have sufficient guidance in coming to the correct conclusion on the issue.[698]

The Zimbabwean Supreme Court case of *Law Society of Zimbabwe v Minister of Finance* is worthwhile considering.[699] While this is obviously not a South African case, it deals with principles that are relevant to the issue being dealt with in this thesis and will add value to this work.

In this case, the Zimbabwean government introduced a capital gains withholding tax that was challenged by the taxpayer on grounds of it not being constitutionally valid.[700] The issue that needed to be dealt with by the court was whether the new capital gains withholding tax 'is shown not to be reasonably justifiable in a democratic society'.[701]

The issue of whether a provision is 'reasonably justifiable in a democratic society' will take into account the following factors:

i) Whether the legislative objective is sufficiently important to justify limiting a fundamental right;
ii) Whether the measures designed to meet the legislative objective are rationally connected to it; and
iii) Whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[702]

The issue that the taxpayer had with the newly introduced provisions was that the withholding tax of ten per cent on the value of all immovable property sold was arbitrary and not reasonably justifiable in a democratic society.[703] The withholding tax was said to impose the following unfair burdens on taxpayers: a person selling their primary residence is allowed to roll over the gain until the second property is sold, such a person would pay the withholding tax when no tax is actually due; if immovable property is sold at a loss no capital gains would be payable

[697] Du Plessis 'Property rights and their continued open-endedness – a critical discussion of Shoprite and the Constitutional Court's property clause jurisprudence' (2018) Stellenbosch Law Review Vol 29 No. 1 at 80-81.
[698] Du Plessis 'Property rights and their continued open-endedness – a critical discussion of Shoprite and the Constitutional Court's property clause jurisprudence' (2018) Stellenbosch Law Review Vol 29 No. 1 at 88.
[699] 61 SATC 458.
[700] *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458 at 461.
[701] This is the same term used in section 36 of the South African Constitution. It is useful to consider how the Zimbabwean courts dealt with this phrase as it was dealt with in detail in this matter.
[702] *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458 at 461.
[703] *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458 at 463.

on the transaction; no interest is paid by the Commissioner of Taxes on amounts that were withheld in excess of the tax payable and in the days of rapid inflation the taxpayer could suffer a massive loss.[704]

The court held that if the state had introduced a straight tax of ten per cent and not a withholding tax of ten per cent of the value of the property, the court would have had no grounds to interfere in the theoretical legislative provision. However, as the withholding tax is merely a prepayment of a later tax to fall due, there must be a reasonable relationship between the amount that was withheld and the tax later found to be due.[705]

The result of this withholding tax was that in many cases the state would impose a tax even where no tax was due. This results in the withholding tax being irrational, unfair and unconstitutional.[706] It is, therefore, not the collection of taxes which is impugned, but the technique used in doing so. This technique was held to be 'not reasonably justifiable in a democratic society'. The court stated the following as to why the withholding tax was indiscriminate, arbitrary and irrational:

> 'It was indiscriminate because it failed to provide any mechanism whatever for distinguishing between those who would ultimately be liable and those who would not.'[707]

It was arbitrary in the sense that it was based on or derived from uninformed opinion or random choice as it was known that not everyone who sold property would be liable yet all were obliged to pay.[708] It is a matter of people in different classes being inappropriately treated in the same way.[709]

The discussion of the arbitrariness of this provision of a tax imposed in Zimbabwe can be used as a comparison in South African law as South African case law is very limited in this regard.[710]

[704] *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458 at 464.
[705] *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458 at 468.
[706] *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458 at 468.
[707] *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458 at 470.
[708] *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458 at 470.
[709] *Law Society of Zimbabwe v Minister of Finance* 61 SATC 458 at 471.
[710] Another case worth considering in this discussion is *The City Council of Pretoria v Walker* CCT 8/97. In this case the complainant brought an action against the City Council of Pretoria on the basis that he was being treated differently due to the area he lived; this was in terms of how the municipal charges were metered as well as the enforcement of municipal debt which was enforced in the area he lived but not in other areas. The court held, at para 138, that if the complainant had brought the application on the grounds that there should be uniform enforcement of the laws and not that there should be equal non-enforcement of the laws that the court would have had to take different considerations into account. If this had been the case the court would have had to consider whether a resident could force the council to enforce laws against all people equally without considering where

The principles in this case can, therefore, be applied to the case at hand in order to determine whether the tax imposed which results in residents paying a higher rate of tax than non-residents is arbitrary.

The court held that the provision was arbitrary as it failed to provide a mechanism for distinguishing between those who had an ultimate tax liability and those who did not. Also, that the legislation was based on random choice as not who sold their property would be affected. The standard of whether a tax is arbitrary as set out in this case would lend to a conclusion that the taxation of residents at higher rates of tax than non-residents is not arbitrary. This is because resident taxpayers will pay tax when they have made a profit on their rental income or a capital gain on disposal; it is merely the amount of tax in comparison with non-residents that is in question not their ultimate liability to actually pay tax. It is not based on random choice or uninformed opinion.

The court in *Shoprite Checkers*[711] also dealt with the concept of arbitrariness. The court approved what was held in *First National Bank* that a deprivation is arbitrary when the law does not provide sufficient reason for the deprivation or when it is procedurally unfair. Further, that a 'complexity of relationships' must be considered in determining whether sufficient reason has been provided. The court stated that this complexity of relationships involved considering the relationship between means (deprivation) and ends (purpose of the law), the relationship between the purpose of the law and the person holding the property. Lastly, the relationship between the purpose of the law and the nature of the property and extent of the

that person lives or their skin colour. In other words, had the application been brought on the basis that the selective enforcement of the recovery of municipal debt was based on arbitrary criteria which infringed his right to equal protection and equality before the law he could have had a remedy based on the equality clause of the then interim Constitution. While this deals with the equality clause, the court's considerations on arbitrary may be applied to a section 25 consideration. Essentially the court stated in *Walker* that the treatment of someone on a different basis to other people because he or she lived in a different area is arbitrary. At first blush it may seem that this is the same as the situation where a resident is being taxed at higher rates than a non-resident merely because the resident is a South African resident taxpayer; in other words he or she is paying more tax because he or she considers South Africa as his or her home. However, *Walker* must be differentiated from the scenario where residents are being taxed at higher rates in comparison with non-residents, as the taxpayer in *Walker* has access to the same municipal services as the people in the other area and this would seem unfair that he should pay more. In the scenario with taxing residents at higher rates, the resident has access to more governmental services than the non-resident as a result of he or she living in South Africa. This in comparison with the non-resident investor who lives elsewhere but invests in South African fixed property. It cannot, therefore, be said that the arbitrariness referred to in *Walker* is the same as the situation with the taxation of residents due to this fact. While this may be a consideration of whether taxing residents at higher rates than non-residents is arbitrary, it is certainly not a major factor.

[711] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14.

deprivation.[712] This is essentially the same as was stated as being the test for sufficient reason in *Mkontwana* as discussed above. Froneman J stated that in the event that the legislative deprivation extinguishes the right of choice of vocation or any other fundamental right or constitutional value, arbitrariness must be tested against proportionality. In other cases, rationality will be sufficient reason.[713]

Relating this principle to the case before the court, Froneman J stated that the change in legislation brought about by the Eastern Cape Liquor Act did not extinguish any fundamental rights of holders of grocers wine licences or fundamental constitutional values. Rationality would, accordingly, be sufficient reason to avoid a finding of arbitrariness. On the facts, it is quite rational to change the regulatory regime of liquor sales to provide for simplification of the licensing system.[714] Further, that the deprivation only occurred after holders of grocers wine licences were allowed to continue selling wine in their grocery store for ten years and were given the opportunity of making an application to sell wine in separate liquor stores within five years of commencement of the Eastern Cape Liquor Act. Froneman J held that this was reasonable and non-arbitrary.[715]

Froneman J held, therefore, that while the licence constituted property in the hands of the grocers, that it was not a fundamental constitutional right and that it must be shown that the legislation is rational in order for there to be sufficient reasons for the deprivation.[716] In respect of differentiating tax rates between residents and non-residents, it can be argued that while the right to property may not be a fundamental right, the taxation of residents and non-residents at different effective tax rates is also concerned with the right to equality. It was shown in the previous chapter that the different effective tax rates violated the taxpayer's right to equality. Therefore, in terms of this judgment by Froneman J, it cannot just be shown that the legislation is rational in question in order to avoid a finding of arbitrariness; the arbitrariness must be tested against proportionality.

[712] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 77-79.
[713] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 82.
[714] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 83.
[715] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 86.
[716] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* CCT 216/14 at para 86.

It is clear from the *Shoprite* judgment and the articles dealing with the judgment that the more serious the limitation of a person's rights, the more in depth the analysis needs to be as to whether the limitation can be justified in terms of it being held as not being arbitrary. It will not be sufficient in considering the differentiated tax rates for residents and non-resident owners of fixed property to merely find that the provision is rational in order to state that the provision is not arbitrary; an increased amount of tax payable by residents in comparison with non-residents is a permanent and serious deprivation of a person's rights. It will be necessary to lean towards the other end of the scale and have an enquiry closer to that of proportionality in order to determine whether the deprivation in question is arbitrary.

In the case of *National Credit Regulator* [717] it was held that while the objectives of the National Credit Act are understandable, the court was not convinced that the purpose of the limitation provided sufficient reasons for the deprivation; as per the *First National Bank* case sufficient reason is needed to show that the deprivation is not arbitrary. The state does not have unfettered discretion as to how it may pursue the ends that it wishes to achieve. Given that the extent of the deprivation is far reaching, the purpose should be clearly stated and the means chosen to accomplish it must be narrowly set out.[718] It was held in this case that the means chosen to achieve its aims were disproportionate.

The case of *Hindry v Nedcor Bank Ltd and another*[719] is another important case when determining the constitutionality of a tax act provision. In this case, SARS paid out refunds to the taxpayer erroneously. SARS rectified this by raising revised assessments on the taxpayer. The taxpayer objected to the revised assessments that resulted in the taxpayer owing money to SARS. In other words, the assessment on which the refunds were based were now reversed and the taxpayer owed money to SARS.[720] However, the taxpayer did not pay the amounts due to SARS in terms of the revised assessments as they took the view that assessment cannot be re-opened three years after the applicable income tax period.[721]

As a result of the refusal to pay, SARS issued a notice in terms of section 99 of the Income Tax Act[722] appointing the taxpayer's bankers as their agent to pay over the debt owed by the taxpayer to SARS. Section 99 allowed SARS to declare any person an agent of another person

[717] CCT 34/12.
[718] *National Credit Regulator v Opperman and others* CCT 34/12 at para 71.
[719] 61 SATC 163.
[720] *Hindry v Nedcor Bank and another* 61 SATC 163 at 168.
[721] *Hindry v Nedcor Bank and another* 61 SATC 163 at 170.
[722] No. 58 of 1962.

and the appointed agent will then be required to make payment of any monies that it holds on behalf of the taxpayer to SARS.[723] After the taxpayer's bank had notified the taxpayer of this notice received by SARS, the taxpayer instituted an interdict application to prevent the bank from paying the monies to SARS.[724]

The taxpayer challenged section 99. The taxpayer argued that this section violated the Constitution and should be set aside. It was argued that this section is an extraordinary mode of payment as:

i) It makes no provision for notice to be given to the taxpayer prior to the notice being issued to the third party to act as agent;
ii) It makes no provision for any sort of representation by the taxpayer;
iii) Is a procedure that is out of the control of the courts; and
iv) It obliges the agent to make the payment to SARS on pain of sanction.[725]

On these grounds, it was argued that this section infringes the taxpayer's right to privacy, administrative action and right of access to courts. It was held that the taxpayer's arguments were based on the premise that the section enables SARS to summarily recover any amount prior to the adjudication of an objection that a taxpayer has lodged. However, the taxpayer did not advance grounds on which the validity of the amounts owing to SARS is disputed.[726]

The court stated that the garnishment of a debt, which this process is akin to, is a normal form of execution available in the process of collecting a monetary debt and that the garnishment of a debt may be regarded as a seizure of property.[727] The court did not, however, deal with this matter in terms of section 25 of the Constitution even though the garnishment of a debt was regarded as a seizure of property. Section 99 can be used to recover an amount due under an assessment or an amount owing to SARS as a result of an incorrectly paid refund without there being a judgment in favour of SARS.[728] The question that the court had to decide was whether this provision violated a taxpayer's basic human rights by reason of its extra-judicial and

[723] Section 99 of the Income Tax Act was repealed although the recovery of a tax debt by means of payment by a third party is now dealt with in terms of section 179 of the Tax Administration Act No. 28 of 2011.
[724] *Hindry v Nedcor Bank and another* 61 SATC 163 at 171.
[725] *Hindry v Nedcor Bank and another* 61 SATC 163 at 174.
[726] *Hindry v Nedcor Bank and another* 61 SATC 163 at 176.
[727] *Hindry v Nedcor Bank and another* 61 SATC 163 at 180.
[728] *Hindry v Nedcor Bank and another* 61 SATC 163 at 176.

