

**THE ROLE OF ADMINISTRATIVE JUSTICE IN THE REALM OF THE
COMMISSIONER'S DISCRETIONARY DECISIONS AS PROVIDED FOR BY THE
TAX ADMINISTRATION ACT 28 OF 2011**

by

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LIST OF ACCRONYMS AND ABBREVIATIONS

In this dissertation, the following meanings are attached to the following words and phrases:

“Constitution”	The Constitution of the Republic of South Africa, 1996
“Commissioner”	The Commissioner for the South African Revenue Service
“Interim Constitution”	The Interim Constitution of the Republic of South Africa Act 200 of 1993
“Income Tax Act”	The Income Tax Act 58 of 1962, as amended
“PAJA”	The Promotion of Administrative Justice Act 3 of 2000
“Republic”	The Republic of South Africa
“SARS”	The South African Revenue Service
“TAA”	The Tax Administration Act 28 of 2011
“Value-Added Tax Act”	The Value-Added Tax Act 89 of 1991

ABSTRACT

The South African Revenue Service (“SARS”) is an organ of state in terms of the South African Revenue Service Act. SARS is mandated to administer the collection of tax. The Commissioner for the South African Revenue Service (“CSARS”) is granted certain discretionary powers. This study focuses on two of these discretions as contained in the Tax Administration Act 28 of 2011, as amended (“the TAA”) - the granting of a suspension of payment of outstanding tax (“suspension”), and the waiver of interest and penalties imposed on a taxpayer (“waivers”).

In the exercise of these discretions, the CSARS must also uphold the Constitution of the Republic of South Africa (“the Constitution”). The Constitution is the supreme law of the Republic of South Africa (“the Republic”) and contains the Bill of Rights. As the cornerstone of the Republic’s democracy, the Bill of Rights affirms the values of human dignity, equality and freedom of all the people living in the Republic’s, and expressly sets out that it binds all organs of state.

One important right contained in the Bill of Rights is the right to lawful, reasonable and procedurally fair administrative action. This right is given effect to in the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

This study evaluates firstly, the CSARS’ discretionary powers to grant suspension and waivers; secondly, the provisions of administrative justice with specific focus on PAJA and thirdly, the role administrative justice plays in the CSARS’ exercise of his discretions.

CHAPTER 1

INTRODUCTION

1. **BACKGROUND**

1.1. **Introduction**

“We’ll take you on judicial review” angrily shouts a tax practitioner into the telephone receiver. On the other side of the telephone is a South African Revenue Service (“SARS”) Debt Management consultant. This phrase, along with slogans of “administrative justice principles”, “judicial review” and “in terms of PAJA” is commonly used by tax practitioners in their daily speak. The average taxpayer, the proverbial ‘man on the street’, has likely not heard these terms.

These terms are becoming more common in tax circles amongst both legal and non-legal tax practitioners. There are Tax Court judgments that refer to the administrative justice principles as elements in tax disputes,¹ either in conjunction with or separately from the tax merits.

What exactly does it all mean and how exactly does it fit into the daily functions of SARS? More importantly, what is the relevance of this talk about administrative justice to the average taxpayer?

1.2. **Constitutional supremacy**

The Constitution of the Republic of South Africa (“the Constitution”)² is the starting point of this exposition as the Republic is a constitutional state. This is seen from amongst others, section 1(c) of the Constitution which provides that the Republic is founded on the value of “supremacy of the Constitution and the rule of law”. Further emphasis of this position is in the founding principles of the Constitution where it provides that “[t]he Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.³

The rule of law imposes restrictions on the manner in which the state may exercise the powers conferred upon it.⁴ In defining the concept of the “rule of law” the Constitutional Court held that

“[i]t is a fundamental principle of the rule of law, recognized widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the

¹ *Metcash Trading Limited v Commissioner for SARS* 2001 (1) SA 1109 (CC); *Trend Finance (Pty) Ltd v Commissioner for SARS* [2005] 4 All SA 657 (C); *Commissioner for SARS v Sprigg Investment* [2010] SCA 172; *BCE Food Service Equipment (Pty) Ltd v Commissioner for SARS* [2017] ZAGPJHC 243.

² The Constitution of the Republic of South Africa, 1996.

³ Section 2 of the Constitution.

⁴ LAWSA Vol 5(3) *The existence of the rule of law in South Africa* last updated 31 January 2012. Typically a LAWSA reference would look like this: Harms “Civil Procedure: Superior Courts” in Joubert & Faris (eds) *The Law of South Africa* 4 (2012) par 125.

extent at least that it expresses the principle of legality – is generally understood to be a fundamental principle of constitutional law”.⁵

The Court expanded further by saying

“[I]t seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution”.⁶

Subsequent to the *Fedsure* judgment, the Constitutional Court has held that the principle of the rule of law extends to more than restricting the state from acting outside of the confines of the law.⁷ The principle of the rule of law now also imposes procedural and substantive restrictions on the way in which the state exercises its powers and performs its functions.⁸

As the supreme legislation in the Republic of South Africa (“the Republic”), the Constitution entrenches the principle of the rule of law. In all discussions of the Constitution, focus is placed on the Bill of Rights contained in its Chapter 2. This is due to the fact that the Bill of Rights is the cornerstone of the Republic’s democracy.⁹ The rights contained in the Bill of Rights affirm the values of human dignity, equality and freedom of all people in the Republic of South Africa (“the Republic”).¹⁰ The Constitution places an obligation on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”.¹¹ The Bill of Rights expressly sets out that it binds the legislature, judiciary and all organs of state.¹²

Included in the definition of an organ of state is SARS as it is declared as such in section 2 of the SARS Act. The Commissioner for SARS (“the Commissioner”) manages SARS, to help it fulfil its mandate for the efficient and effective collection of revenue¹³ which is utilised for the running of the State of the Republic. SARS performs a public function in terms of the collection of taxes and administration of the tax system. As such, SARS has an obligation to act in accordance with legislative provisions, to uphold taxpayers’ rights where applicable and to adopt and adhere to administrative procedures that are in line with the Constitution.

⁵ *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC) (“*Fedsure*”), paragraph 57.

⁶ *Fedsure Life*, paragraph 57. The “rule of law” is entrenched in our common law and the interpretation thereof under the Interim Constitution is the same in the final Constitution.

⁷ LAWSA Vol 5(3) *The existence of the rule of law in South Africa* last updated 31 January 2012.

⁸ LAWSA Vol 5(3) *The existence of the rule of law in South Africa* last updated 31 January 2012.

⁹ Section 7(1) of the Constitution.

¹⁰ Section 7(1) of the Constitution.

¹¹ Section 7(2) of the Constitution.

¹² Section 8(1) of the Constitution.

¹³ Section 3 of the South African Revenue Service Act No. 34 of 1997 (“the SARS Act”).

1.3. Administrative justice

The Bill of Rights contains the constitutional right to lawful, reasonable and procedurally fair administrative action,¹⁴ along with the right to written reasons where a person is adversely affected by administrative action.¹⁵ The phrase “administrative justice” is coined from these rights, and is given effect to in terms of the Promotion of Administrative Justice Act (“PAJA”).¹⁶

“Administrative action” is defined in section 1 of PAJA as

“any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or

(b) ... which adversely affects the rights of any person and which has a direct, external legal effect...”

This study will further expand on the principle of administrative justice in later chapters whilst considering the impact, if any, of this principle in the tax sphere. This will be with particular reference to certain of the Commissioner’s decisions, which he¹⁷ is empowered to make in terms of the Tax Administration Act (“the TAA”).¹⁸

1.4. The Commissioner’s decisions

The Commissioner is tasked with the management of SARS.¹⁹ In fulfilling his tasks, the Commissioner is entitled to take “all decisions in the exercise by SARS of its powers”.²⁰ This includes any decision by the Commissioner, which must receive a wide and benevolent interpretation so that the indulgence allowed by a legislative provision is fully effective.

¹⁴ Section 33(1) of the Constitution.

¹⁵ Section 33(2) of the Constitution.

¹⁶ Act 3 of 2000.

¹⁷ The role of the Commissioner may be filled by a natural person of any gender. For purposes of this study, the Commissioner will be referred to as male given that at the time of writing, both the suspended Commissioner and Acting Commissioner are male.

¹⁸ Act 28 of 2011.

¹⁹ The Commissioner’s responsibilities are set out in section 9 of the SARS Act and those set out in section 9(1) are (i) the performance by SARS of its functions, (ii) taking decisions in the exercise by SARS of its powers, (iii) performing functions and exercising powers afforded by legislation, and (iv) being the chief executive officer and financial officer of SARS.

²⁰ Section 9(1)(b) of the PAJA.

A "decision" is defined in PAJA as "any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision..."²¹

The Commissioner's decisions, as provided for in the various tax Acts administered by the Commissioner, are *inter alia*

- the exercise of a discretion,
- considering objections and appeals,
- delegating his authority to officials within SARS, and
- adopting various process and procedures to implement and enforce tax legislation.

This dissertation is concerned with the discretionary powers afforded to the Commissioner. More specifically, two discretionary powers couched in the TAA that impact on the taxpayer's financial position; namely:

- i. the Commissioner's discretion to suspend payment of tax in dispute pending finalisation of the dispute, and
- ii. the Commissioner's discretion to waive penalties and interest imposed on a taxpayer.

1.4.1. Suspension of payment

Section 164 of the TAA (referred to herein as the "suspension provision") contains both the "pay now, argue later" rule and the Commissioner's discretion not to apply this rule. The "pay now, argue later" rule provides that the obligation to pay tax is not suspended in instances where the amount is disputed.²²

This position is not absolute with the Commissioner having a discretion to direct otherwise.²³ A partial or full suspension of payment of alleged tax debt can be granted, but only on instruction of a "senior SARS official"²⁴ and upon consideration of an application by a taxpayer for such suspension.²⁵ This suspension constitutes an exercise of the Commissioner's discretion and is exercised in line with subsection (3) of the suspension provision read together with subsection (5) of the suspension provision. The former subsection grants the Commissioner the discretion to suspend payment on

²¹ Section 1 of the PAJA.

²² Section 164(1) of the TAA.

²³ Section 164(1) of the TAA.

²⁴ This is defined in section 1 of the TAA read together with section 6(3) as either the Commissioner, a SARS official with written authority from the Commissioner to act as a senior SARS official, or an official occupying a post designated by the Commissioner as one of a senior SARS official.

²⁵ The application for suspension must contain the indicative factors in section 164(3) of the TAA. These are factors are not an exhaustive list and a taxpayer may present other factors which support its application for suspension.

considering certain factors, with the latter subsection providing instances when the Commissioner must deny a suspension application or revoke a suspension granted.

1.4.2. Waiver of interest and penalties

Chapter 12 of the TAA contains the interest rules, with section 187(6), read together with section 187(7) of the TAA containing the Commissioner's discretion to waive interest imposed on the late or non-payment of taxes due. However, given that certain of the provisions in the TAA which impose interest are not in force, in certain instances the waiver provisions in the Income Tax Act²⁶ and the Value-Added Tax Act²⁷ must be considered. The discretion provision in the TAA provides that interest may only be waived where a senior SARS official is satisfied that the interest is payable due to circumstances beyond the taxpayer's control, unless prohibited by another tax Act.²⁸ The circumstances beyond the taxpayer's control are then limited to those set out in section 187(7) of the TAA and are a natural or human-made disaster; civil disturbance or disruption in services; or a serious illness or accident.

In respect of the discretion to waive penalties imposed on a taxpayer,²⁹ the Commissioner's discretion is granted in Part E of Chapter 15 of the TAA. The remittance provisions in the TAA apply to both administrative non-compliance penalties imposed in terms of the TAA³⁰ and fixed percentage penalties imposed in terms of respective enabling tax Acts. A Taxpayer may request the Commissioner to remit any penalty imposed on the taxpayer in terms of section 215. Sections 216 – 218 of the TAA provide the circumstances in which the Commissioner may remit the penalties as requested by the taxpayer.

1.5. Relevance of the study

The 2018 Budget Review issued by the Department of Finance indicated that the SARS collection shortfall for the 2016/ 2017 financial year was recorded as the biggest collection shortfall since 2009/ 2010.³¹ There has been much media attention focused on this.³² One such example is an article in the Daily Maverick, which article went on to state

“[U]nder SARS commissioner Tom Moyane, tax collection has dropped to R1,175 trillion from the anticipated R1,144 trillion. While there is a concern about tax administration under the current leadership, economic factors like depressed consumer demand, decreased excise taxes due to declining imports, lacklustre

²⁶ Act 58 of 1962.

²⁷ Act No. 89 of 1991.

²⁸ Section 187(6) of the TAA.

²⁹ These penalties can be imposed for various acts of non-compliance by a taxpayer and are imposed on the basis of the provisions in Parts A – C of the Chapter 15 of the TAA.

³⁰ Section 211 of the TAA.

³¹ www.treasury.gov.za/documents/national%20budget/2017/review/FullBR.pdf see also Marianne Merten Business 22 Feb 2017 02:39 (South Africa) Daily Maverick *In numbers: Budget 2017* <https://www.dailymaverick.co.za/article/2017-02-22-in-numbers-budget-2017/#.WnoFi6iWbIV> accessed 6 February 2018.

³² See amongst others <https://www.businesslive.co.za/bd/economy/2017-08-21-downgrade-alarm-as-revenue-shortfall-could-hit-r50bn/>; <https://www.biznews.com/budget/budget-2017/2017/10/25/mini-budget-tax-shortfall-r51bn-debt-gdp-telkom/> accessed 6 February 2017.

employment levels, stressed households who are avoiding new credit, certainly contributed to the gap.”³³

The 2017/ 2018 financial year is also predicted to see tax collections that are below the initially set budget. The Minister of Finance announced in the Medium Term Budget Speech in October 2017 that

“This year, sluggish economic growth has caused a significant reduction in the tax revenue outlook which has significantly eroded government’s fiscal position. Tax revenue is projected to fall short of the 2017 Budget estimate by R50.8 billion in the current year, the largest downward revision since the 2009 recession.”³⁴

Given these budget deficits, SARS needs to find new revenue streams. The now-suspended Commissioner undertook to close as much of the budget deficit as possible through the implementation of a number of programmes and initiatives.³⁵ Another way in which SARS could attempt to meet its collection targets is by refusing to exercise certain of its discretions in favour of taxpayers. Discretions such as waiving penalties and interest, or suspending disputed tax debt until finalisation of the dispute. All of these refusals will force taxpayers to pay the capital taxes and full penalties and interest to SARS, thus contributing to lessening the collection shortfall. It therefore becomes important to consider the role of administrative justice principle in the tax landscape. This is not only looking at the administrative justice principle as a possible means for redress for taxpayers, but also as a possible tool for checks-and-balances on the discretionary decisions considered in this study.

2. **RESEARCH OBJECTIVE & RESEARCH QUESTIONS**

The primary objective of this study is to consider the role administrative justice plays in the Commissioner’s decision making. Not just any decisions, but those two key decisions that entail an exercise of discretion on the Commissioner’s part. These two decisions also affect a taxpayer’s financial position.

In setting out to achieve this objective, the following questions must be answered:

- i. What is the extent of the Commissioner’s decision making powers, in the form of the exercise of his discretions to suspend payment and waive interest and penalties as provided for in the TAA?
- ii. What is administrative justice and what role does it play in the decisions made by organs of state?

³³ Marianne Merten Business 22 Feb 2017 02:39 (South Africa) Daily Maverick *In numbers: Budget 2017* <https://www.dailymaverick.co.za/article/2017-02-22-in-numbers-budget-2017/#.WnoFi6iWbIV> accessed 6 February 2018.

³⁴ Minister of Finance 2017 *Medium Term Budget Policy Statement* (25 October 2017) p 16 available at <http://www.treasury.gov.za/documents/MTBPS/2017/speech/speech.pdf>.

³⁵ <https://www.iol.co.za/business-report/sars-will-close-the-r508-billion-shortfall-says-commissioner-12501266> SARS will close the R50.8 billion shortfall, says commissioner accessed 6 February 2018.

- iii. What role does administrative justice play in the Commissioner's decision on whether or not to exercise his discretions, relating to suspension of payments and waivers of interest and penalties, in a taxpayer's favour?

The answers to these questions will lead to conclusions that will highlight the impact of administrative justice in the Commissioner's discretionary decisions. These conclusions may serve as recommendations on how the Commissioner can best exercise the discretions afforded to him. The remedial actions available to an aggrieved person will also be considered.

3. LIMITATION OF THE STUDY

The planned study is a literature review, with interpretation and application of relevant principles. The literature comprises of South African academic textbooks, journal articles, publications and media statements by SARS, legislation and case law.

The study focuses only on the selected decisions taken in the form of discretions afforded to the Commissioner in terms of the TAA. The discretions apply to all tax Acts administered by the Commissioner except for customs and excise legislation.³⁶ The decisions focused on are limited to:

- i. the Commissioner's discretion to suspend payment of tax in dispute pending finalisation of the dispute, and
- ii. the Commissioner's discretion to waive penalties³⁷ and interest imposed on a taxpayer.

4. PRELIMINARY FRAMEWORK OF THE DISSERTATION

The dissertation is divided into five chapters.

Chapter 1 is the introduction and background to the study. This moves onto Chapter 2 which contains an investigation and discussion on the Commissioner's discretionary powers. Chapter 2 addresses the first research question.

The second research question, on the administrative justice principles, is discussed in Chapter 3. Chapter 3 sets out the provisions of administrative justice, with a particular focus on PAJA.

Once the content of the Commissioner's decisions are elucidated upon and the prescripts of administrative justice are considered, Chapter 4 sets out the role that administrative

³⁶ Definition of "tax Acts" in section 1 of the TAA which specifically excludes the Customs and Excise Act.