summary nature.[729] The court does not deal with this in detail but implicitly accepts that the taxpayer's rights have been violated.[730]

As the court was of the view that the taxpayer's rights had been infringed it continued to consider section 36 of the Constitution and whether this limitation was justifiable. The argument put forth by SARS was, firstly, that there is an urgent need for the collection and application of taxes in the interest of the South African society as a whole.[731] A substantial delay in the collection of taxes would have a disastrous consequence for South Africa. SARS further argued that this section is an essential part of the South African self-assessment system as it enhances voluntary compliance in the collection of taxes, and that the section can facilitate a speedy recovery of debt due to SARS and that SARS only resorts to utilising this section when a taxpayer has been furnished with an assessment but fails to pay the amount owing. In addition, the section does not deprive the taxpayer of the right to approach a court regarding a decision made in terms of section 99 and the section allows the objective of effective taxation and equal treatment of all taxpayers.[732]

The court held that the evidence overwhelmingly indicates that the principle of section 99 is a legitimate limitation of the taxpayer's rights in terms of section 36 of the Constitution.[733] In this regard, the taxpayer had been informed of the amounts owing to SARS but had not put forth any legitimate grounds for not being liable for the amount of tax owing. The conclusion that the court came to was that the limitation of constitutional rights implicit in section 99 is reasonable and justifiable in an open and democratic society.[734]

While this case does not deal with section 25 of the Constitution, it indirectly deals with a person's right to property. The taxpayer's property had been seized as a result of the garnishee order which was able to be made in terms of section 99 of the Income Tax Act. While the court glossed over whether the taxpayer's rights to privacy, access to courts and administrative action by assuming without deciding that these rights had been infringed, it concentrated on section 36 of the Constitution and held that the limitation on the taxpayer's rights was reasonable and justifiable in an open and democratic society. As a result, the court held that the seizure of a person's property, in the form of money, was reasonable and justifiable under these

[729] *Hindry v Nedcor Bank and another* 61 SATC 163 at 180.
[730] *Hindry v Nedcor Bank and another* 61 SATC 163 at 186.
[731] *Hindry v Nedcor Bank and another* 61 SATC 163 at 182.
[732] *Hindry v Nedcor Bank and another* 61 SATC 163 at 182.
[733] *Hindry v Nedcor Bank and another* 61 SATC 163 at 183.
[734] *Hindry v Nedcor Bank and another* 61 SATC 163 at 186.

circumstances. This can be included in the consideration of whether a provision would amount to an unreasonable taxing measure, as per Croome.[735]

The court should have, however, also dealt with this matter in terms of section 25 of the Constitution. It was held that the taxpayer's property was seized and the provisions of section 25 should have been one of the sections under which this constitutional analysis took place. The court should have then dealt with whether there was an arbitrary deprivation of property. A deprivation of property would have been apparent as discussed above and below, taxation amounts to a deprivation of property. The issue that the court would have had to decide would have been whether the deprivation was arbitrary and unlawful. The court's statement that the limitation on the taxpayer's rights was reasonable and justifiable in an open and democratic society would be a strong indication that the limitation was not arbitrary. The provision would probably not have been held to have infringed section 25 of the Constitution and the court would not have had to consider section 36 of the Constitution.

The court in *Chevron*[736] held that sufficient reason for the impugned section of the National Credit Act exists as the prohibition against unlawful credit agreements serves a crucial purpose of protecting consumers. However, the court referred to the ruling in *First National Bank* that a law may be arbitrary if there is not sufficient reason or it is procedurally unfair.[737] This is confirmation from the Constitutional Court that the principles set out in *First National Bank* are still applicable for section 25 enquiries.[738] As the court found that sufficient reasons existed for the deprivation, it must be decided whether the provision was procedurally fair. The court held that the primary concern when dealing with whether this provision was procedurally unfair was that the court was given no discretion when making an order under section 89(5)(b) of the National Credit Act. The court again referred to the *Opperman* case where it was stated that a lack of discretion on the part of a court to forfeit property would result in an arbitrary deprivation of property.[739]

[735] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 23. Croome states that if a taxing measure was unreasonable that the court should strike it down as being unreasonable in an open and democratic society.
[736] *Chevron SA (Pty) Ltd v Wilson's Transport and others CCT 88/14* at para 20.
[737] *Chevron SA (Pty) Ltd v Wilson's Transport and others* CCT 88/14 at para 20.
[738] This case is discussed below.
[739] *Chevron SA (Pty) Ltd v Wilson's Transport and others* CCT 88/14 at para 22. See also Currie & De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 541 where they state that: 'Procedural fairness also means that the state should exercise its powers in terms of clear rules and principles set out in advance. The exercise of power is arbitrary where it does not follow rules or precedents, where it is unpredictable.'

In this case, it was held that the legislation does not allow the court to take relevant circumstances into account, such as the conduct of the parties to the transaction, their financial positions, their level of business and financial acumen, the possible apportionment of blameworthiness of the parties in relation to the unlawfulness of the agreement and the extent to which the credit receiver had profited from the transaction.[740] The lack of ability on the part of the court to consider these issues means that the section is procedurally unfair and makes the deprivation arbitrary.[741]

It is important to note that the Constitutional Court only used the procedural unfairness enquiry in the determination of whether a provision is in breach of section 25. In other words, even if there are sufficient reasons for the deprivation, if it is procedurally unfair then it can still be arbitrary and in breach of section 25 of the Constitution.

Badenhorst states that the court's formulation in *Chevron* of deprivation and arbitrary deprivation were correct and in line with recent court decisions such as *Mkontwana* where the concept of deprivation was dealt with on a wider basis than in *First National Bank*.[742] The court in *Chevron* was correct in finding that to order the repayment of monies paid by the consumer for goods it actually receives merely because the credit provider is not registered constitutes an arbitrary deprivation of property, on the basis of it being procedurally unfair, and an unjustifiable limitation of constitutional property which fell foul of section 25 (1) of the Constitution.[743]

The court and Badenhorst are correct in their views. The repayment of monies that were paid to a customer of a credit provider merely because the credit provider is not a registered credit provider is unconstitutional. It goes way too far in its punishment of the credit provider. If it were to have happened that the credit provider needed to repay the customer the money it received from that customer, the customer would have had the goods that it bought and its money back. This is blatantly unfair for the credit provider. While it is commendable that the National Credit Act protects consumers, this section takes the protection too far and results in

[740] *Chevron SA (Pty) Ltd v Wilson's Transport and others* CCT 88/14 at para 23.
[741] *Chevron SA (Pty) Ltd v Wilson's Transport and others* CCT 88/14 at para 23.
[742] Badenhorst 'An arbitrary deprivation of property? The South African Constitutional Court's decision on s 89(5)(b) of the National Credit Act, 34 of 2005, in Chevron (Pty) Ltd v Wilson's Transport (2016) Canterbury Law Review Vol. 22 at 118.
[743] Badenhorst 'An arbitrary deprivation of property? The South African Constitutional Court's decision on s 89(5)(b) of the National Credit Act, 34 of 2005, in Chevron (Pty) Ltd v Wilson's Transport (2016) Canterbury Law Review Vol. 22 at 118.

an arbitrary deprivation of property for the credit provider who received payment for goods that it sold to its customer.

Van der Walt also deals with this lesser considered aspect of whether section 25(1) is constitutional: whether the provision in question is procedurally fair.[744] As set out above in the *First National Bank* Constitutional Court judgment, the court held that a deprivation is arbitrary when the law in question does not provide sufficient reason for the deprivation or is procedurally unfair.[745]

After the court in *First National Bank* stated that procedural unfairness would entail a deprivation amounting to an arbitrary deprivation, it then proceeded to analyse when a provision would be substantively unfair. It did not, however, give any further detail on what it meant by the term procedurally unfair.[746] Even though procedural fairness is not discussed in any detail in *First National Bank*, it confirmed that procedural fairness constitutes an independent ground for a potential finding that a deprivation is arbitrary.

Van der Walt states that there is a lack of clarity on the meaning of procedural unfairness in *First National Bank* as well as *Mkontwana* where it was stated that procedural arbitrariness is a flexible concept that had to be determined with reference to all the circumstances. Van der Walt states that the *First National Bank* and *Mkontwana* decisions give the impression that procedural fairness will be assessed on the same basis as the test for just administrative action under the Promotion of Administrative Justice Act.[747] However, the courts in these cases could not use the Promotion of Administrative Justice Act to adjudicate those decisions as there was no administrative action; this Act cannot be used in any determination if no administrative action exists. In other words, if the deprivation is imposed directly by legislation, the question whether the deprivation is procedurally arbitrary can only be dealt with in terms of section 25(1) of the Constitution. There is no administrative action when the legislation imposes the deprivation.[748] While the adjudication must be made in terms of section 25(1) of the Constitution, it is likely that the principles relating to whether administrative action is

[744] 'Procedurally Arbitrary Deprivation of Property' (2012) Stellenbosch Law Review Vol. 23 No.1 at 88.
[745] Van der Walt 'Procedurally Arbitrary Deprivation of Property' (2012) Stellenbosch Law Review Vol. 23 No.1 at 88.
[746] Van der Walt 'Procedurally Arbitrary Deprivation of Property' (2012) Stellenbosch Law Review Vol. 23 No.1 at 88.
[747] No. 3 of 2000. Van der Walt 'Procedurally Arbitrary Deprivation of Property' (2012) Stellenbosch Law Review Vol. 23 No.1 at 90.
[748] No. 3 of 2000. Van der Walt 'Procedurally Arbitrary Deprivation of Property' (2012) Stellenbosch Law Review Vol. 23 No.1 at 91-92.

procedurally fair in terms of the Promotion of Administrative Justice Act would be used in determining whether the deprivation was arbitrary. In other words, principles of administrative action would be used but this review would take place in terms of section 25(1) of the Constitution.[749]

Van der Walt concludes by stating that in the absence of administrative action, such as where the legislation has directly caused the deprivation, the rule against bias is probably embodied in the requirement that the deprivation must be made in terms of a law of general application. The general principles of procedural fairness would probably not find much application in the context of section 25(1) challenges against legislation that directly causes the deprivation.[750] However, Van der Walt also states that where the deprivation is caused directly by legislation, the deprivation could be procedurally arbitrary if the legislation reasonably should but does not provide for either judicial oversight or periodic review of the legislative framework that brings about the deprivation.[751]

The imposition of tax in terms of legislation cannot be said to be procedurally unfair as the implementation of the tax applies equally to all persons and there is a yearly review of fiscal legislation in terms of the annual Budget Review given by National Treasury.[752]

I am also of the view that the deprivation of property suffered by resident taxpayers by paying a higher rate of taxation than non-residents on the same amount of taxable income is not substantively unfair in terms of section 25(1) of the Constitution. It can be said that sufficient reasons exist for the deprivation and that no undue hardship is suffered by the taxpayer. This is so because there is an argument to be made that the reduced tax payable by non-residents will help to encourage foreign investment in the country;[753] this is a legitimate and more compelling purpose than merely a rational connection between means and end.. In addition,

[749] No. 3 of 2000. Van der Walt 'Procedurally Arbitrary Deprivation of Property' (2012) Stellenbosch Law Review Vol. 23 No.1 at 92.
[750] No. 3 of 2000. Van der Walt 'Procedurally Arbitrary Deprivation of Property' (2012) Stellenbosch Law Review Vol. 23 No.1 at 93.
[751] No. 3 of 2000. Van der Walt 'Procedurally Arbitrary Deprivation of Property' (2012) Stellenbosch Law Review Vol. 23 No.1 at 94.
[752] See the National Treasury 'Budget Review 2020' 26 February 2020.
[753] It has been illustrated in other parts of this thesis, e.g. under 6.3, that tax incentives have a minimal effect on a foreign investor's decision to invest in a country. However, the requirement to show that there has been an arbitrary deprivation is that there must be a more compelling purpose between means and end than merely a rational connection (see*First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 497). It is my view that while foreign investment may be only marginally affected by tax rates, that even a slight increase in foreign investment due to lower tax rates would comprise a purpose that is more compelling than merely a rational connection between means and end. In other words, the discrimination would not be arbitrary.

non-residents should not be required to pay as much tax as a resident as they do not have access to all the governmental services that a resident does. On this basis there is a justification for having a higher tax rate for residents in contrast with non-residents.