³⁷ The focus is only on administrative non-compliance and percentage based penalties. The understatement penalties imposed in terms of section 222 read together with section 223 of the TAA are excluded from this discussion. This is because the remission of these penalties is not in terms of a discretion afforded, but rather on the presence of a bona fide inadvertent error.

justice plays in the exercise of the Commissioner's discretions in relation to the selected decisions. This is in answering the third and final research question of this study.

Chapter 5, being the concluding chapter of the study, will answer the overall research question on whether PAJA has an impact on the Commissioner's discretionary powers to grant a suspension of payment and waivers of interest and penalties.

5. RESEARCH METHODOLOGY

The method applied in the study is a desktop approach in that research was conducted on available South African literature.

Bending questions will be applied in the study so as to interrogate the legal framework provided on administrative justice and how it impacts the Commissioner's discretions. This is an effort to better understand not only the interplay between administrative justice and the Commissioner's selected discretionary decisions, but also to understand if it is necessary to have these protections for taxpayers in such instances.

CHAPTER 2

THE COMMISSIONER'S DISCRETIONARY POWERS

2.1. INTRODUCTION

SARS is established as an organ of state in terms of section 2 of the South African Revenue Service Act ("the SARS Act").¹ Along with establishing the SARS as an organ of state, the SARS Act also provides for the appointment of a Commissioner of SARS by the Minister of Finance.²

The Commissioner of SARS is tasked with the management of SARS. The management can be carried out through the assignment or delegation of certain management duties by the Commissioner to a SARS employee with appropriate skills.³ This assignment or delegation may be seen as the exercise of a discretionary power, or the assigned duties themselves may be in the form of an exercise of a discretion.

This chapter discusses the role of the Commissioner and SARS. This serves as a basis in considering a discretionary power in broad terms as well as how it must be exercised. The chapter then focuses on the Commissioner's two discretionary powers, which will be the focus of this study, namely consideration of a suspension of payment application pending resolution of a dispute and the waiver of interest and penalties on application by a taxpayer ("the waiver applications").

2.2. THE COMPOSITION OF SARS

2.2.1. SARS as an organ of state

SARS is established in terms of the SARS Act as the organ of state responsible for the "efficient and effective collection of revenue".⁴ The collection of taxes and administration of the tax system is a public function performed by SARS.

The rights in the Bill of Rights are not absolute rights and are subject to certain limitations provided for in the Constitution's section 36. This is colloquially referred to as the "limitation clause" and provides for particular instances in which the rights in the Bill of Rights may be infringed upon.

The limitation clause provides that "the rights contained in the Bill of Rights may be limited only in terms of laws 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 relevant factors..." A right in the Bill of Rights can only be

¹ Act No. 34 of 1997.

² Section 6 of the SARS Act provides that the Commissioner's appointment is effected by the Minister of Finance in consultation with the Cabinet and the Advisory Board. The same provision sets out that the Commissioner is a SARS employee and is appointed for a term not exceeding five years, which term is renewable.

³ Section 10(1) of the SARS Act.

⁴ Section 2 read together with section 3 of the SARS Act.

infringed upon in line with the limitation clause. Any other type of infringement is unlawful and can be challenged in a court.

2.2.2. The Commissioner for SARS

SARS has the power to, amongst others, appoint its own employees and determine their terms of employment so as to ensure the expedient performance of its functions.⁵ The SARS Act provides that the Minister of Finance must appoint a person as the Commissioner for SARS,⁶ who is the chief executive officer of SARS.⁷

A Commissioner, appointed in accordance with section 6 of the SARS Act, is responsible for:⁸

- the performance by SARS of all its functions;
- all decisions taken in SARS' exercise of its powers, and
- the performance of any function and exercise of any power assigned to the Commissioner in terms of any legislation or a section 4(1)(a) agreement.⁹

Although the SARS Act grants the Commissioner with the authority to assign his/ her management or other duties to a SARS employee; delegate any of his/ her powers to SARS employee, or instruct a SARS employee to perform any of the Commissioner's duties,¹⁰ the Commissioner remains responsible for the exercise of the power or performance of the duty.¹¹ The assignment, delegation or instruction applies only in respect of the powers in the SARS Act itself.¹²

Given that the TAA was promulgated subsequent to the proclamation of the SARS Act, the Commissioner's powers and functions contained in the TAA cannot be delegated on the basis of the SARS Act. These powers and functions will have to be delegated in terms of the TAA, with proper consideration of the provisions therein to ensure that the delegation is valid.

The Commissioner's decision under both the TAA and the SARS Act to delegate or assign powers and functions is the exercise of a choice – the choice to carry out the power or function himself, or to grant it to another person. Further, certain of the powers and functions delegated or assigned by the Commissioner involve the making of a decision. The questions arises when will these decisions be seen as an exercise of discretions?

⁵ Section 5(1)(a) of the SARS Act.

⁶ Section 6(1) of the SARS Act

⁷ Section 9(1)(d) of the SARS Act.

⁸ Section 9 of the SARS Act.

⁹ Section 4(1)(a) of the SARS Act makes mention of an agreement between SARS and an organ of state or institution entitled to the revenue collected by SARS.

¹⁰ Section 10(1) of the SARS Act.

¹¹ Section 10(2) of the SARS Act.

¹² Section 10(3) of the SARS Act.

2.3. DISCRETION IN GENERAL

Case law of the Republic is considered in determining what constitutes a discretion. In *Commissioner for South African Revenue Service v Dunblane (Transkei) (Pty) Ltd (“Dunblane”)*¹³ the court decided whether a SARS official’s determination of income tax by the taxpayer was an exercise of a discretion.¹⁴ The court espoused the principle that an exercise of discretionary power depends on the nature of the deduction and the terms of the statutory provision in terms of which the deduction is allowed.¹⁵ The court considered the wording of the provision and held that not only did it not provide for the re-determination of an assessed loss brought forward from the preceding year, it also did not grant a discretionary power to the Secretary in respect of the carrying forward of the assessed loss from one year to another.¹⁶ In essence, a discretion exists in instances where it is clearly worded as a discretion.

The trademark case of *McDonald’s Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another; McDonald’s Corporation v Dax Prop CC and another; McDonald’s Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and another (“McDonald’s”)*¹⁷ considers the wording of the statutory provision¹⁸ dealing with the removal of a trade mark from the trade mark register. This removal could be done on application to a court by an aggrieved party. The court held that by use of the word “may” in the provision, grants a discretion to the court in considering such an application.¹⁹ Similar to the *Dunblane* case the wording of the provision is looked at to determine the existence of a discretion.

The presence of a discretion is therefore found in the wording of specific legislation. In the context of the Commissioner for SARS, a discretion is found in the SARS Act and the various tax Acts he administers.

2.4. THE COMMISSIONER’S DISCRETIONS

The SARS Act grants the Commissioner with the discretions to assign, delegate or instruct another SARS employee to carry out some of the Commissioner’s responsibilities. This study is focused on the discretions afforded to the Commissioner in the TAA, being the consideration of applications for suspension of payment and waiver of interest and penalties.

Before considering these discretions, the manner of the exercise of the discretions must first be considered. The taxpayer must meet any requirements set out in a provision granting the Commissioner a discretion for the discretion to be exercised favourably. The Commissioner must, as set out in *ITC 1601*, apply “his mind to the issues and facts before

¹³ 2001 JOL 9123 (A).

¹⁴ This was within the context of section 3(2) of the repealed section 58 of the Income Tax Act 21 of 1995. The SARS official determined that the taxpayer had incurred an assessed loss in the amount of R127 823 628 in respect of the 1992 year of assessment.

¹⁵ *Dunblane* paragraph 19.

¹⁶ *Dunblane* paragraph 15.

¹⁷ [1996] 4 All SA 1 (A).

¹⁸ Section 36(1) of the Trade Marks Act 62 of 1963.

¹⁹ *McDonalds* page 27.

him”.²⁰ Put differently “[i]n exercising his discretion the Commissioner must necessarily satisfy himself after having due regard to the circumstances of the case and the provisions of s89quat(3).”

In the event that the taxpayer is aggrieved by the Commissioner’s exercise of the discretion, the taxpayer has two options. The first option is to look at the discretion provided for and rely on the power to objection and appeal against the exercise of the discretion in instances where the discretion is subject to objection and appeal. If there is no such right available, the taxpayer’s second option is to approach the courts. The taxpayer would apply for a review of the Commissioner’s decision on the basis that the Commissioner has acted *mala fide* or that he or she has failed to apply his or her mind to the matter.²¹ In order to make such averments, the legislative powers relating to discretions granted to the Commissioner are considered.

Therefore the provisions for a suspension of payment and the waivers must be considered before deciding which remedy a taxpayer may pursue when aggrieved by the exercise of the discretions.

2.4.1. Suspension of payment application

The TAA provides that an objection or appeal to the tax court, or an appeal against a decision of the tax court does not suspend the taxpayer’s obligation to pay tax and SARS’ right to receive and recover tax, unless a senior SARS official²² directs so.²³ This is colloquially referred to in tax circles as the “pay now, argue later” rule.