Resident taxpayers are only required to pay tax on a profit made from the letting of fixed property or on a capital gain made upon disposal of the property. It cannot be said that there is undue hardship on the taxpayer in this regard. As Croome states, a deprivation in the form of taxation is generally lawful as the state requires funds from its citizens to meet its obligations.[754] If a taxpayer has made a profit from his or her trade, it must be expected of this person to pay tax to assist with the functioning of the government. It would not be unreasonable to expect a resident taxpayer in these circumstances to pay tax on their taxable income.

As has been stated above, the determination of whether a provision is arbitrary would need to be considered on a basis that is more burdensome than rationality and closer to that of proportionately. As Croome states, a tax will be unjustifiable if it amounts to an unreasonable taxing measure, has an ulterior motive or is not for a public purpose.[755] This entails a consideration that is closer to the proportionality analysis under section 36; if a provision is an unreasonable taxing measure it will not be reasonable in an open and democratic society. A higher rate of taxation paid by residents in comparison with non-residents is not unreasonable. Residents are taxed on a profit that they have made and there is a legitimate reason for the higher rate of taxation that they pay. There is also no ulterior purpose and the higher rate of taxation is for a public purpose and the taxation in question is also not derived from uniformed opinion or random choice

It is, accordingly, my view that the taxation of residents at higher rates than non-residents does not constitute an arbitrary deprivation of property in terms of section 25(1) of the Constitution.

[754] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 23.
[755] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 23.

5.6. Conclusion on section 25 applicability

As has been stated above, in order to show that a provision is in line with section 25 of the Constitution, it must be shown that the provision is in terms of a law of general application and does not amount to an arbitrary deprivation of property.

a) Law of general application

As has been stated above, the tax imposed on the residents and non-residents which results in the different effective tax rates is as a result of the Income Tax Act which is a law of general application. This part of a constitutional property enquiry is, therefore, satisfied.

b) Property

The starting point in the consideration of what is property is section 25. Section 25(4) states that property is not limited to land. As per the cases of *Chevron*, *Troskie*, *First National Bank* and *National Credit Regulator*, it is apparent that money in hand which will be paid as tax constitutes money that is capable of constitutional protection.

c) Deprivation

Whether a tax may be considered a deprivation is not as straight forward as whether tax paid is money. It was stated in *First National Bank* (High Court) that tax does not amount to deprivation. However, the principles that have been set out in various cases disagree with what was said by the judge in this case.

When a taxpayer pays over an amount of money to the government, they have lost all legal rights to that money. As per *First National Bank* (Constitutional Court) any interference with the use, enjoyment or exploitation of private property involves a deprivation.

In *Mkontwana* it was held that a deprivation amounted to a substantial limitation of a person's property that is beyond the normal expected restrictions on property. This was approved by *South African Diamond Producers* where it was also stated that there must be a removal of a legally protectable interest or entitlement. In other words, there must be a legally relevant impact on the taxpayer's property.

Croome is also of the view that taxation amounts to a deprivation of property as it constitutes an involuntary act that is required by force of law.

It is evident from the relevant case law that the payment of tax which results in the permanent loss of a person's property is a substantial limitation on that person's right to their property. There is a legally relevant impact on the taxpayer's property. Taxation does, therefore, amount to a deprivation of property. The third part of the section 25(1) enquiry has, therefore, been satisfied.

d) Arbitrary

The final aspect of section 25(1) I must consider is the requirement that a deprivation be arbitrary before it will be considered unconstitutional. A discussion of whether the different effective tax rates are arbitrary must begin with a consideration of the dictionary definition of the word 'arbitrary'. 'Arbitrary' can be defined as:

> 'based on random choice or personal whim, rather than any reason or system.'[756]

This aspect of the section 25(1) enquiry needs the greatest consideration as whether the taxation of residents and non-residents at different effective tax rates constitutes an arbitrary deprivation of property is not clear cut.

An enquiry into whether a deprivation is arbitrary must start with what was held in *First National Bank* by the Constitutional Court. It was stated in this case that the term is not limited to non-rational deprivations in the sense of there being no rational connection between means and ends. However, it is also not as expansive an enquiry as the limitation clause contained in section 36 of the Constitution. Further that there must be sufficient reason for the deprivation and it must be procedurally fair, failing which the deprivation will be arbitrary. In order to determine sufficient reasons, I must consider the relationship between the purpose of the deprivation and the person whose property is affected.

As was stated earlier, it can be argued that the purpose of the reduced amount of tax for a non-resident is to encourage foreign investment in the country and that resident taxpayers must pay more tax to allow investment to flow into the country. There is, accordingly, a connection between the purpose of the deprivation and the people who are affected by it. As the extent of the deprivation is significant, a person is permanently deprived of a significant asset, their money, more than a rational enquiry is required. This concept was also approved in the *Shoprite* case. More compelling reasons than merely a rational connection between means and ends for

[756] Dictionary.com available at https://bit.ly/3eCvtUB, accessed 22 April 2020.

the deprivation must be shown in order to show that the deprivation in this matter is not arbitrary.

As per *Mkontwana,* if there is a connection between the purpose of the deprivation and the property there must be sufficient reasons for the deprivation. It was stated that there would be sufficient reasons if the government purpose for the deprivation was both legitimate and compelling. In *Law Society of Zimbabwe* it was stated that a tax provision is arbitrary if it was indiscriminate and derived from a random choice.

Relating these principles to the differentiated tax rates between residents and non-residents, it can be stated that an argument could be made which would encompass a legitimate governmental purpose in taxing non-residents at lower rates than residents; namely to encourage foreign investment in the country which is needed to boost the South African economy. This is a more compelling reason than merely a rational connection between means and ends that illustrates that there are sufficient reasons for the deprivation that is suffered by resident taxpayers. As per the dictionary definition of 'arbitrary', the increased tax rates for residents is obviously not based on random choice without any reason. There is a legitimate reason for the reduced tax rates for non-residents that does not cause undue hardship to the taxpayer, even if the government has never actively thought about this situation.

It is, therefore, concluded that although a person's property is deprived through the taxation of residents at higher rates of taxation than non-residents on income from South African rental property as well as capital gains tax on the disposal of South African property, that this deprivation is not arbitrary and does not, therefore, violate section 25 of the Constitution. It is not an unreasonable taxing measure. There is consequently no requirement to consider section 36 of the Constitution as this section is only applicable if section 25 had been violated.

5.7. Comparison with Botswana, the United Kingdom and Australia

The Constitution of Botswana, 1996 provides for a protection from the deprivation of property. This is in terms of section 8 of the Constitution of Botswana which is entitled 'Protection from deprivation of property'. This section reads as follows:

> '(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say –
>
> (a) The taking of possession or acquisition is necessary or expedient –
>
> i. In the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement;
>
> ii. In order to secure the development or utilization of that, or other, property for a purpose beneficial to the community; or
>
> iii. In order to secure the development or utilization of the mineral resources of Botswana; and
>
> (b) Provision is made by a law applicable to that taking of possession or acquisition –
>
> i. For the prompt payment of adequate compensation…'

While the heading of this section of the Constitution of Botswana states that there is protection from the deprivation of property, as can be seen by the wording of this section, that this section deals with expropriation. This is because compensation is payable if a person is dispossessed of his or her property; it was stated earlier in this chapter that an expropriation is a subset of deprivation that requires compensation to be paid.[757]

This is confirmed by the case of *President of the Republic of Botswana and others v Bruwer and another.*[758] This case dealt with the issue of expropriation in terms of section 8 of the Constitution of Botswana. In considering this section, the court stated the following:

[757] An interpretation of section 8 of the Constitution of Botswana to the effect that section 8 lays down the minimum requirements to be observed by the envisaged law on expropriation. See Ng'Ong'Ola 'Challenging the Legality of a Notice of Expropriation in Botswana' (1998) South African Law Journal Vol. 115 at 621 where the statement made in the case of *President of the Republic of Botswana and others v Bruwer and another* 1998 BLR 86 (CA) to this effect was approved.

[758] 1998 BLR 86 (CA).

> 'This provision deals with the compulsory acquisition of private property generally. With respect to immovable property the governing Act in terms of the Constitution is the Acquisition of Property Act (Cap. 32:10). Our attention has not been drawn to, nor have my researches identified, a similar statute dealing with the acquisition of movable property.'[759]

The court in *Bruwer* goes on to state[760] that section 8 of the Constitution lays under what circumstances compulsory appropriation and acquisition is allowable and in respect of which type of property. Further, that the Acquisition of Property Act has confined this provision to 'real property'.

Section 3 of the Acquisition of Property Act states that the government may acquire any real property where the acquisition of such property is necessary or expedient in the interests of defence, public safety, public order amongst other requirements and that compensation must be paid to the property owner. Section 2 of the Acquisition of Property Act states that real property means any real right in immovable property including any lease of immovable property, certain rights to public water of use and servitudes.

It is, therefore, clear that the deprivation dealt with under section 8 of the Constitution of Botswana deals with the appropriation or acquisition of fixed property subject to compensation; this would amount to expropriation and would not cover the broad types of deprivation of property that are protected by section 25 of the South African Constitution which do not amount to the appropriation or acquisition of property in its entirety.

Sub section 5 of section 8 of the Botswana Constitution is also worth considering. It states that nothing contained in sub section 5 shall be in contravention of sub section 1 of section 8. In other words, if any of the scenarios in sub section 5 are apparent, there will be no deprivation in terms of sub section 1. Sub section 5 states that to the extent that the law in questions allows for the taking of possession or acquisition of property in satisfaction of any tax, rate or due, it will not be contrary to sub section 1 and, accordingly, not an unconstitutional deprivation of property. At first sight, this may seem to indicate that the imposition of tax would not amount to an unconstitutional deprivation of property. However, what this really says is that if a person owes an amount of tax, property can be taken from them to satisfy that tax debt owing without

[759] *President of the Republic of Botswana and others v Bruwer and another* 1998 BLR 86 (CA) at 91.
[760] *President of the Republic of Botswana and others v Bruwer and another* 1998 BLR 86 (CA) at 110.

the deprivation amounting to an unconstitutional deprivation of property. In other words, if a person owes a tax debt to the state, the state may take that person's property to satisfy that debt.

This is a different scenario to a consideration of whether the imposition of the tax itself is an unconstitutional deprivation of property. This section deals with the payment of a tax debt that is already owing and not whether the imposition of the tax in the first place constitutes an unconstitutional deprivation of a person's property as is the case in the taxation of residents at higher rates than non-residents.

There is only one other provision which deals with the right to property. This is briefly mentioned in section 3 of the Constitution which states that every person in Botswana is entitled to fundamental rights, including protection for the privacy of his or her home and other property and from deprivation without compensation. This section appears to be an overview of the rights that a person is entitled to but that they are expanded upon under the following sections. This does not, therefore, have any bearing on the arguments advanced in this thesis.

There are no other provisions in the Constitution of Botswana that deal with a person's right to property. It can be stated that the Constitution of Botswana only provides a protection against the dispossession of property in the cases of expropriation. A taxpayer in Botswana would not have the capability to bring an argument to court in Botswana that their constitutional rights to property have been infringed by the imposition of a tax that is at a higher rate than other taxpayers as there has been no expropriation.

The Commonwealth of Australia Constitution[761] provides for a level of protection against the acquisition of property by legislation. Section 51 (xxxii) of the Australian Constitution states that the parliament can make laws for the peace, order and good government of Australia with respect to:

'the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has the power to make laws'

The Australian Constitution, therefore, protects property from interference in the form of acquisitions by the government other than on just terms. While this provision allows the government to acquire property, it is regarded as a constitutional guarantee to property rights.

[761] Act, 1990.

There are no other constitutional limitations on the making of laws which restrict property rights. [762]

This form of constitutional protection, however, only deals with the expropriation of property. This was confirmed in the case of *Bank of New South Wales v Commonwealth (Bank Nationalisation Case)*[763] where it was stated that this section deals with the principle that where the legislature deprives a person of their property, that fair payment should be made to the person who was deprived of property. Where Australian legislation allows for dispossession of a person's property on other than just terms within the meaning of section 51 (xxxii), there are fail safe provisions that ensure that the person is entitled to compensation for the acquisition by the government.[764]

The Australian Constitution, therefore, provides for protection from the acquisition of property by the government without compensation; this protection is however a protection not to have your property expropriated without compensation. The protection does not extend any further than this to dispossessions that do not entail an expropriation of property, such as the case of a deprivation of property caused by the payment of a tax. It is, accordingly, evident that an Australian citizen would not be protected against a deprivation of their property in the form of a taxation.

As stated in Chapter 4, the United Kingdom does not have a written Constitution.[765] There are, therefore, no constitutional protections to property in the United Kingdom. There are laws in the United Kingdom, such as the Compulsory Purchase Act[766] that deal with the deprivation of property. The purpose of this act is to give governmental bodies the right to compulsorily acquire land from private citizens for urban and rural regeneration, land to build essential infrastructure, the revitalisation of communities and the promotion of business.[767] Such compulsory orders should only be made where there is a compelling public interest to do so.