This rule has passed constitutional muster in the Constitutional Court case of *Metcash Trading Limited v The Commissioner for the South African Revenue Service and the Minister of Finance (“Metcash Trading”)*²⁴ which considered the constitutionality of the rule in terms of the Value-Added Tax Act (“the VAT Act”).²⁵ The *Metcash Trading* matter focused on whether the “pay now, argue later” principle infringed a taxpayer’s right of access to the courts as provided for in section 34 of the Constitution. The Court held that the rule does not infringe a taxpayer’s constitutional right to due adjudication, or that if it does, the limitation is justified.²⁶ The court arrived at the conclusion that “... none of the sections challenged, either singly or in combination, constitutes a constitutionally offensive limitation of the right of access to courts that is guaranteed by section 34 of the Constitution”.²⁷

Although this decision was handed down before the implementation of the TAA, it remains relevant. This is because although the provisions which were disputed in *Metcash Trading* have been repealed, the “pay now, argue later” rule remains in force. With the introduction

²⁰ ITC 1601 58 SATC 172, page 178.

²¹ ITC 1527 54 SATC 227, page 233.

²² This is defined in section 1 of the TAA read together with section 6(3) as either the Commissioner, a SARS official with written authority from the Commissioner to act as a senior SARS official, or an official occupying a post designated by the Commissioner as one of a senior SARS official.

²³ Section 164(1) of the TAA.

²⁴ 2001 (1) SA 1109 (CC).

²⁵ Act 89 of 1991, as amended.

²⁶ *Metcash Trading* paragraph 67.

²⁷ *Metcash Trading* paragraph 67.

of the TAA, the rule has merely been amended to set out factors to be considered²⁸ when exercising the discretion in an effort to show a clear link with administrative justice considerations. The initial position²⁹ is that while the Commissioner had the discretion to suspend the payment of tax, there were no specific factors identified³⁰ that had to be considered in the exercise of the discretion.³¹

There is no automatic right for suspension of payment of a tax debt.³² A taxpayer must therefore request a suspension of payment of the tax due where the taxpayer either disputes or intends to dispute the assessment giving rise to the tax debt.³³ In such instances, the taxpayer has the right to have the “suspension request fairly considered by a senior SARS official.”³⁴

The Commissioner’s discretion, afforded by use of the word “may”,³⁵ is contained in section 164(3). The decision on whether or not to grant the suspension as requested is exercised by the Commissioner himself or another duly authorised person by considering the factors in section 164(3) of the TAA. The factors listed in section 164(3) of the TAA serve as a guide for the Commissioner in determining whether or not to grant suspension of payment of the tax obligation.

These factors form a combined test and a taxpayer does not need meet each and every factor, although submissions should be made in respect of each of the factors.³⁶ This is also on the basis of the SARS *Short Guide to Tax Administration Act, 2011* (“the Short Guide to the TAA”)³⁷ which provides that all the factors must be considered.³⁸

²⁸ Section 164(3) of the TAA.

²⁹ This study is limited to the exercise of a discretion in respect of suspension of payment application in the context of the TAA in force as at date of this study. Any amendments are mentioned merely for completeness purposes, but not as an integral part of this study.

³⁰ Regardless of the fact that there were no factors identified, the Commissioner still had an obligation to comply with the principles of administrative justice when exercising the discretion. This position is reflected in paragraph 42 of *Metcash Trading* where the court held that the Commissioner’s exercise of his discretion in relation to the suspension of payment “must be rational. The action must also constitute “just administrative action” as required by section 33 of the Constitution and be in compliance with any legislation governing the review of administrative action.”

³¹ Fritz *An appraisal of selected tax-enforcement powers of the South African Revenue Service in the South African constitutional context* (unpublished LLD thesis, University of Pretoria (2017)) 158. Reference can also be made to this thesis for the history on the factors introduced at pages 167 – 170.

³² De Lange & Van Wyk (2017) 20 *PER/ PELJ* 6. When do you use initials and when not??

³³ Section 164(2) of the TAA. The dispute must be in terms of Chapter 9 of the TAA, being the dispute resolution chapter of the TAA.

³⁴ De Lange & Van Wyk (2017) *PER/ PELJ* 8.

³⁵ De Lange & Van Wyk (2017) 20 *PER/PELJ* 7.

³⁶ ENSafrica for SAICA *Tax Administration 2361. Pay now, argue later* available at <https://www.saica.co.za/integritax/2014/2361. Pay now, argue later.htm> November 2014 – Issue 182 (accessed 6 May 2018).

³⁷ SARS version 3 29 March 2018.

³⁸ Short Guide to the TAA 61.

The factors are:

- “(a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
- (b) the compliance history of the taxpayer with SARS;
- (c) whether fraud is *prima facie* involved in the origin of the dispute;
- (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered; or
- (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*.”

The Short Guide to the TAA provides no guidance on SARS’ interpretation of the factors listed in section 164(3) of the TAA. Guidance is sought from commentators such as Solomon³⁹ who discusses three of the factors⁴⁰ as follows:

- (a) the collection of the disputed tax is in jeopardy in instances where SARS faces a real risk that the tax will not be collected;
- (b) irreparable hardship can be interpreted to refer to hardship where any subsequent action would not place the taxpayer in the same position as the position it was in prior to enduring such hardship. There is an acknowledgment by SARS that the irreparable hardship does not only have to be financial, and
- (c) the tender of security is more onerous on taxpayers as the actual offer of security, as opposed to the possibility to offer security, is considered by SARS. There is also no guidance provided on the type of security to be tendered that will be considered as ‘adequate’.⁴¹

De Lange and Van Wyk are of the view that consideration of all the factors will count in the taxpayer’s favour where certain factors are not present, such as for example where fraud is not *prima facie* involved in the dispute.⁴²

The factors are not a closed list based on the use of the “including” in the provision.⁴³ A taxpayer may therefore present other factors that it feels are relevant for consideration by a senior SARS official such as for example the merits of success of the dispute of the tax debt.

³⁹ Solomon (22 April 2015) *Tax ENSight* available at <https://www.ensafrica.com/news/pay-now-argue-later-recent-amendments-to-section-164-of-the-Tax-Administration?Id=1772&STitle=tax%20ENSight> (accessed 6 May 2018).

⁴⁰ The article considers the amendment to section 164(3) which took effect on 20 January 2015 and was brought about by section 50 of the Tax Administration Laws Amendment Act No. 44 of 2014.

⁴¹ From the author’s experience in practise SARS is likely to accept the tender of a bank guarantee, and a cession or pledge over shares or immovable property as ‘a tender of adequate security’.

⁴² De Lange & Van Wyk (2017) 20 *PER/ PELJ* 13.

⁴³ De Lange & Van Wyk (2017) 20 *PER/ PELJ* 12 – 13.

Section 164(5) of the TAA provides a senior SARS official with authority to refuse a request for suspension of payment or to revoke a suspension of payment already granted. This can only happen where the senior SARS official is satisfied that either of the following exist:

- (a) the objection or appeal that was lodged is frivolous or vexatious;
- (b) the objection or appeal are submitted as dilatory tactics by the taxpayer;
- (c) a suspension should not have been granted after further consideration of the factors in section 164(3);
- (d) the factors referred in section 164(3) upon which the decision to suspend payment was made have materially changed.

The author submits that the onus to prove eligibility for the suspension of payment rests with a taxpayer.⁴⁴ The Commissioner needs to apply his mind to the factors placed before him by the taxpayer and exercise the discretion in the taxpayer's favour. It is only in instances where there are *mala fides* on the part of the taxpayer, such as the lodging of a frivolous or vexatious dispute or using the dispute as a dilatory tactic, where the Commissioner can refuse to exercise his discretion in the taxpayer's favour.⁴⁵ The Commissioner's discretion under section 164(5) of the TAA also extends to allow him to revoke a suspension of payment already granted. This can be due to a material change of factors or further consideration of the factors.

The following are instances wherein the suspension of payment may be revoked subsequent to it being granted:

- (a) no objection is lodged;
- (b) an objection is disallowed or no appeal is lodged; or
- (c) an appeal to the tax board or tax court is unsuccessful and no further appeal is noted.⁴⁶

The revocation happens "with immediate effect from the date of expiry of the relevant prescribed time period or any extension of the relevant time period under" the TAA.⁴⁷

Although the "pay now, argue later" principle may seem harsh to taxpayers with legitimate disputes, there is temporary relief granted to taxpayers while the Commissioner decides how to exercise his discretion on a suspension of payment application. The relief is that there is a period during which SARS cannot enforce any collection procedures, unless

⁴⁴ This is also in line with our common law principle that "he who alleges must prove". The burden of proof in respect of suspension of payment applications, however, is not dealt with in section 102 of the TAA, which provides.....

⁴⁵ Author's interpretation of section 164(5) of the TAA.

⁴⁶ Section 164(4) of the TAA.

⁴⁷ Section 164(4) of the TAA.

there is a reasonable belief by SARS that there is a risk of dissipation of assets by the taxpayer.⁴⁸ This is for the period:

- (a) from the day that SARS receives a request for suspension of payment until 10 business days after notice of SARS' decision on the request, or
- (b) from the day the decision to suspend payment is revoked until 10 business days after the revocation has been issued to a taxpayer.⁴⁹

It is important for taxpayers to keep in mind that the exercise of the suspension discretion is not subject to objection and appeal. This means that the Commissioner's decision/s to grant a suspension, not to grant a suspension, or even to revoke a suspension cannot be submitted for reconsideration through the objection and appeal process. A taxpayer is only able to object, and in turn appeal, against certain actions by the Commissioner as listed in section 104 of the TAA.

As was held in *ITC 1601*, with reference to the decision made in *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk*,⁵⁰ the court⁵¹ has the power to reconsider the exercise of the Commissioner's decision in instances where the decision is not subject to objection and appeal. No specific procedure has been laid down to this effect, and the hearing will proceed as if the matter has been taken on review.⁵²

Before approaching the courts for review of the Commissioner's exercise of his discretion, a taxpayer can now rely on section 9 of the TAA for the Commissioner to reconsider the decision. The amendment to section 9(1) of the TAA⁵³ now means that all decisions made by a SARS official,⁵⁴ or any notice issued by SARS to a specific person, which are not subject to objection and appeal may be withdrawn or amended. This withdrawal or amendment can be initiated by either the SARS official or the taxpayer and is effected by either (i) the SARS official who made the decision; (ii) the SARS official's direct manager, or (iii) a senior SARS official.⁵⁵

It should be borne in mind that although a suspension may be granted in terms of section 164(2) of the TAA, with due regard of the factors in both section 164(3) of the TAA and externally, there is an interest portion on the tax debt that continues to accrue. Interest accrues at the prescribed rate as determined by the Minister of Finance in the Government Gazette from time to time.⁵⁶ Where a debt is suspended, interest runs on the

⁴⁸ Section 164(6) of the TAA.

⁴⁹ Section 164(6) of the TAA.

⁵⁰ 1985 (2) SA 668 (T).

⁵¹ Although the learned judge was referring in the context to the tax court, the Tax Court is a division of the high court and the high court is also able to review the Commissioner's decision in exercising his discretion.

⁵² *ITC 1601* page 178.

⁵³ Amended in terms of section 22(a) of the Tax Administration Laws Amendment Act No. 13 of 2017.

⁵⁴ Section 1 of the TAA defines "SARS official" the Commissioner, an employee of SARS or a person contracted or engaged by SARS for purposes of administration of a tax Act and who carries out his/ her duties under the Commissioner's control, direction or supervision.

⁵⁵ Section 9(1) of the TAA.

⁵⁶ In terms of the most recent Government Gazette No. 1 dated 8 July 2017, the current prescribed rate is 10% on amounts due to SARS and 6% on amounts due from SARS.

suspended portion of the debt from the date the debt is due until the date it is paid.⁵⁷ For the excess portion of the tax debt received by SARS, interest accrues from the date the excess was received until it is refunded to the taxpayer.⁵⁸ Any refunds due to a taxpayer at the end of a dispute process, where there are excess funds paid to SARS, are subject to set-off and deferral in accordance with section 191 of the TAA.⁵⁹

2.4.2. Waiver of interest and penalties

2.4.2.1. Interest

To get an understanding of the interest provisions currently in force is similar to one navigating through a maze. This is due to the fact that although the legislature's intention was to consolidate the interest provisions across the tax types into the TAA,⁶⁰ this is not the case as the interest provisions contained in the TAA are not all in force.

The interest provisions are contained in Chapter 12 of the TAA, which comprises of three sections – “general interest rules” in section 187, “period over which interest accrues” in section 188 and section 189 provides for the “rate at which interest is charged”.

Currently in terms of the TAA, interest accrues on a tax debt or refund due at the rate prescribed under section 189 of the TAA,⁶¹ and for the period provided under section 188 of the TAA.⁶² The prescribed rate is the interest rate as fixed by the Minister in the Government Gazette from time to time,⁶³ with any new interest rate coming into effect the month after which it is announced.⁶⁴ The period over which interest accrues is from the effective date of the tax to the date the tax is paid.⁶⁵

The discretion for waiver of the interest imposed is contained in section 187(6) of the TAA. The provision provides that where a taxpayer can satisfy a senior SARS official that the interest payable arose as a result of circumstances beyond the taxpayer's control, the interest attributable to the circumstances may be remitted. The remission cannot be granted outside of three years, in the case of an assessment by SARS, or five years, in the case of a self-assessment.⁶⁶ The circumstances beyond the taxpayer's control are however limited to the following exceptional circumstances:

- (a) a natural or human-made disaster;
- (b) a civil disturbance or disruption in services, or

⁵⁷ Section 164(7) of the TAA.

⁵⁸ Section 164(7) of the TAA.

⁵⁹ Section 164(8) of the TAA.

⁶⁰ Section 2(a) of the TAA provides that the purpose of the TAA is to ensure the efficient and effective collection of tax by aligning the administration of the tax Acts to the extent possible.

⁶¹ Section 187(1)(a) of the TAA.

⁶² Section 187(1)(b) of the TAA.

⁶³ Section 187(3) of the TAA.

⁶⁴ Section 187(4) of the TAA.

⁶⁵ Section 188(1) of the TAA. The effective date for a jeopardy assessment is provided for in section 187(5) of the TAA as being the date for payment as specified in the jeopardy assessment.

⁶⁶ Section 187(8) of the TAA.

(c) a serious illness or accident.⁶⁷

Given the fact that the interest provisions in the TAA are not yet fully in force, certain interest provisions in the relevant tax Acts must be applied for the relevant tax types.⁶⁸ Guidance on how and when to apply the various interest provisions is found in section 4 of the TAA which provides for the application of the TAA. It provides that where the TAA is silent on the administration of a tax Act and the relevant tax Act provides for it, the provisions of that tax Act must apply.⁶⁹ The provision also states that where there is an inconsistency between the provisions of the TAA and those of another tax Act, the provisions of the other Act prevail.⁷⁰

The waiver of interest under the TAA requires the taxpayer to meet a heavy burden – the circumstances of a natural disaster, civil disturbance or even serious illness are rarities in everyday business transactions. The fact that there is no provision in the TAA for the objection or appeal of a decision not to waive interest, whereas the respective tax Acts had such,⁷¹ makes the TAA interest waiver provisions prejudicial to taxpayers.

Regardless of this though, a taxpayer can once again rely on the opportunity afforded by section 9 of the TAA to approach the senior SARS official to reconsider its decision. Should the taxpayer not receive sufficient redress by following this route, the taxpayer may then approach the courts for other relief. As at date of this dissertation, there is no case law considering this new standard for the waiver of interest. The author is keen to see the view of the judiciary in this regard.

2.4.2.2. Penalties

The TAA provides for two types of administrative non-compliance penalties, being fixed amount penalties and percentage based penalties. There is also provision in the TAA for understatement penalties, which are imposed over and above the administrative non-compliance penalties.

Fixed amount penalties

SARS is granted the authority to impose a non-compliance penalty for non-compliance listed in a public notice issued by the Commissioner,⁷² except for:

- (a) the failure to pay tax subject to a percentage based penalty;
- (b) non-compliance in respect of which an understatement penalty has been imposed, or

⁶⁷ Section 187(7) of the TAA.

⁶⁸ From an income tax perspective a taxpayer will have to comply with the requirements in sections 89quat(3) and 89quat(4) of the Income Tax Act; for value-added tax it's the requirements of section 39(7) of the Value-Added Tax Act.

⁶⁹ Section 4(2) of the TAA.

⁷⁰ Section 4(3) of the TAA.

⁷¹ Section 89quat(5) of the Income Tax Act and section 32(1)(a)(vi) of the Value-Added Tax Act.

⁷² Section 210(1) read together with section 210(2) of the TAA.

(c) the failure to disclose information subject to a reportable arrangement penalty.

SARS can impose a non-compliance penalty for failure by a natural person to submit an income tax return as and when required under the ITA. This will apply for years of assessment commencing on or after 1 March 2006 and can be imposed where that person has two or more income tax returns outstanding for the years of assessment.⁷³

The non-compliance penalty is imposed on the basis of a fixed amount penalty table which sets out a penalty amount linked to a taxpayer's assessed loss or taxable income of the preceding year.⁷⁴ There is also a penalty imposed on a 'participant'⁷⁵ for failing to disclose information in relation to a reportable arrangement.⁷⁶

Percentage based penalty

In instances where SARS is satisfied that an amount of tax was paid late, it must impose a penalty equal to the percentage of the amount of unpaid tax as prescribed in the tax Act in addition to any other penalty or interest.⁷⁷

This provision is read in conjunction with the various penalty provisions in the different tax Acts. For instance, where a taxpayer submits an underestimate of provisional tax for a year of assessment, the Commissioner may impose a 20% penalty per paragraph 20(1) of the ITA provides. The example from a VAT perspective is section 39(1) of the VAT Act which provides for a 10% late payment penalty for the late payment of VAT, which is imposed in accordance with Chapter 15 of the TAA.