[762] Australian Law Reform Commission 'Property Rights' available at https://bit.ly/2yklRNv, accessed 18 April 2020.
[763] (1948) 76 CLR 1.
[764] Australian Law Reform Commission 'Property Rights' available at https://bit.ly/2yklRNv, accessed 18 April 2020.
[765] British Library 'Britain's unwritten Constitution' available at https://bit.ly/2V7KlTG, accessed 20 February 2020.
[766] 1965.
[767] Ministry of Housing, Communities and Local Government 'Guidance on compulsory purchase process and the Crichel Down Rules' (2018), available at https://bit.ly/34RLxgH, accessed 20 April 2020.

The government authority acquiring the land will always be required to pay compensation to the landowner.[768]

This law, therefore, allows for the expropriation of privately held land with compensation payable by the government authority acquiring the land. This type of protection is not, therefore as wide as the protection afforded to people under section 25 of the South African Constitution.

It is clear considering the Constitutions of Botswana and Australia and the situation in the United Kingdom that section 25 of the South African Constitution offers a wide protection of property rights that extends to cases other than those occasioned by expropriation. It also includes situations where legislation results in the deprivation of property through a tax being levied.

5.8. The African Charter on Human and Peoples' Rights

The African Charter on Human Rights[769] is a document that was put together detailing all of the rights which each person living in Africa should be provided by the state in which they live with the aim of ensuring a better life for all people living in Africa. The purpose of the charter is to ensure that all African people are provided with rights to freedom, equality, justice and dignity. This included a pledge to eradicate all forms of colonialism and apartheid. Further, that in order for people's fundamental rights to be enjoyed, other rights relating to economic, social and cultural must also be afforded to people. The fundamental rights of freedom, equality, justice and dignity cannot live in isolation; this is why the charter goes further and provides for rights in the following spheres of life (not exhaustive):[770]

a) The enjoyment of freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status;
b) The right of equality before the law and equal protection of the law;
c) The respect for his or her life;
d) The right to have his or her cause heard;
e) The right to receive information;
f) The right to freedom of association;

[768] Ministry of Housing, Communities and Local Government 'Guidance on compulsory purchase process and the Crichel Down Rules' (2018), available at https://bit.ly/34RLxgH, accessed 20 April 2020.
[769] Entered into force on 21 October 1986.
[770] African Charter on Human and Peoples' Rights, available at https://bit.ly/2wLEoBQ, accessed 20 April 2020.

g) The right to freely assemble;
h) The right to participate freely in the government of his country;
i) The right to work under equitable and satisfactory conditions;
j) The right to education; and
k) The right to property.

The right to property is detailed under Article 14 of the African Charter on Human and Peoples' Rights. It states the following:

> 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

South Africa acceded to the charter on 9 July 1996;[771] this was shortly before the final Constitution of South Africa came into force on 18 December 1996. The Department of Justice and Constitutional Development states that South African law has been implemented to give effect to the provisions of the African Charter on Human and Peoples' Rights and that the South African legal system is beginning to mirror this charter thereby ensuring the protection of human rights through incorporation of the African Charter on Human and Peoples' Rights norms into the South African legal system.[772]

In terms of application of the African Charter on Human and Peoples' Rights into South African law, one needs to consider section 231(2) of the South African Constitution which states that international law is only binding in South Africa once it has been approved by resolution by the National Assembly and by the National Council of Provinces. This is not the case with the African Charter on Human and Peoples' Rights;[773] it has not been adopted into South African law. However, in terms of section 233 of the Constitution, our courts, when interpreting law, must prefer any reasonable interpretation that is consistent with international law over any alternative that is not consistent with international law.[774]

[771]The Department of Justice and Constitutional Development 'African Charter', available at https://bit.ly/2xvi3Jp, accessed 18 April 2020.
[772] The Department of Justice and Constitutional Development 'African Charter', available at https://bit.ly/2xvi3Jp, accessed 18 April 2020.
[773] The Department of Justice and Constitutional Development 'African Charter', available at https://bit.ly/2xvi3Jp, accessed 18 April 2020.
[774] It is beyond the scope of this thesis to delve into further detail regarding international law and its general applicability in South Africa.

One of the enforcement mechanisms of the African Charter on Human and Peoples' Rights is the African Court on Human and Peoples' Rights. The purpose of the African Court on Human and Peoples' Rights is to contribute to the implementation of the safeguards of the African Charter on Human and Peoples' Rights.[775] The Protocol to the African Charter on Human and Peoples' Rights, which gives power to the African Court on Human and Peoples' Rights, has been ratified by South Africa.[776] It would achieve its goals by dealing with matters where individuals rights have been violated by their country; rights which are guaranteed in terms of the African Charter on Human and Peoples' Rights.

Article 5 of the Protocol to the African Charter on Human and Peoples' Rights provides for three routes through which the African Court on Human and Peoples' Rights may address human rights claims made under the African Charter on Human and Peoples' Rights. The first is through the African Commission on Human and Peoples' Rights, the second is through the state which is party to the African Court on Human and Peoples' Rights and the third allows individuals and non-governmental organisations to apply directly to the African Court on Human and Peoples' Rights against a state. However, the third route is subject to article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights which provides that a state must specifically permit the African Court on Human and Peoples' Rights to receive a case filed directly by an individual or a non-governmental organisation.[777] South Africa is one of the few countries who have not given the African Court on Human and Peoples' Rights this specific authority.

If a South African were to feel aggrieved by the South African Constitution or by any legislation in South Africa, they would find it extremely difficult to bring an application to the African Court on Human and Peoples' Rights as they would not obtain direct access.[778] In addition, it is difficult to be optimistic that a South African court would interpret a provision in

[775] Enabulele 'Incompatibility of National Law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say' (2016) African Human Rights Journal Vol. 16 at 2.
[776] Enabulele 'Incompatibility of National Law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say' (2016) African Human Rights Journal Vol. 16 at 2.
[777] Enabulele 'Incompatibility of National Law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say' (2016) African Human Rights Journal Vol. 16 at 2.
[778] Enabulele 'Incompatibility of National Law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say' (2016) African Human Rights Journal Vol. 16 at 19.

favour of a ruling that has been made in the African Court on Human and Peoples' Rights over a South African ruling or South African legislation.[779]

I now consider whether the provisions of the South African and Botswana Constitution are in line with the protection of property provision of the African Charter on Human and Peoples' Rights; if they are not a person from either of these countries would theoretically have the capability to bring an application to the African Court on Human and Peoples' Rights to protect their rights, although they may find practical difficulty in doing so. Section 25(1) and section 25(2) of the South African Constitution read as follows:

> '(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of a law of general application –
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to those affected or decided or approved by a court.'

As can be seen, the South African Constitution is in line with the provisions of the African Charter on Human and Peoples' Rights, in that they both guarantee the right to property and that this right may only be encroached in the public interest and in terms of a law of general application. There are unlikely to be any instances where a South African person would successfully bring an application to the court in an attempt to show that South Africa has violated their right to property or even equality.

In the same vein, section 8 of the Constitution of Botswana provides that no property may be compulsorily taken except if it is in the public interest and compensation is paid to the person who is deprived of his or her property.

The two African countries that are examined in this thesis, South Africa and Botswana, already have a guaranteed to protection to property in terms of their own constitutions. The African Charter on Human and Peoples' Rights does not add any protection to inhabitants of these countries. The impact of the African Charter on Human and Peoples' Rights is, therefore, of

[779] Enabulele 'Incompatibility of National Law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say' (2016) African Human Rights Journal Vol. 16 at 19 – 20.

limited practical use for these countries for the purposes of the protection to property afforded in Article 14 of the African Charter on Human and Peoples' Rights.

5.9. The right to economic freedom

The interim Constitution of South Africa[780] had a section entitled 'Economic Activity'. Section 26 states the following:

> 'every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.'

The Constitution of the Republic of South Africa changed the wording of this provision under section 22 under the heading 'Freedom of trade, occupation and profession'. This section states that every citizen has the right to choose their trade, occupation or profession freely. Further, that the practice of a trade, occupation or profession may be regulated by law.

It is, therefore, evident that section 22 of the final Constitution is far more restrictive than the right contained in the interim Constitution. The section now only allows for the right to choose a profession, trade or occupation whereas the right in the interim Constitution alluded to a right which may have required the government to clear obstacles standing in the way of a person engaging in economic activity and freely pursuing a livelihood.[781] However, even though the right has been curtailed in the final Constitution, it is not a simplistic 'choice' that an individual is allowed. This notion of choice as contained in section 22 is a type of choice that inherently relates to the ability to implement one's choice. Further, that the phrase 'trade, occupation or profession' is wide and covers all forms of economic activity that anyone might choose to engage in.[782]

[780] Constitution of the Republic of South Africa, 1993.
[781] Cheadle, Davis and Haysom 'South African Constitutional Law: The Bill of Rights' Lexis Nexis Online edition at chp 17.1. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at 459 where they state that the right to economic activity as contained in section 26 of the Interim Constitution was replaced with a far narrower right to 'occupational choice' or occupational freedom' in the Constitution.
[782] Cheadle, Davis and Haysom 'South African Constitutional Law: The Bill of Rights' Lexis Nexis Online edition at chp 17.1. To add to this argument is that section 1 of the Income Tax Act defines the term 'trade' which specifically includes the letting of rental property. While the Constitution does not define the term 'trade', I believe that this is a strong indication that the letting of property would constitute a trade for the purposes of section 22.

The Constitutional Court in the *South African Diamond Producers*[783] case dealt with section 22 of the Constitution and stated that this section comprises two elements. Firstly, is the right to choose a trade, occupation or profession freely and the proviso to this that the practice of trade, occupation, profession may be regulated by law. The court held that there is far stricter scrutiny that must entail a consideration of whether an individual has been allowed to choose their trade as opposed to the proviso that the practice may be regulated. If a legislative provision would have a negative impact on the choice of trade, occupation or profession it must be tested in terms of the reasonableness requirements as contained in section 36. A provision which regulates trade need only pass the rationality test.[784]

For the purposes of this chapter, the first part of section 22 is important; we are not concerned here with the regulation of a trade but rather with the amount of tax that one person pays in comparison with another person and whether this higher tax rate affects this person's section 22 right. This may be considered in the light of the choice of trade, profession or occupation.

What is important from what was held in *South African Diamond Producers* is whether a provision has a negative impact on choice of trade. I believe that a person's choice of trade is not negatively affected by the higher tax rate that they may incur in comparison with a non-resident.[785] A person who is considering purchasing properties to let is free to choose to do so, his or her choice is not negatively affected by this potential higher tax rate. This is for a couple of reasons. If that person were to choose any other trade and make a profit on that trade, they would pay tax on that profit. Merely because one particular type of trade would mean that a person would pay more tax than a non-resident does not affect his or her choice to partake in

[783] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* CCT 234/16 at para 65. See also Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at pg 463 where they state that section 22 of the Constitution in two parts and requires a distinction to be made between regulation impacting a person's choice of trade, occupation or profession on the one hand and the regulation of the practice of a trade, occupation or profession on the other. Further, that freedom to choose a trade cannot be restricted by law unless the restriction is justifiable in terms of the section 36 limitation clause; regulation of the practice of a trade is, however, subject to less stringent standards. The practice of a trade can be regulated by law provided that the law is rational.

[784] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* CCT 234/16 at para 65.

[785] See Currie and De Waal 'The Bill of Rights Handbook' (2013) 6th edition Juta at pg 466 where it was queried whether a legal restriction placed on commercial activity can realistically be said to impact on occupational freedom; further that most restrictions of commercial freedom would fall far outside of the scope of section 22 of the Constitution. It is my view that the taxation of an individual who has made a profit from letting property or a capital gain on the sale of that property cannot be considered a legal restriction on commercial activity. If a legal restriction on commercial activity would not constitute a restriction on section 22 then the taxation of residents at higher rates than non-residents would not constitute a restriction of the resident's rights in terms of section 22; the protection afforded by section 22 would not go this far. Currie and De Waal also state in 'The Bill of Rights Handbook' (2013) 6th edition Juta at pg 466 that the term 'occupation' does not comprise a consideration of whether a person makes a profit or derives an income from their activities.

that trade. As an example, if a resident were to choose the economic activity of investing in shares for long term gain and made a capital gain when they sold the shares, the comparative theoretical non-resident would not even pay capital gains tax in South Africa at all on those gains from the sale of shares.[786] In such circumstances it cannot be said that their right to choose the trade of purchasing shares for long term gain has been negatively affected; likewise, a person's right of choice of freedom of economic activity has not been negatively affected under these circumstances. Secondly, a higher rate of taxation in comparison with another group of people does not affect their right to choose that trade. It might affect the tax they pay in comparison with another person, but it does not affect their right to choose to partake in that trade.

In addition to the above arguments, the views of Eiselen and Van Zyl are also worthwhile considering.[787] This article considers the case of *Krok v The Commissioner for the South African Revenue Service*.[788] In this case, the court had to deal with whether the provisions of the double taxation agreement between South Africa and Australia could apply retrospectively to a tax debt that preceded the coming into force of the protocol to the double taxation agreement;[789] the protocol allowed for the countries to assist each other with the collection of a tax debt.[790] The type of assistance was not permissible prior to the protocol coming into force and the tax debt that the Australian Taxation Office wished to collect resulted from tax periods prior to the coming into force of the protocol.[791] It was held that tax debts prior to the coming into force of the protocol could be collected in terms of the provisions of the protocol to the double taxation agreement. It was also held that this did not mean that there was retrospective application of the law.[792] However, Eiselen and Van Zyl disagreed with the judge and state that there was retrospective application of article 25A of the double taxation agreement that was unfair and resulted in the unfair deprivation of the taxpayer's right to property.[793]

[786] As per paragraph 2 of the Eighth Schedule to the Income Tax Act where it is stated that non-residents are only taxable in South Africa on gains made from the disposal immovable property situated in South Africa.
[787] Eiselen & Van Zyl 'The Retrospective Amendments to Tax Legislation and the Taxpayer's Right to Property and Economic Freedom' (2016) Vol. 3 at 563.
[788] [2015] 4 All SA 131 (SCA).
[789] *Krok v The Commissioner for the South African Revenue Service* [2015] 4 All SA 131 (SCA) at 134.
[790] South African Revenue Service 'Protocol amending the Agreement between the Government of the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on income' 2008 at Article 25A.
[791] *Krok v The Commissioner for the South African Revenue Service* [2015] 4 All SA 131 (SCA) at 142.
[792] *Krok v The Commissioner for the South African Revenue Service* [2015] 4 All SA 131 (SCA) at 148.
[793] Eiselen & Van Zyl 'The Retrospective Amendments to Tax Legislation and the Taxpayer's Right to Property and Economic Freedom' (2016) Vol. 3 at 570 – 571.

Eiselen and Van Zyl state that this retrospective effect of the amendment to the provisions of the double taxation agreement would result in a curtailment of a person's economic freedom.[794] This is because taxpayer's should have a certainty in the amount of tax that will be payable, as per the canons of taxation as detailed by Adam Smith.[795] With the current situation and the retrospective nature of the amendment to the double taxation agreement, the taxpayer lost his tax certainty and the right to not have his tax affairs determined arbitrarily. The taxpayer also lost his right to determine his tax affairs to his best advantage as the law was changed and applied retrospectively.[796]

Such an application of the tax law constitutes a deprivation of a person's right to economic freedom. If a person arranges his tax affairs in a certain order, but the law is later changed and his previous arrangement is inconsistent with the change, that person has a real limitation on his or her economic freedom. They have no certainty as to how their tax affairs will be treated. This is a severe restriction on a person's right to freedom of trade, occupation or profession. However, the facts in the *Krok* case differ from instances where the higher tax rate paid by a resident in comparison with a non-resident. The resident taxpayer knows that they are going to be taxed at a higher effective rate of taxation than a non-resident; there is curtailment of their rights as a result of retrospective changes to the law. The right to freedom to choose one's trade as contained in section 22 of the Constitution does not guarantee the right to fair tax payable on that trade. The tax laws which result in higher effective tax rates for residents in comparison with non-residents does not prevent or limit a resident's ability to conduct the trade of letting property; it rather results in them having to pay a higher rate of taxation than comparable non-residents.

It cannot be said, therefore, that a taxpayer's freedom of trade, occupation or profession has been infringed by the higher effective tax rate that they are subject to as a result of their tax residency status.

[794] Eiselen & Van Zyl 'The Retrospective Amendments to Tax Legislation and the Taxpayer's Right to Property and Economic Freedom' (2016) Vol. 3 at 563.
[795] 'An inquiry into the nature and Causes of the Wealth of Nations' (1776) Bantam. Eiselen & Van Zyl 'The Retrospective Amendments to Tax Legislation and the Taxpayer's Right to Property and Economic Freedom' (2016) Vol. 3 at 570.
[796] Eiselen & Van Zyl 'The Retrospective Amendments to Tax Legislation and the Taxpayer's Right to Property and Economic Freedom' (2016) Vol. 3 at 571.

5.10. Conclusion

This chapter has set out the requirements needed to prove that a provision contained in legislation is contrary to the property clause as contained in section 25 of the Constitution. In this regard, it needs to be shown that a person's property is deprived in terms of a law of general application and that the deprivation was arbitrary.

Section 25(2) of the Constitution, which deals with expropriation of property, was shown to not be of relevance in this matter as expropriation deals with the taking of property by the government with concomitant compensation payable. The taxation of an individual will never amount to expropriation as a person cannot be compensated for a tax payment made.

It was illustrated that the taxation of residents and non-residents at different rates of taxation constituted a deprivation of a residents' property as they are taxed at higher rates than non-residents on the same amount of taxable income. The threshold for proving deprivation could be shown as a person's right to their property, in the form of money, is substantially and permanently affected by the payment of tax. This was shown to be the case in the matter of the higher tax rates for resident taxpayer in comparison with non-resident taxpayers.

However, in order to show that the deprivation of property is arbitrary a more stringent process is required. While the taxation of a person at higher rates of taxation is a substantial limitation on that person's property, it was found that there are sufficient reasons for the higher rate of taxation. Also, that the taxpayer is not caused undue hardship nor is the tax measure unreasonable as the person is paying tax on a profit they have made from either letting the property or a capital gain on its disposal. The reduced tax rates for non-residents is done in order to encourage much needed foreign investment in South Africa; residents have to pay more tax in relation to these non-resident investors so that this foreign investment can be encouraged. In addition, non-residents who do not live in South Africa do not have access to all of the governmental services that a resident does and it is, therefore, reasonable that a resident should pay more tax than a non-resident. This was held to be sufficient reason for the deprivation of property that is suffered by resident taxpayers. This taxation of residents at higher effective tax rates than non-residents is, therefore, not an arbitrary deprivation and section 25(1) of the Constitution has not been violated.

The Constitutions of Botswana and Australia were considered, and it was found that these constitutions provide a protection to the right to property but only in so far as a right to not have your property expropriated without compensation. Neither of these constitutions provide

for a right to property in cases other than expropriation, such as in the case of section 25(1) of the South African Constitution. The South African Constitution provides South African citizens with a wider protection to property than Australia and Botswana. While the United Kingdom does not have a single constitutional instrument, it has legislation that also prevents the expropriation of property without compensation.

The African Charter on Human and Peoples' Rights was also considered in particular with regards to the right to property. It was held that the right to property that is afforded by this charter prevents the deprivation of property unless the deprivation is in the public interest. The protection of the right to property in the African Charter on Human and Peoples' Rights is not as extensive as section 25 of the South African Constitution and is similar to the Botswana Constitutions' protection. This charter does not, therefore, add further protection to citizens of South Africa or Botswana in terms of the right to property.

Lastly, section 22 of the South African Constitution and the right to economic freedom was considered. It was found that this right ensures the freedom of choice of trade, occupation and profession and that letting of immovable property is considered a trade. However, the right to freedom of choice of trade does not provide for a protection against higher rates of taxation in comparison with other people and that a person's right to trade is not restricted by the amount of tax that is payable on a profit made from that trade.

Chapter 6 – Recommendations and Conclusion

6.1 Introduction

This thesis deals with the question of whether it is constitutionally justifiable to tax South African resident taxpayers at higher effective tax rates than non-resident taxpayers on income earned from the letting of fixed property and the disposal of fixed property in South Africa or whether residents' constitutional rights have been violated. The constitutional analysis considered three sections of the Constitution, namely the right to equality, property and freedom of trade, occupation and profession. The thesis compared the position in South Africa with that of Botswana, the United Kingdom and Australia.

6.2 The Right to tax income from immovable property

In order to answer this question, it had to be established why only rental income and proceeds from the disposal of fixed property were to be considered. Chapter 2 sets out that non-residents are taxable on South African sourced income[797] and that rental income and proceeds from the disposal of fixed property which emanate from a South African source[798] are taxable in South Africa in terms of South African legislation.[799] In other words, South African legislation allows South Africa to tax non-residents who receive this type of income from a South African source, in South Africa. South African legislation will always be the starting point for determining whether South Africa has taxing rights to income earned. If South African legislation does not give South Africa taxing rights to income, no other instrument can give South Africa taxing rights.[800] If South Africa does not have taxing rights to a certain type of income, there is no point in considering this income as the purpose of the thesis is to determine whether it is constitutionally justifiable to tax residents and non-residents at different effective tax rates on income from a South African source. If South Africa cannot tax a non-resident in terms of domestic legislation, that type of income cannot form part of this inquiry.

[797] As per the definition of 'gross income' as contained in section 1 of the Income Tax Act.
[798] It was determined that rental income earned in South Africa is from a South Africa source as per *Commissioner for Inland Revenue v Lever Brothers and Unilever* 1946 AD and capital gains made from South Africa fixed property are from a South African source as per section 9(2)(j) of the Income Tax Act.
[799] Capital gains from the disposal of South African fixed property is taxable in South Africa in terms of paragraph 2 of the Eighth Schedule of the Income Tax Act. Rental income falls within the ambit of the 'gross income'.
[800] A double taxation agreement merely allocates taxing rights, it does not give taxing rights. Costa & Stack 'The Relationship between Double Taxation Agreement and the provisions of the South African Income Tax Act' (2014) 7(2) Journal of Economic and Financial Sciences at 272.

Not all types of income that a non-resident may earn from South African sourced income are taxable in South Africa in terms of South African legislation; for example, interest income earned by a non-resident from a South African source would not be subject to taxation in South Africa provided that the individual is not physically present in South Africa for more than 183 days in the twelve-month period preceding the date which the interest was earned.[801] As this thesis deals with individuals who live in another country but invest in South Africa, they would not be subject to tax in South Africa on their South African sourced interest. It is important, therefore, that it was established which types of income non-residents in South Africa are liable to tax on.

One of the other issues that Chapter 2 deals with was double taxation agreements. It is also important to consider double taxation agreements as if both countries to the agreement have taxing rights, in terms of their domestic legislation, the double taxation agreement will determine which country has ultimate taxing rights. In other words, there may be a situation where South African domestic legislation gives South Africa taxing rights to income earned by a non-resident in South Africa, but that person's home country also gives itself taxing rights to that income. I must then determine which country has the right to tax that income.

The double taxation agreements between South Africa and Botswana, the United Kingdom and Australia[802] all give South Africa taxing rights to rental income earned from South African property as well as proceeds from the disposal of this property to South Africa. So even if an individual from the United Kingdom earned South African rental income and the United Kingdom has taxing rights to this income,[803] the double taxation agreement would take precedence and give South Africa taxing rights to this income. As mentioned in Chapter 2, the

[801] Section 10 (1)(h) of the Income Tax Act.
[802] South African Revenue Service 'Convention between the Government of the Republic of South Africa and the Government of the United Kingdom and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains' 2002. South African Revenue Service 'Convention between the Government of the Republic of South Africa and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Income Taxes' 1999. South African Revenue Service 'Convention between the Government of the Republic of South Africa and the Government of the Republic of Botswana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains' 2004.
[803] As residents are taxable on worldwide income as per HM Revenue and Customs 'Tax on Foreign Income' available at https://bit.ly/38grr06, accessed 15 July 2020.

OCED Model Tax Convention gives the country where the fixed property is situated taxing rights to both rental income and capital gains from the disposal of fixed property.[804]

There are other types of income which are not taxable in South Africa even if South Africa had taxing rights in terms of domestic legislation. For example, Article 11 of the double taxation agreement between South Africa and the United Kingdom gives the United Kingdom taxing rights to interest income earned by a resident of the United Kingdom in South Africa. In other words, even if South African domestic legislation gave South Africa taxing rights to interest earned in South Africa by residents of the United Kingdom, the double taxation agreement would ensure that only the United Kingdom had taxing rights to this income. It is, therefore, important to ensure that the relevant double taxation agreements give South Africa taxing rights to the income, otherwise there is no point in considering that type of income in this thesis.

Chapter 2 also considered the possible economic justifications for taxing residents at higher rates of taxation than non-residents. It was established that most countries do not allow non-residents access to the same tax benefits that are available to resident taxpayers as the non-resident taxpayers would receive tax benefits in both their home country and the country of source of income.[805] While this is true to the extent that these taxpayers are paying less tax in the country of the source of income due to these additional tax benefits, their overall tax liability should not be affected if their home country taxes them on a worldwide basis.[806] These taxpayers are, therefore, receiving a benefit in comparison with their counterparts in the source country, but their overall tax position should not be affected.