Imposition of the penalties

Both types of administrative non-compliance penalties are imposed in the same manner – by way of a 'penalty assessment', which must include certain prescribed information.⁷⁸ Although legislation sets out the procedure to impose penalties, this is not what happens in practise. Taxpayers are usually only aware of penalties on drawing a statement of account for a certain tax type for a specific period, with the statement of account reflecting a line item of "penalties" with an amount next to it.⁷⁹

In certain instances, like for corporate income tax, the taxpayer's income tax assessment for the period will contain a line item reflected as "administrative penalties" with an amount next to it. The penalty assessment must be paid on or before the date for payment stated

⁷³ Government Notice 790 Government Gazette 35733 of 1 October 2012.

⁷⁴ Section 211(1) of the TAA.

⁷⁵ "Participant" has a wide definition in section 34 of the TAA and includes the "promoter" (the person principally responsible for organising, designing, selling, financing or managing the arrangement), and a person who directly or indirectly derives, or is assumed to derive, a tax benefit by virtue of an arrangement.

⁷⁶ Section 212(1) of the TAA.

⁷⁷ Section 213(1) of the TAA.

⁷⁸ Section 214(1) of the TAA.

⁷⁹ The legality of the imposition of penalties in such a manner does not form part of this study and the study presumes that penalties imposed in this way are validly imposed.

in it or on or before the deadline for payment per a notice of assessment if the penalty is imposed together with the assessment of tax.⁸⁰

Remittance of penalties

The procedure for remittance of the administrative non-compliance penalties is identical for all penalty types. An aggrieved person may request SARS to remit the penalty before the date for payment⁸¹ in the penalty assessment, in the prescribed form and manner⁸² and in accordance with the tests applicable to the specific penalty type.⁸³ Such remittance request must include a description of the circumstances that prevented the person from complying with the obligation in the tax Act as well as any required supporting documents and information.⁸⁴

Submitting a penalty remittance request has the benefit of suspending collection steps by SARS for the period commencing on the day that SARS receives the request until 21 business days after SARS has given the aggrieved person notice of its decision. The exception to this is that SARS may collect the penalty where it reasonably believes that there is a risk of dissipation of assets by the person or fraud is involved in the non-compliance or remittance request.⁸⁵

The remittance of the administrative penalties is contained in Part E of Chapter 15 of the TAA. SARS has a discretion to remit the penalty in whole or in part as follows:

- (a) For a penalty imposed for the failure to timeously register as a taxpayer, the penalty may be remitted if
 - (i) the discovery of the failure to register happened when the person voluntarily approached SARS, and
 - (ii) all required returns have been submitted by the non-complying person;⁸⁶

⁸⁰ Section 214(2) of the TAA.

⁸¹ SARS has a discretion, per section 215(4) of the TAA, to extend this period if the issue of non-compliance is a failure to register when required, is a nominal or first incidence of non-compliance and reasonable grounds exist for the late submission of the remittance request, or exceptional circumstances rendered the person incapable of submitting the request timely.

⁸² In practise the “prescribed form and manner” is the completion of a remittance request on a taxpayer’s e-Filing profile. The only difficulty with this is when the e-Filing platform does not identify a penalty, for example where the penalty is imposed by way of statement of account as opposed to through an assessment. SARS has accepted written representation setting out submissions in relation to the remittance criteria set out in the TAA.

⁸³ Section 215(1) of the TAA.

⁸⁴ Section 215(2) of the TAA.

⁸⁵ Section 215(3) of the TAA.

⁸⁶ Section 216 of the TAA.

- (b) For a penalty imposed in respect of either a ‘first incidence’⁸⁷ of non-compliance or non-compliance that lasted for less than five business days – SARS may remit the penalty up to an amount of R2 000⁸⁸ if satisfied that
- (i) reasonable grounds for the non-compliance exist, and
 - (ii) the non-compliance has been remedied.⁸⁹
- (c) For percentage based penalty – remittance will be where SARS is satisfied that
- (i) “the ‘penalty’ has been imposed in respect of a ‘first incidence’ of non-compliance, or involved an amount of less than R2 000;
 - (ii) reasonable grounds for the non-compliance exist, and
 - (iii) the non-compliance in issue has been remedied.”⁹⁰

Where another tax Act contains remittance provisions in relation to a penalty imposed under that tax Act, SARS may remit the penalty on the basis of the provisions of the tax Act as opposed to those in the TAA.⁹¹

This is the full extent of the discretions afforded SARS in relation to the remittance of penalties. Section 218 of the TAA provides for the remittance of penalties in exceptional circumstances, but contains peremptory provisions in this regard. The provision reads

“SARS must, upon receipt of a ‘remittance request’, remit the penalty or if applicable a portion thereof, if SARS is satisfied that one or more of the circumstances referred to in subsection (2) rendered the person on whom the penalty was imposed incapable of complying with the relevant obligation under the relevant tax Act.”⁹² (own emphasis) “The circumstances in subsection (2) are limited ones, but provide room for manoeuvre with the last circumstance being “any other circumstance of analogous seriousness”.⁹³

The decision by SARS not to remit a penalty, whether in whole or in part, is subject to objection and appeal.⁹⁴ As already discussed, the amendment to section 9 of the TAA ensures that taxpayers have another avenue to approach in attempting to have the penalty remitted.

Seeing that each type of administrative non-compliance penalty has certain requirements that must be met to satisfy SARS in exercising its discretion, SARS’ exercise of the discretion can be challenged. As long as a taxpayer ensures that it complies with the

⁸⁷ Section 208 of the TAA defines “first incidence” as an incidence of non-compliance where no penalty assessment has been issued in the preceding 36 months across all tax types, with any previously remitted penalty being disregarded.

⁸⁸ For a reportable arrangement penalty this amount is increased to R100 000 in terms of section 217(2) of the TAA.

⁸⁹ Section 217(1) of the TAA.

⁹⁰ Section 217 (3) of the TAA.

⁹¹ Section 215(5) of the TAA.

⁹² Section 218(1) of the TAA.

⁹³ Section 218(2)(g) of the TAA.

⁹⁴ Section 220 of the TAA.

requirements set out for remittance of the penalty type, it should be able to enjoy the Commissioner exercising his discretion in its favour.

2.5. CONCLUSION

The Commissioner's discretions in relation to suspension of payment and waivers of interest and penalties are clearly set out in the TAA. The taxpayer knows the test that will be applied by the Commissioner in applying his mind when exercising his discretions. This creates certainty for taxpayers and also ensures that the Commissioner fully applies his mind. In such an instance, it can be said that the Commissioner will reach a rational decision.

The courts have held that any review application of a Commissioner's decision not to exercise a discretion in favour of a taxpayer will entail looking at whether the Commissioner applied his mind to the information placed before him. Taxpayers who do not ensure that they meet the criteria in the relevant provision or who do not provide the Commissioner not only with requested information, but also any other additional information that will assist the Commissioner in reaching his decision, will not find solace in approaching the courts.

In respect of suspension of payment, where a taxpayer submits sufficient evidence as to why it is entitled to the suspension of payment, it should receive a favourable outcome to the suspension of payment application. This is evidence to show that the dispute is not vexatious, frivolous or a dilatory tactic and that the upfront payment of the tax debt will prejudice it in some way or other. In the event that the decision is unfavourable, the taxpayer can take the decision on review to the tax court or the high court. Given that the taxpayer would have submitted a concrete case to the Commissioner, the court may be inclined to rule it's in favour.

The waiver of interest, on the other hand, is a more difficult relief to obtain. This is on the basis that, even though there is criteria laid out for the Commissioner to consider in exercising his discretion, the criteria is almost impossible for a taxpayer to meet in its daily affairs. Exceptional circumstances, which are in turn limited to only the four in the TAA, do not bode well for taxpayers seeking a waiver of interest. This exercise of discretion is not subject to objection and appeal and although the remedy in section 9 of the TAA is an option, given that interest is sometime a large quantum and can now exceed the capital, approaching the courts for a review application may be the most expeditious remedy available to a taxpayer.

The remittance of penalties is similar to the suspension of payment in that the test for the exercise of the Commissioner's discretion can be met. The tests of "first incidence" of non-compliance or nominal incidence of non-compliance are not difficult ones to meet, and prove. They should also not create any difficult situation to which the Commissioner must apply his mind. In the unfortunate event that the penalty is not as a result of a "first incidence" of non-compliance or nominal incidence of non-compliance, the taxpayer can attempt to rely on the peremptory provisions under the exceptional circumstances for remittance. Taking the Commissioner's decision on review or relying on the section 9 remedy is also an option in this regard.