In addition to this, the United Kingdom states that non-residents are not entitled to the same tax benefits as residents to ensure that everyone who benefits from the economic and social environment pays their fair amount of tax in the United Kingdom.[807] The government of the

[804] In terms of Article 6 and Article 13 of the OECD Model Tax Convention respectively. The Organisation for Economic Co-operation and Development 'Articles of the Model Convention with Respect to Taxes on income and Capital – as they read on 21 November 2017' available at https://bit.ly/3iDrKra, accessed 13 September 2020.
[805] Van Raad 'Non-Residents – Personal Allowances, Deduction of Personal Expenses and Tax Rates' (2010) World Tax Journal at 155.
[806] For the purposes of this thesis, tax residents of the United Kingdom and Australia are taxed on worldwide income. HM Revenue and Customs 'Tax on Foreign Income' available at https://bit.ly/38grr06, accessed 15 July 2020. Australian Taxation Office 'Foreign income of Australian residents working overseas' available at https://bit.ly/2tCq7Wx, accessed 20 January 2020. However, tax residents of Botswana are only taxable on Botswana sourced income so a Botswana resident could gain these tax benefits in South Africa as they would not have to declare and be taxable on this income in Botswana as well. As per section 9 of the Botswana Income Tax Act Chapter 52:01.
[807] HM Revenue and Customs 'Restricting non-residents' entitlement to the UK personal allowance' (2014) available at https://bit.ly/2NbTaqN, accessed 15 July 2020.

United Kingdom has realized that by extending a personal allowance[808] to non-residents, they may be in a more beneficial position to residents who are in a similar position to the non-resident. The result is that while the individual is probably not affected, the United Kingdom government collects less taxes than other jurisdictions that restrict non-resident benefits.[809]

The Australian government states[810] that the reason why they removed the capital gains discount[811] for non-residents was that the discount was not needed to attract foreign investment, it would result in substantial increases of tax revenue for the Australian government, fixed property gains are as a result of conditions in that country and that returns made on Australian land will be increased. All of these are strong reasons for a government to not provide the same tax benefits to non-residents investing in immovable property as is afforded to residents of that country. These reasons can be used by the South African government to justify an increased tax rate for capital gains made on South African fixed property.

There are, therefore, economic justifications for altering the current tax rates to increase the amount of tax paid by non-residents on income from immovable property in South Africa. These are: the South African government is currently losing out on legitimate sources of revenue that they should have access to, individuals who benefit in South Africa from government services not paying a fair and reasonable amount of tax as well as the unfair position which resident taxpayers are placed as a result of the tax benefits also being extended to non-residents. In the light of these findings the following recommendations are made.

6.2.1 Recommendations

The arguments made by the governments of the United Kingdom and Australia can be extended to South Africa. It is reasonable that people earning income in South Africa from South African fixed property should pay tax in South Africa. While a non-resident who does not live in South Africa does not have access to the same governmental services as a resident living in South Africa, it should still be required that the non-resident makes a tax contribution which is fair and reasonable and in proportion to the income and wealth acquired as a result of owning

[808] This is a reduction in tax payable by individual's resident in the United Kingdom; it is very similar to the South African tax rebates discussed below.
[809] HM Revenue and Customs 'Restricting non-residents' entitlement to the UK personal allowance' (2014) available at https://bit.ly/2NbTaqN, accessed 15 July 2020 at 6.
[810] Australian Treasury '2012-2013 budget builds on growing record of tax reform' (2012) available at https://bit.ly/2NadXdZ, accessed 8 January 2020.
[811] Australian residents are allowed a 50 per cent reduction in capital gain made on assets held for longer than 12 months.

property in South Africa. Also, it must be considered that they benefit from state resources such as the provision of roads and electricity, which enable them to derive income from the property and ultimately acquire wealth. In Chapter 3, I explain that non-residents are effectively paying far less tax than residents. It is, therefore, recommended, that non-residents pay an increased amount of tax in South Africa so that their tax burden is fair, reasonable, and in proportion to the income and wealth acquired in South Africa.

6.3 The practical effect of taxing residents and non-residents at the same statutory tax rates

It was found in Chapter 3 that South Africa taxes residents and non-residents in terms of the same tax table and non-residents are entitled to the same tax benefits, such as capital gains inclusion rate, annual capital gain exclusion and the same tax rebates. It is a result of non-residents being taxed at the same statutory rates of taxation and having the same tax benefits as residents that the different effective tax rate between residents and non-residents becomes an issue.

While this may seem unlikely as one would think that taxing people at the same tax rates results in the same amount of tax being paid, it is because a South African resident taxpayer will add any taxable income from letting fixed property or any capital gain from the disposal of fixed property to their other South African income which results in the higher effective tax rate. For example, if a resident taxpayer has a full time job and lets property as another means of obtaining additional income, he or she will add the taxable income made from the letting of property to their salaried income and pay tax at the marginal tax rate which they are assigned to. If a person's salary puts them in the 41per cent marginal tax bracket, any taxable income from the letting of fixed property would be taxed at 41 per cent.

In contrast, a non-resident who is living and working in another country may have the rental income as their only South African income. As non-residents are only required to pay tax in South Africa on South African sourced income, they would only pay tax on the taxable rental income in South Africa and not their income earned from working elsewhere. This would result in the individual paying a significantly reduced amount of tax in comparison with the resident as there is no other South African income to which the rental income needs to be added. A non-resident who lets fixed property in South Africa may, therefore, not even pay tax in South Africa if the taxable income from the rental property is less than R83 100 or if the taxable income is less than R205 900 they would only pay tax at the marginal rate of eighteen per

cent.[812] Of course, it is well-known that in a progressive tax system – such as income tax – the more a taxpayer earns, the higher the rate at which the taxpayer is taxed. This is in accordance with the principle of the distribution of wealth.

The profound effect of this was clearly illustrated in Chapter 3 where it was demonstrated how much less tax is being paid by a non-resident in South Africa in comparison with a resident taxpayer on the same amount of taxable income from both the letting of fixed property as well as the disposal of fixed property. It is worth inserting this table again here to exemplify this.

Percentage tax paid by non-resident in comparison to resident – rental income and capital gains tax

	Rental Income		**Capital Gains Tax**	
	Example 1	*Example 2*	*Example 1*	*Example 2*
South Africa	10%	9.60%	47.6%	47%
Australia	100%	88%	51.8% (more)	56% (more)
Botswana	21%	21%	100%	100%
United Kingdom	100%	50%	80%	72%

As can be seen, South African tax residents only pay roughly ten per cent of the tax on the same rental income as a non-resident and roughly 47 per cent in the case of capital gains tax on the disposal of fixed property. This is in contrast with Australia where non-residents pay the same, or slightly less, tax on rental income as residents and non-residents pay more capital gains tax than residents.

A comparison with Botswana might be more appropriate than with Australia and the United Kingdom, as Botswana is also a developing country which needs foreign investment to spur economic growth and development. It is evident that a non-resident investing in fixed property in Botswana would pay 21 per cent of the amount of tax paid by a resident on the same amount of taxable income from rental income and the same amount of capital gains tax on the disposal of fixed property as a resident. The fact that a neighbouring country of South Africa, that is also a developing country and which has a similar per capital gross domestic product,[813] has higher rates of taxation for non-residents than South Africa is an indicator that South Africa taxes its non-residents at low rates in comparison with its peers. In addition, South Africa has

[812] South African Revenue Service 'Rates of Tax for Individuals' available at https://bit.ly/31aQOjp, accessed 15 July 2020.
[813] Business Tech 'The Biggest Economies in Africa' (2018) available at https://bit.ly/3l2A0D0, accessed 17 August 2020. Botswana has the third highest gross domestic product per capita in Africa followed by South Africa in fourth.

a far larger foreign direct investment flow than Botswana.[814] It can, therefore, be argued that as Botswana has far less foreign direct investment inflows than South Africa but it has higher tax rates than South Africa that South Africa has room to increase its tax rates. Although foreign direct investment is of utmost importance in developing the South African economy,[815] it has been shown that tax rates have a minimal effect on a person's decision whether to invest in a country.[816] The increase in tax rates should not, therefore, have a negative impact on foreign direct investment inflows.

6.4 The Constitutionality of taxing residents and non-residents at different effective tax rates in terms of the right to equality

Chapter 4 deals with the issue of whether the higher effective tax rate paid by residents in comparison with non-residents violated the residents' right to equality in terms of section 9 of the South African Constitution. Section 9 of the Constitution reads that everyone is equal before the law and that no one may be unfairly discriminated against.

This chapter determined that tax rebates are meant to be in place to ensure that people do not pay tax on the essentials of life[817] but that this is not the case in South Africa as the rebates are not sufficient to ensure that people do not pay tax on essentials. The relevance of this for this thesis is that non-resident South African taxpayers who invest in South Africa but live elsewhere, should not have access to any rebates in South Africa, as they currently do, as they do not pay for the essentials of life in South Africa. This is a strong argument in favour of either getting rid of or reducing the rebate that non-residents currently have access to in South Africa.

The judgment of *Harksen v Lane*[818] is instrumental in a determination of whether legislation can be said to amount to a breach of a person's right to equality. In terms of this judgment, it must be shown that there is differentiation, that the differentiation amounts to unfair discrimination and that the unfair discrimination is not justifiable in terms of section 36 of the

[814] In 2019 South Africa had $4.624 billion and Botswana had $261 million worth of foreign direct investment inflows. UNCTAD 'World Investment Report – 2020' (2020) at 239.
[815] Masipa 'The relationship between foreign direct investment and economic growth in South Africa: Vector error correction analysis' (2018) Acta Commercii 18(1) at 466.
[816] OECD 'Tax Incentives for Investment – A Global Perspective: experiences in the MENA and non-MENA countries' (2007).
[817] Vivian 'Equality and personal income tax – the classical economists and the Katz Commission' (2006) South African Journal of Economics Vol. 74:1 at 91.
[818] 1998 (1) SA 300 (CC).

Constitution which saves a provision from being declared unconstitutional if it a reasonable limitation of a person's right in an open and democratic society.

It was found that differentiation exists as a result of the different effective tax rates paid by residents in comparison with non-residents and that there is a legitimate governmental purpose for the differentiation[819] as the lower tax rates for non-residents may encourage foreign investment in the country. Only one of the four tax benefits available to non-residents was found not to have a legitimate governmental purpose.[820] The next part of the enquiry was whether discrimination existed. As differentiation as a result of tax residency is not on a listed ground as contained in section 9(3) of the Constitution, discrimination can be established if the ground of differentiation is based on attributes and characteristics which have the potential to impair a person's fundamental dignity or affect them adversely in a comparably serious manner.[821] It was found that the taxation of residents at higher rates in comparison with non-residents affects the resident taxpayer in a comparably serious manner; they are forced to part permanently with their money at a rate that is higher than another group of persons solely because of their tax residency status.[822] Discrimination was, therefore, shown to be present.

It then had to be determined whether there was unfair discrimination. The test for unfairness depends primarily on the impact of the discrimination on the affected person.[823] It was stated that residents suffer much more than an inconvenience, the discrimination was not caused by

[819] If no legitimate governmental purpose is shown, the provision will fall foul of section 9 of the Constitution.
[820] It was found that there is no legitimate governmental purpose for the rebate for non-residents as they do not pay their necessities of life in South Africa.
[821] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 54.
[822] It is my view that the payment of additional tax as a result of a person's tax residency affects a resident in a manner that is comparably serious to an affront to their dignity as a result of what has been stated in *City Council*. In this case, the city council only took legal action for the repayment of arrear municipal rates against white defaulters and not black defaulters. The discrimination was, therefore, thus based on a listed ground. While discrimination was established due to it being on a listed ground, the court stated that this discrimination which was based on race can be said to affect the white defaulters in a manner which is at least comparably serious to an invasion of their dignity(see*The City Council of Pretoria v Walker* CCT 8/97 at para 81). The court thus made a comment which was not necessary for the purposes of the judgment as discrimination had already been established, but which is instructive for the purposes of this thesis. While the discrimination in this thesis deals with a person's tax residency (not a listed ground) and not their race group, it is my view that the discrimination is comparable for a number of reasons. While a person can choose their tax residency status to an extent (a person could leave South Africa permanently and become tax resident of another country), someone should not be discriminated against for choosing South Africa as their home (and thus being tax resident of South Africa). While tax residency is obviously not immutable like race, a person should not be in a worse off position for choosing to live in South Africa and considering it their home. In addition, in *City Council*, the discrimination resulted in white people being sued for non-payment of municipal rates. In other words, their money was taken from them as a result of being white. This is comparable to a resident who pays more tax as a result of being tax resident; they are having to pay more money as a result of their tax residency. It is submitted that these factors result in a resident being affected in a manner that is comparably serious to an affront on their dignity and discrimination is therefore established.
[823] *Harksen v Lane NO and others* 1998 (1) SA 300 (CC) at para 54.

any action of their own, but on account of which country they choose to call their home and non-residents do not need benefits such as the rebates as they do not need assistance with living expenses in South Africa. In addition, the discrimination suffered by residents has a serious effect on their finances. While there is an argument that non-residents do not have access to the same governmental services as a South African resident as they do not live in South Africa, they should still be required to pay their fair amount of taxes in South Africa as they have access to government services, such as roads and electricity, which enable them to let their South African property and for the property to increase in value, and ultimately, acquire wealth. The effective higher tax rates were found to amount to unfair discrimination.