CHAPTER 3

ADMINISTRATIVE JUSTICE PROVISIONS

3.1. INTRODUCTION

The people in the Republic all have the right to just administrative action as provided for in section 33 of the Constitution. Along with providing the right to written reasons for administrative action, just administrative action is administrative action that is lawful, reasonable and procedurally fair.

Procedural fairness, as relates to administrative action, serves as an important safe guard against abuse of power given the far-reaching powers that State administrative functionaries are provided with in the Republic.¹ The same can be said of reasonableness and legality of administrative action. All of these are safeguards that are to be applied to administrative action to ensure that it is “just administrative action”.

The administrative action of an administrative functionary (referred to as “the administrator” throughout) must be fair and just.² In determining whether this is the case, it becomes imperative to understand action that will constitute “administrative action” as well as the safe-guards in place to achieve “just administrative action”. An understanding of this will assist later in the study to determine whether the exercise of the Commissioner’s discretions set out herein are “just administrative action”.

This chapter is an exposition of administrative justice – what it is, how it is protected and why it is relevant to taxpayers. The discourse begins with placing administrative justice in the realm of administrative law, the body of principles that governs the Republic’s administrators. As all law is subject to the Constitution, the supreme law of the land, the Constitution’s impact on administrative law in general and administrative justice in particular must be considered. It is important to understand what is meant by “administrative justice”. Given that there is no clear definition of “administrative justice”, the author has reached the conclusion that “administrative justice” refers to the “just administrative action” afforded by section 33 of the Constitution.

This chapter also discusses the rights afforded by administrative justice, being the right to just administrative action and the right to reasons. The right to reasons is in respect of administrative action that materially and adversely affects a person’s rights.

The rights to administrative justice are given effect to in the PAJA as required by section 33(3) of the Constitution. A discussion on administrative justice would therefore be incomplete without considering the pertinent provisions of this legislation; from its definitions, to its application and to the remedies it contains.

¹ *Janse van Rensburg NO and Another v Minister of Trade and Industry NO and Another* 2000 (11) BCLR 1235 (CC).

² Smit (ed) (2013) 239.

3.2. ADMINISTRATIVE JUSTICE

3.2.1. Positioning administrative justice in the legal landscape

Section 33 of the Constitution provides everyone with the right to “just administrative action”, with subsection (1) setting out what this actually entails – administrative action that is lawful, reasonable and procedurally fair. The provision also provides the people living in the Republic’s with the right to reasons where administrative action adversely affects a person’s rights;³ and concludes by providing for the enactment of national legislation to give effect to the rights encompassed in the provision.⁴

This provision is loosely referred to as “administrative justice” in legal circles,⁵ with the legislation enacted to comply with section 33 of the Constitution containing the phrase “administrative justice” in its short title. Each of the components of “administrative justice” are discussed below.

Administrative justice, by means of administrative action taken, falls within the scope of administrative law. Administrative law is the “branch of public law that regulates the legal relations of public authorities, whether with private individuals and organisations or with other public authorities.”⁶ In essence, “[A]dministrative law governs “administrative action” and other conduct of the public administration.”⁷

3.2.2. Interplay of administrative law and the Constitution

The adoption of the Constitution brought about change in all areas of law, with the biggest change being the introduction of the “rule of law”.⁸ This means that Parliament is no longer supreme, with the Constitution being the overarching standard for all legislation and conduct.⁹ As a result of this, certain constructs of administrative law are now different to what they were pre-1996.¹⁰

Prior to the adoption of the Constitution, the Supreme Court had inherent power of judicial review to test delegated legislation and administrative decisions on grounds established at common law. In this way the body of principles that came to be called “administrative law” were developed.¹¹

Section 33 of the Constitution, originally section 24 of the Interim Constitution, now entrenches the right to just administrative action. This applies to all law and binding of all

³ Section 33(2) of the Constitution.

⁴ Section 33(3) of the Constitution.

⁵ As seen from multiple commentators on section 33 of the Constitution with the ones referred to in this study being Hoexter C (2012); Devenish GE *et al* (2001).

⁶ Hoexter (2012) 2.

⁷ Hoexter (2012) 50.

⁸ Section 1(c) of the Constitution.

⁹ Section 2 of the Constitution.

¹⁰ This study is not focused on the developments in constitutional law save to refer to the amendments effected on the adoption of the Constitution.

¹¹ Hoexter (2012) 14.

organs of state,¹² and may be limited only in terms of the limitation clause in section 36 of the Constitution.

Constitutional law and administrative law now overlap as the Constitution has a fundamental bearing on nature of the administrative law system, based on the Constitution being the supreme law of South Africa. There are differences between the two fields of law.¹³ Constitutional law is concerned with the framework within which firstly, policy can be made, and secondly, legislation to give effect to the policy can be legislated and interpreted. Administrative law is concerned with the daily actions of administrators to implement the policy and exercise the powers afforded by the legislation. Administrative law also includes the creation of additional legislation within the policy framework provided by constitutional law.¹⁴

The common law is still in existence and section 33 of the Constitution must be seen as incorporating and expanding on the established principles of the common law.¹⁵ Challenges to administrative action were initially brought on the basis of direct reliance on the Constitution, but since PAJA has now been enacted the challenges must be brought in terms of PAJA.¹⁶

The common law remains available as a basis on which to challenge administrative action, but it is subject to constitutional control. This means that the common law must be applied with regard to the Constitution and its rights. A challenge on administrative action in terms of section 33 of the Constitution is still available, but only in exceptional circumstances. These exceptional circumstances are the challenge of the validity of the provisions of PAJA, challenge legislation that is alleged to infringe the right to just administrative action and for an interpretation of the provisions of PAJA.¹⁷

3.2.3. Defining administrative justice

The term “administrative justice” is a recent feature in legal circles in the Republic as there was no such clause in the Republic’s 1983 Constitution.¹⁸ It is therefore unfortunate that the Constitution does not contain a definition of “administrative justice”.

The current author’s attempt at defining “administrative justice” is that it is “just administrative action as guaranteed in section 33 of the Constitution”. This definition is

¹² Section 8(1) of the Constitution.

¹³ Hoexter (2012) 23.

¹⁴ Hoexter (2012) 23.

¹⁵ Hoexter (2012) 29. This is also in line with section 8 of the Constitution that provides that in order to give effect to a right in the Bill of Rights, the common law must be developed to the extent not given effect to by legislation; and common law rules may be developed to limit such right to the extent that it applies to the limitation clause in section 36 of the Constitution.

¹⁶ De Vos *et al* (2016) p 585.

¹⁷ Hoexter (2012) 17.

¹⁸ Author unknown *Revised version of the paper delivered at the conference ‘Towards a New Constitution’ held by the VerLoren van Themaat Centre for Public Law Studies, University of South Africa, 28 to 29 March 1994 p 351.*

reached after considering firstly, Kotzé’s article¹⁹ and secondly, Burns’ paper aptly titled “Administrative Justice”.²⁰

Kotzé defines “administrative justice” for purposes of her article as a part of public law regulating the exercise of administrative action, as carried out by organs of state, which is set out in section 33 of the Constitution.²¹ Kotzé then refers to Devenish *et al*²² whose consideration of section 33 of the Constitution add value in the determination of “administrative justice” –

“[A]dministrative justice aims to, *inter alia*, ensure good governance and administration, ensure fair dealing in administrative context, enhance protection of the individual against abuse of state power, promote public participation in decision-making, and strengthen the notion that public officials are answerable and accountable to the public they are meant to serve.”²³

Administrative justice is seen to come from the non-judicial branch of government and may be understood in both a procedural and substantive sense.²⁴ The procedural sense encompasses rules of fairness or compliance with the rules of natural justice. The substantive sense encompasses the fairness and rationality of an outcome.²⁵

These views feed into the author’s conclusion that “administrative justice” is in essence “just administrative action as set out in section 33 of the Constitution”. De Vos *et al*²⁶ lend further support to this position as they state that the right to administrative justice in section 33 of the Constitution is a right “which seeks to ensure proper processes are followed before administrative decisions are made and that those decisions are lawful and reasonable.”²⁷

The author now unpacks “administrative action” before considering the obligations imposed on administrators who take such administrative action in ensuring that it meets the requirement of “just administrative action”.

¹⁹ Kotzé LJ (2004) 7.2 PER/ PELJ 57/204.

²⁰ Author unknown *Revised version of the paper delivered at the conference ‘Towards a New Constitution’* held by the VerLoren van Themaat Centre for Public Law Studies, University of South Africa, 28 to 29 March 1994.

²¹ Kotzé LJ (2004) 7.2 PER/ PELJ 57/204 at 58/204 at footnote 2. Kotzé credits this definition to Burns *Administrative Law* 9.

²² Devenish GE *et al* (2001) 14 – 16.

²³ Kotzé LJ (2004) 7.2 PER/ PELJ 57/204 at 67/204.

²⁴ Author unknown *Revised version of the paper delivered at the conference ‘Towards a New Constitution’* held by the VerLoren van Themaat Centre for Public Law Studies, University of South Africa, 28 to 29 March 1994 p 351.