This discrimination could also not be saved by the general limitations clause as contained in section 36 of the Constitution as being reasonable and justifiable in an open and democratic society owing to the fact that a person's right to equality is more important than a possible argument for the government that the lower tax rates for non-residents encourages foreign investment in South Africa.

The considerable gap between the tax paid by residents and non-residents on the same amount of taxable income results in unfair discrimination against resident taxpayers as a result of their tax residency status; it therefore violates the resident's right to equality. In the light of these findings the following recommendations are made.

6.4.1 Recommendations

It can be assumed that a non-resident living in another country and investing in fixed property in South Africa is wealthy as this property would not be their primary home but rather a form of investment. It is, therefore, fair that a non-resident be required to pay a portion of tax in accordance with their ability to pay.[824] In other words, on a progressive scale that is founded on the principle of the distribution of wealth, it is fair and equitable to tax foreign investors in immovable property in South Africa at a proportionally higher tax rate. However, as the current system stands, a wealthy non-resident taxpayer is paying a small fraction of the amount of tax that a resident pays on the same amount of taxable income. It is my view that this gap is currently disproportionate with a non-resident's ability to pay and should be reduced. It is not,

[824] As per the Adam Smith's first canon of taxation. Adam Smith 'An inquiry into the Nature and Causes of the Wealth of Nations' (1776) Bantam at 1043.

however, envisaged that a non-resident pays as much tax as a resident, but rather that the gap is reduced significantly.

In addition to the non-resident's ability to pay a higher amount of tax, is the fact that a reduction in the current gap would ensure that a resident's right to equality is no longer infringed. This reduction in difference tax paid between residents and non-residents would need to be made by increasing the tax rates paid by non-residents or removing a tax benefit that is currently available for both rental income and capital gains made from South African fixed property. The specific details of the proposed amendments are discussed by way of examples under 6.7 below.

6.5 The Constitutionality of taxing residents and non-residents at different effective tax rates in terms of the right to property

Chapter 5 deals with the issue of whether the different effective rates violated a resident's right to property in terms of section 25 of the Constitution. As per the wording of this section, if a person is to successfully prove that their right to property has been violated, they would need to show that their property was not deprived in an arbitrary manner.

The starting point of this enquiry was to determine whether resident individuals who pay higher rates of taxation are deprived of property that is constitutionally protectable. It was found that money that is paid by an individual in the form of tax constitutes property that is worthy of constitutional protection. The next enquiry was what constitutes a deprivation of property. It was found that taxation amounts to a deprivation of property as it is an involuntary act that is required by force of law[825] and results in a permanent loss of a person's property. This is a sufficiently serious limitation of a person's property to warrant taxation amounting to a deprivation of property for purposes of section 25 of the Constitution.

However, it was also found that taxation does not amount to expropriation[826] as a requirement for expropriation is that compensation be paid for the deprivation of property.[827] A person cannot be expropriated for tax as they cannot receive compensation for the deprivation of their money as this would result in the state compensating the person for their tax paid.

[825] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 22.
[826] An expropriation is a sub-set of deprivations.
[827] Mostert 'The Distinction between Deprivations and Expropriations and the Future of the Doctrine of Constructive Expropriation in South Africa' (2003) South African Journal on Human Rights 567 at 573 & Slade 'The Effect of Avoiding the FNB Methodology in Section 25 Disputes' (2019) Obiter Vol. 4 Issue 1 at 36.

The final enquiry in terms of section 25(1) of the Constitution was then whether the deprivation was arbitrary. As this was the most unclear aspect of the enquiry, this aspect was dealt with in detail. It was found[828] that a deprivation will be arbitrary if there is not sufficient reason to justify the deprivation or the deprivation is procedurally unfair. In order to determine whether there is sufficient reason, the relationship between the purpose of the law in question and the person whose property is affected must be considered. It was found that if there is a legitimate governmental purpose for the deprivation,[829] it does not cause undue hardship or an unreasonable taxing measure[830] then the deprivation would not be arbitrary.

The taxation of residents at higher effective tax rates was found not to be arbitrary as sufficient reasons existed for the legislation. The lower tax rates for non-residents could be said to be to encourage foreign investment in South Africa; it therefore served a legitimate governmental purpose. It was also found that the tax does not cause undue hardship nor is it an unreasonable taxing measure. This is because residents are paying tax on profit made from the letting of fixed property or capital gains tax on its disposal. It must be expected of a taxpayer to pay tax on profits made from carrying on a trade or capital gains made on an asset held. It was also found that the implementation of tax in terms of legislation is not procedurally unfair. The deprivation was, therefore, found not to be arbitrary and accordingly not in breach of section 25(1) of the Constitution.

The final constitutional issue germane to this thesis is the right to trade, occupation and profession as contained in section 22 of the Constitution. This section protects an individual's right to choice of trade, occupation or profession.[831] The fact that a resident pays tax at a higher effective rate than a non-resident does not affect his or her ability to choose the trade of letting fixed property. The higher tax rate affects how much tax they pay on profits made from letting fixed property, but that does not affect their choice to trade in the first place; it does not have a negative effect on their right to choose the trade. It was, therefore, found that a resident's section 22 rights have not been infringed by the higher effect tax rate that they would be forced to pay in comparison with non-residents who have the same amount of taxable income. In the light of these findings the following recommendations are made.

[828] *First National Bank of South Africa Ltd v Commissioner of the South African Revenue Service and another 2002(4) SA 768 (CC)* at 507.
[829] *Mkontwana v Nelson Mandela Metropolitan Municipality and another* CCT 57/03 at para 51.
[830] Croome 'Taxpayers' Rights in South Africa' (2010) Juta at 23.
[831] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and others* CCT 234/16 at para 65.

6.5.1 Recommendations

It is recommended that a differentiation that does not result in an arbitrary deprivation nor does it affect a person's right to choice of trade will not violate the right to property and economic freedom. It is, therefore, not necessary to consider these constitutional aspects when amending tax rates or rebates.

6.6 Findings and recommendations

As it was found that a resident taxpayer's right to equality has been infringed, measures need to be taken to ensure that this situation is rectified. In order for there to be a more equal rate of taxation between residents and non-residents, a tax benefit that a non-resident currently has access to will need to be removed or an additional tax imposed. The four aspects of South African law which result in benefits to the non-resident are: the same tax tables, the rebates, the annual capital gains tax exclusion as well as the capital gains inclusion rate. Concluding that the current tax rates infringe on a resident's right to equality must entail recommendations that will prevent this violation from occurring in the future. However, making amendments to ensure that this discrimination no longer exists is not a straightforward task.

Removing a tax benefit to ensure equality may have other unintended consequences. For example, to ensure that non-residents pay tax on a more equal basis on rental income may be tricky to do in practice as this would need to be done either by amending the individual tax tables so that residents and non-residents are taxed at different tax rates or by removing the rebates for non-residents. While this may seem like an easy manner to reduce the current tax gap, this would have other unintended consequences such as affecting the tax that non-residents pay on other types of South African sourced income, such as employment income. This may have unintended consequences such as discouraging people from coming to South Africa for temporary work assignments which would have a negative effect on the country. The argument made earlier that non-residents should not be entitled to rebates as they do not pay for their necessities of life in South Africa would not be applicable if the person is living and working in South Africa as they would then be paying for necessities of life in South Africa. It would not be practical to remove the rebates or change the tax tables only for non-residents who earn rental income in South Africa or have proceeds from the disposal of fixed property and not for other non-residents who earn other types of income in South Africa; I must establish alternative solutions to make the tax rates more equal.

A more practical solution regarding tax on rental income by non-residents is to implement a higher rate of taxation on the taxable income from letting of fixed property that a non-resident earns in South Africa. This would need to be implemented upon the issuing of a tax assessment by SARS when the individual submits his or her South African tax return.[832] This would be relatively simple to implement as it would merely require an adjustment of SARS' electronic E-filing software system and would not require a labour intensive process on the part of SARS.

This would ensure that it is only non-residents with this type of income who are required to pay a higher amount of tax and not all non-residents who earn income in South Africa. It is not practical to remove the rebates for these taxpayers as they may have other South African sourced income which would then be affected by the removal of the rebate. While the non-residents would still have access to the rebates in South Africa, there would be far greater equality in taxation between residents and non-resident's earning rental income in South Africa if this proposal were to be implemented.

The best way to illustrate how this would work is by means of an example. 'Rental income Example 2 – South Africa' was one of the rental income examples used in Chapter 3 to illustrate how much tax a non-resident pays in comparison with a resident. It is worthwhile setting it out again as it will be used as the basis to illustrate the proposed amendment.

Rental income Example 2 - South Africa

Resident taxpayer

Salary income	R 1,000,000.00
Tax on salary[833]	R 307,813.00
Taxable rental income from letting property	R 100,000.00
Tax on rental income[834]	R 41,000.00

Non-resident taxpayer

Taxable rental income from letting property	R 100,000.00
Tax on rental income[835]	R 3,042.00

[832] A non-resident who is carrying on a trade, which as per section 1 of the Income Tax Act includes letting fixed property, is required to submit an annual tax return in South Africa. Government Gazette No. 43495 'Returns to be submitted by a person in terms of section 25 of the Tax Administration Act, 2011 (Act No. 28 of 2011)' 3 July 2020.

[833] As per the 2021 tax tables and including the primary rebate.

[834] Taxed at the marginal rate of 41 per cent that the taxpayer is on due to his salary income.

[835] Including primary rebate.

Additional tax paid by resident ***R37,958***

In this example, the non-resident has only paid seven per cent of the amount of tax that is paid by a resident. This is not a fair and reasonable contribution considering that the non-resident receives governmental services to the property which enable him or her to let that property and earn the rental income and acquire wealth through South African resources. It is proposed that non-residents are charged a flat rate of 30 per cent on taxable income earned on the rental of immovable property. In other words, the non-resident is not taxed according to the normal tax tables on taxable rental income but at a flat rate. This will assist with the practicality of implementing this type of tax on non-residents. The effect of this proposed amendment can be illustrated by amending the above example as follows:

Rental Income Proposed Example - South Africa

Resident taxpayer

Salary income	R 1,000,000.00
Tax on salary	R 307,813.00
Taxable rental income from letting property	R 100,000.00
Tax on rental income	R 41,000.00

Non-resident taxpayer

Taxable rental income from letting property	R 100,000.00
Tax on rental income	R 15,042.00
Additional tax paid by resident	***R 25,958.00***
Percentage tax paid by non-resident in comparison with resident	37%

In this proposed method of taxing non-residents, the non-resident will pay 37 per cent of the tax that is paid by the resident. This would result in a fair and reasonable tax contribution being made by the non-resident in line with the governmental services that he or she receives for the property. Such an amendment would ensure that residents' right to equality is no longer infringed by the current large gap between tax paid by residents in comparison with non-residents.

In order to ensure a more equitable capital gains tax rate between residents and non-residents, the annual capital gain exclusion[836] which is currently afforded to both residents and non-residents could be removed for non-residents or the capital gains inclusion rate[837] should be increased for non-residents. As non-residents are only subject to capital gains tax in South Africa on proceeds from the disposal of immovable property, an interest or right in immovable property or any property rich share[838] this would not inadvertently affect other non-residents who, for example, invest in shares in South Africa as they are not subject to capital gains tax in terms of South African legislation.

It is best to illustrate the proposed change by means of an example. 'Capital Gains Tax Example 2 – South Africa' was one of the capital gains examples used in Chapter 3 to illustrate how much tax a non-resident pays in comparison with a resident. It is worthwhile setting it out again as it will be used as the basis to illustrate the proposed amendment.

Capital Gains Tax Example 2 – South Africa

Resident taxpayer	
Salary income	R 1,000,000
Tax on salary	R307,813
Capital gain from sale of immovable property	R 1,000,000
Less annual exclusion	R 40,000
Capital gain from sale of immovable property	R 960,000
Included in taxable income	R 384,000
Tax on capital gain	R 157,440
Non-resident taxpayer	
Capital gain from sale of immovable property	R 1,000,000
Less annual exclusion	R 40,000
Capital gain from sale of immovable property	R 960,000
Included in taxable income	R 384,000
Tax payable	R 71,530
Additional tax paid by resident	***R 85,910***

[836] Currently R40,000 in terms of paragraph 5 of the Eighth Schedule of the Income Tax Act.
[837] For natural persons the inclusion rate is 40 per cent of the capital gain made as per paragraph 10 of the Eighth Schedule to the Income Tax Act.
[838] Paragraph 2 of the Eighth Schedule to the Income Tax Act.

In this example the non-resident paid 45 per cent of the tax that the resident paid. My proposal is that the capital gains inclusion rate for non-residents is increased to 50 per cent from the current 40 per cent. This would result in the following scenario:

Capital Gains Tax Proposed Example – South Africa

Resident taxpayer

Salary income	R 1,000,000.00
Tax on salary	R 307,813.00
Capital gain from sale of immovable property	R 1,000,000.00
Less annual exclusion	R 40,000.00
Capital gain from sale of immovable property	R 960,000.00
Included in taxable income	R 384,000.00
Tax on capital gain	R 157,440

Non-resident taxpayer

Capital gain from sale of immovable property	R 1,000,000.00
Less annual exclusion	R 40,000.00
Capital gain from sale of immovable property	R 960,000.00
Included in taxable income	R 480,000.00
Tax payable	R 103,035.00
Additional tax paid by resident	***R 54,405.00***
Percentage tax paid by non-resident in comparison with resident	65%

By increasing the capital gains inclusion rate from 40 per cent to 50 per cent the amount of tax that is paid by a resident in comparison with a non-resident has increased from 45 per cent to 65 per cent. It is my view that this is a much more reasonable amount of capital gains tax that a non-resident should pay as the increase in the value of the property (the acquisition of wealth) can be attributed to economic conditions in South Africa as well as governmental services that are provided to the property. Such an increase would ensure that a resident's right to equality

is no longer being infringed by the effective tax rates that they are paying in comparison with a non-resident.

The implementation of such a change would be relatively straight forward as when SARS calculates an individual's capital gains tax upon the filing of an annual tax return, they can merely change the inclusion rate to 50 per cent for all individuals who are registered as non-residents. Again, the administrative burden, in the case of E-filing, is a mere tweak of existing software.

It is my view that South Africa should increase the amount of tax that is received from non-residents on the disposal of fixed property in South Africa as well as on rental profits. This would ensure that non-residents are paying a tax contribution in South Africa which is fair and reasonable and in accordance with the fundamental principles of a progressive tax system underpinned by the values of the distribution of wealth. Moreover, resident taxpayers' right to equality would no longer be violated. The current situation where a non-resident can pay as little ten per cent of the tax paid by a resident on the same amount of taxable rental income and less than half the capital gains tax paid by a resident is, in my view, not reasonable. The South African government is entitled to a greater amount of tax to be paid by non-residents under these circumstances. The rental profits made and the increased value of South African property is partly as a result of non-residents receiving government services to their properties and partly as a result of conditions that enables capital growth, and ultimately the acquisition of wealth.[839] In other words, it is the conditions in the country where the property is situated as well as the governmental services provided that will enable a taxpayer to let the property and receive a capital gain on the disposal of that property. It is, therefore, just that non-residents pay a reasonable amount of tax which is in proportion to the income and wealth acquired as a result of owning property in South Africa on these two types of income. In addition, non-residents are only subject to tax in South Africa if they have made a profit on their rental property or they have made a capital gain on their property; it is reasonable that a person who makes a profit or a capital gain pay tax on that profit or gain in the country of source of income that is equitable and fair.

[839] This is in line with the arguments made by the Australian government for the removal of the capital gain discount for non-residents which I agree with.

In addition, the first canon of taxation,[840] being the canon of equality of taxation, is applicable to this scenario. In terms of this canon, a person must pay tax in accordance with their ability to pay. It can be assumed that a non-resident living in another country and investing in fixed property in South Africa is likely to have acquired wealth. This is because the property owned is likely not be where that person lives but it is likely to be an additional property that is acquired for investment purposes. Such a person has the ability to pay and should be expected to pay an amount of tax that is fair and reasonable. An increased payment of tax as has been proposed would fit within the canons of taxation.

6.7 Potential counter arguments

6.7.1 If a non-resident had other South African income, they would pay the same tax as a resident

There may be a counter argument to my recommendations to the effect that if a non-resident had other South African income then they would pay the same amount of tax as a resident. As mentioned earlier, the thesis only deals with non-residents earning passive income in South Africa;[841] other types of income (e.g. employment or business-related income) that a non-resident may earn do not form part of this consideration of whether a resident's constitutional rights have been violated.

It may, however, be argued that a non-resident may have other South African rental properties that would result in them paying the same rates of tax as a resident i.e., there would then be no difference in the tax rates. Nevertheless, to consider a theoretical position where a non-resident may have other South African sourced income that would result in the tax rates being equal is speculative. It also does not derogate from the fact that residents' constitutional rights are currently being violated by the different effective tax rates imposed on residents in comparison with non-residents. It is submitted that these different effective tax rates are sufficient to prove that a resident's constitutional rights have been violated.

[840] Adam Smith 'An inquiry into the Nature and Causes of the Wealth of Nations' (1776) Bantam at 1043.
[841] At 2.4.

6.7.2 If a resident only had taxable rental income, they would pay less tax than a resident who has rental income and a salary

A similar counter argument to my recommendations is that if a resident (as opposed to a non-resident) were to only earn R100,000 rental income, this person would also pay less tax on the rental income than a resident who earns R100,000 rental income and a salary of R600,000.

The first canon of taxation as pronounced by Smith is that a person must pay an amount of tax that is in proportion to their respective abilities.[842] 'That is, in proportion to the revenue which they respectively enjoy under the protection of the state'.[843] Smith also states 'the [] of government to the individuals of a great nation, is like the [expence] of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate'.

Therefore, in accordance with the principles of a progressive tax system, the tax rate at which residents are taxed increases in relation to the taxable income of that resident taxpayer.

6.8 Conclusion

This thesis has contributed to the current body of knowledge concerning the taxation of non-residents in South Africa in a number of ways. Firstly, Chapter 2 sets out the economic justifications for taxing non-residents on income from South African fixed property at rates that are reasonable in the light of the fact that they are earning income and acquiring wealth in South Africa. It was established that the South African government has a legitimate justification for taxing a non-resident on rental income from South African fixed property at a reasonable rate because that non-resident is receiving governmental services to their property which allow the property to be let. In addition, the gain in value of the fixed property is as a result of South African market conditions and the South African government has the right to implement an amount of tax on the gain made on fixed property situated in South Africa that is fair and reasonable. In other words, it is because of the non-resident receiving governmental services to their property as well as conditions in South Africa that enable the non-resident to earn income and acquire wealth. This gives South Africa the right to implement an amount of tax on this income which takes cognisance of these factors.

[842] Smith 'An inquiry into the nature and causes of the wealth of nations' 1776 Bantam at 1043.
[843] Smith 'An inquiry into the nature and causes of the wealth of nations' 1776 Bantam at 1043.

Chapter 3 sets out, by means of calculations, the economic outcomes of the differentiation between residents and non-residents that result from both sets of taxpayers being taxed at the same tax rates. The clear conclusion from this Chapter is that there is a large difference in the amount of tax paid by a resident in comparison with a non-resident on the same amount of taxable income. This is an important observation as there exists no similar study about how the taxation of residents and non-residents, who are taxed in terms of the same tax rates, results in such a large discrepancy in the amount of tax paid. In addition, it was established how the countries of comparison tax their residents compared to non-residents. The discrepancy in the countries of comparison is much smaller than in South Africa. These discrepancies, in the South African context, have not been considered before. The establishment of these discrepancies also forms the basis for the determination that the resident's right to equality in terms of the South African Constitution has been infringed.

Chapter 4 illustrates why these different effective tax rates result in a resident's right to equality being infringed. While academic commentators[844] have dealt with scenarios where a taxpayer's right to equality may be infringed by certain provisions of South African tax legislation, there the concept of residents being subject to tax at higher effective tax rates than non-residents on the same taxable income from both rental income and capital gains made on the disposal of immovable property has not been considered. Croome deals with certain scenarios where he suggests that a taxpayer's right to equality would probably be infringed, but he does not deal with this issue in detail considering the applicable cases on the right to equality, cases dealing with tax and the Constitution and how these impact on a discussion of whether a resident's right to equality has been infringed.

In this study, I set out an in-depth consideration of the right to equality, considering the South African Constitution and the relevant case law, and how this applies to the amount of tax that a resident taxpayer, in comparison with a non-resident taxpayer, pays on income earned from the letting and disposal of fixed property. I established that the differentiation between residents and non-residents, as it currently stands, cannot pass constitutional muster in terms of the right to equality. This determination is not merely a theoretical discussion. The discussion deals with a situation that affects resident taxpayers and the amount of tax that they pay in comparison with non-residents on an ongoing basis.

[844] Particularly Croome 'Taxpayers' Rights in South Africa' (2010) Juta.

The interplay between South African tax legislation and the South African Constitution is highlighted, and, through this, I come to the important conclusion that the current tax differentiation between resident and non-resident taxpayers in respect of income deriving from immovable property situated in South Africa infringes on a resident taxpayer's right to equality.

In Chapter 4, I also established that the purpose of a tax rebate is to allow for persons to pay for the necessities of life without that portion of their income being subject to taxation. I found that the South African government has lost sight of this important tax relief mechanism. This is so because the tax rebate applies to both residents and non-residents. Further, that the South African government should consider this aspect of the basic tax principles and should set out to determine whether the current system of rebates in South African tax are sufficient to ensure that people are able to pay for their necessities of life without paying tax on that portion of their income. Particular emphasis should be placed on households who have children and who need additional support in raising their children as the current tax system results in an unfair situation for families with children in comparison with families who do not have children.

In Chapter 5, I determined that the higher effective tax rates paid by a resident in comparison with a non-resident does not infringe the resident's right to property as the differentiation between residents and non-residents is not 'arbitrary'. Nor does the differentiation infringe on a resident's right to choice of trade. The differentiation between residents and non-residents was, therefore, found to pass constitutional muster in terms of the right to property and economic freedom.

It is envisaged that this study can be utilised by National Treasury to consider changes to existing tax laws so as to increase tax rates for non-residents earning taxable income from letting fixed property and the disposal of fixed property situated in South Africa. I believe that this study forms the legal basis for a successful change in the Income Tax Act as it has been shown that the changes that I propose changes will, unlike the current dispensation, pass constitutional muster. Amendments to the effect to diminish the gap between the tax paid by residents and non-residents that subscribes to a progressive tax system underpinned by the values of fairness, equity, and the distribution of wealth will bring the current system in line with the Constitution.

That said, further research must be conducted to determine the extent to which the proposed higher tax rates for non-residents may affect foreign investors' decisions on whether or not to purchase fixed property in South Africa with the purpose of letting this property and/or holding

it as a long-term investment for eventual disposal. As this study is based on a legal inquiry of tax differentiation, economic predictions fall outside of the scope thereof.

In addition, an economic analysis would need to be conducted by National Treasury in order to determine the economic feasibility of the proposed changes, including how much extra revenue would be collected by the government; this would provide guidance on the magnitude which the suggested changes would have in terms of revenue collection. Foreign investment into a country is dependent on a myriad of factors and the unique economic factors applicable to South Africa would first need to be considered before the tax changes as recommended in this study should be implemented.

National Treasury would also need to ensure that they find the correct balance between the increased amount of tax that non-residents would need to pay to ensure that the South African tax base is protected and residents' right to equality is no longer infringed while also ensuring that non-resident investors are not deterred from investing in South Africa.

South Africa is in desperate need of additional tax revenue[845] and the proposed changes would increase tax revenue for the country while also being easy to implement. The change that is needed to implement an increase in tax from rental income profit would be done by means of a flat rate for non-residents. This change would only need to be applied in the assessment issued by SARS when a person files their annual tax return. For the proposal for the capital gains tax amendment, the implementation would also only need to be made when a non-resident files his or her annual tax return. There should be no major changes required to SARS' systems or tax administration in the country in order to implement the proposed changes.

Lastly, and perhaps a hurdle for the implementation of my recommendations, is political will. I believe that this study into the legal aspects of the implementation of a differentiation in tax treatment as proposed in this study is convincing to gather the necessary political support. In the light of the financial crisis that the fiscus finds itself,[846] the time is ripe to relook the way non-residents are taxed in respect of their real rights in immovable property situated in South Africa.

[845] As was set out in Chapter where it was stated that gross debt to gross domestic product will increase to 81.8 per cent in the current fiscal year. National Treasury 'Supplementary Budget Review 2020' 24 June 2020.
[846] Business Tech 'IMF and African Development Bank loans couldn't even cover South Africa's tax shortfall' available at https://bit.ly/2GXGJyv, accessed 13 September 2020.

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