²⁵ Author unknown *Revised version of the paper delivered at the conference ‘Towards a New Constitution’* held by the VerLoren van Themaat Centre for Public Law Studies, University of South Africa, 28 to 29 March 1994 p 351.

²⁶ De Vos *et al* (2016) 581.

²⁷ De Vos *et al* (2016) 581.

3.3. ADMINISTRATIVE ACTION

3.3.1. Defining administrative action - the common law and the Constitution

The administrative justice provision in the Constitution provides a right to just administrative action and sets out the criteria which the said action must meet in order to give effect to this right.²⁸ The criteria of lawful, reasonable and procedurally fair administrative action are discussed individually below. The starting point is to gain an understanding of what constitutes “administrative action”.²⁹

The common law position on “administrative action” is that it is “conduct of an administrative nature performed by public authorities or private persons and entities when they exercise public powers or perform public functions”.³⁰ Once the Constitution was implemented, the common law rules and principles were subsumed into it.³¹ Any consideration of administrative action by the courts must be done with consideration of the common law,³² and the common law derives its force from the Constitution while being subject to constitutional control.³³

The Constitutional Court has laid down the principle for determining what conduct constitutes ‘administrative action’ in, *inter alia*, the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (“SARFU”).³⁴ The principle is that when considering conduct as “administrative action” the function is more important than the functionary carrying out the function. The enquiry is focused not on the arm of government carrying out the conduct, but rather on determining the nature of the power being exercised.³⁵

In the SARFU case the Court had to consider, amongst others, whether the President of the Republic’s decision to appoint a commission of enquiry into the financial and other administrative affairs of the South African Rugby Football Union, and its constituent unions, infringed the tenets of procedural fairness in terms of section 33 of the Constitution.³⁶ The Court held that there were two distinct legal decisions taken by the

²⁸ De Vos *et al* (2016) 586.

²⁹ A good starting point is the jurisprudence on the right to just administrative action. According to Currie I and De Waal J (2013) 653, this is summarised as providing that administrative action is an exercise of public power by an organ of state, except where the organ of state acts in accordance with its character, in line with the separation of powers. This means that the legislature carrying out legislative functions, the judiciary carrying out judicial functions and the executive carrying out certain political decisions will not be administrative action.

³⁰ Currie and de Waal (2013) 647.

³¹ De Vos *et al* (2016) 584.

³² Section 8 of the Constitution.

³³ *Pharmaceutical Manufacturers Association of South Africa In re: Ex parte President of the Republic of South Africa* (2000) (2) SA 674 (CC) 44.

³⁴ 1999 (10) BCLR 1059 (CC).

³⁵ SARFU paragraph 34(b) read together with paragraph 140 - 143.

³⁶ The application brought by SARFU is set out in paragraph 13(4) of the judgment as:

“*Audi alteram partem*

President, being the decision to appoint the commission of enquiry and to grant the commission of enquiry powers under the Commissions Act, which included the right to subpoena witnesses.³⁷

The Court held that the function performed or the nature of the power is relevant in determining “administrative action”. In looking at the nature of the President’s powers to appoint a commission of enquiry, the full court held that such power is not administrative action. This removed the need for the decision to comply with the procedural fairness requirements of section 33 of the Constitution. The court did not consider whether the second decision, that of the President to grant the commission of enquiry powers under the Commissions Act, constituted administrative action. This was due to the fact that the enquiries by the commission were into matters of public concern. As such, procedural fairness did not require the respondents to be granted a hearing prior to the President conferring the powers of the Commissions Act on the commission of enquiry.³⁸

The study now turns to look at the definition of “administrative action” in PAJA.

3.3.2. Defining administrative action in PAJA

The definition of “administrative action” in PAJA is not as simple as that found in the common law. PAJA defines “administrative action” as

“any decision taken, or failure to take a decision, by –

(a) an organ of state when –

- i. exercising a power in terms of the Constitution or a provincial constitution; or
- ii. exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include...”

The definition must be read in conjunction with other definitions as it contains other defined terms within it, such as “decision”, “empowering provision as well as “failure” in the context of “failure to take a decision”.³⁹ Hoexter is critical of the definition and calls it

In terms of section 33 of the Constitution, SARFU and its constituent unions, were entitled to procedural fairness and accordingly to make representations to the President before he appointed the commission; alternatively the respondents had a legitimate expectation that they would be afforded such a hearing arising from the agreement of 21 February 1997.”

Although the summary of the findings to this argument are discussed in this study, the detailed discussion is available at paragraphs 126 – 222 of the judgment.

³⁷ SARFU paragraph 34(a).

³⁸ SARFU paragraph 34(c).

³⁹ Currie and de Waal (2013) 647.

“convoluted” due to having to read the definition in light of other definitions.⁴⁰ She further criticises the definition for being too narrow due to the “piling one on top of another a number of separate conditions that must be fulfilled before an action qualifies as administrative” as well as the long list of exclusions in the definition.⁴¹

Regardless of the criticism on the definition, it is the definition which must be used. The definition can be broken into seven elements, listed below and discussed individually in the subsequent paragraphs:

- a decision taken (or failure to take a decision)
- by an organ of state (or natural or juristic person)
- when exercising a public power or performing a public function
- in terms of an empowering provision
- that adversely affects rights
- has a direct, external legal effect, and
- is not specifically excluded by the list of exclusions in paragraphs (aa) to (ii) of the definition.⁴²

Given that not all actions are “administrative action”, the definition contains a list of these excluded actions in subparagraphs (aa) – (ii). These are actions that are carried out by administrators that have a public function, but given that the actions are listed as exclusions, they do not have to be taken in accordance with section 33 of the Constitution.⁴³

3.3.2.1. **Decision, or failure to take decision**

The definition in PAJA of “decision” is

“decision means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to –

- (a) making, suspending, revoking or refusing to make an order, award or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

⁴⁰ Hoexter (2012) 195.

⁴¹ Hoexter (2012) 196.

⁴² Currie and de Waal (2013) 656; Smit M.H (ed) (2013) 240; Hoexter (2012) 594.

⁴³ Some examples of the excluded actions are the executive powers or functions of the National and Provincial Executives, the judicial functions of a judicial officer of a court, and a decision to institute or continue prosecution.

- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;”

The definition of “decision” in section 1 of PAJA is based on parts of a definition from Australia’s Administrative Decisions (Judicial Review) Act of 1977 and is broad⁴⁴ - it starts off specific then extends its scope with the inclusion of certain specific actions as decisions. By including a proposed decision in the definition, the scope of “decision” is widened with such proposed decision also being an “administrative action”.

The ordinary meaning of the word “decision” is a “noun - a conclusion or resolution reached after consideration”.⁴⁵ Thus, for purposes of relying on the right to just administrative action, there must first be a conclusion of an administrative nature, reached after consideration; second it must be made, required to be made, proposed to be made, or not made; and lastly, in terms of an empowering provision.⁴⁶

a. Decision of an administrative nature

The decision is required to be of an administrative nature. Hoexter opines that the purport of the phrase is unclear,⁴⁷ but this is not the case at all in my opinion. On the one hand, the phrase serves to limit the decisions which may be considered as “administrative action”. It would not make sense to include “any decision taken or to be taken...” under the ambit of just administrative action. Due to the separation of powers,⁴⁸ there are different spheres of government that take decisions based on their function i.e. the

⁴⁴ Hoexter (2012) 198.

⁴⁵ Oxford Living Dictionaries accessed at <http://en.oxforddictionaries.com> accessed 16 June 2018 at 6:00 PM. The ordinary meaning of the word is relevant as the definition of “decision” in PAJA makes reference to “any decision”. It is with reference to the ordinary meaning of “decision” that a proper understanding of “decision” in terms of PAJA is possible.

⁴⁶ See also *Sibiya v Director-General Home Affairs and Others* (2009) 3 All SA 68 (KNP) para 14 where the court held that the definition “covers the basic conduct of administrative functionaries when dealing with citizens in circumstances which can adversely affect the rights of those citizens and which has a direct, external legal effect on them.”

⁴⁷ Hoexter (2012) 203.

⁴⁸ <https://www.parliament.gov.za> accessed 14 June at 9:12PM which describes this as meaning that the power of the state is divided into three interdependent components on the strength of the Constitution. These are the legislature, the executive and the judiciary. A discussion on the separation of powers is outside the scope of this study, but reference can be made to Munzhedzi P.H *The Role of the Separation of Powers in Ensuring Public Accountability in South Africa: Policy versus Practice* article. This was presented at The 2nd Annual International Conference on Public Administration and Development Alternatives held 26 – 28 July 2017 for an in depth discussion, accessed electronically on 14 June 2018 9:20PM at http://ulspace.ul.ac.za/bitstream/handle/10386/1882/munzhedzi_role_2017.pdf?sequence=1&isAllowed=y.

judiciary is concerned with judicial functions, the executive with the running of government and the legislature with enacting legislation.⁴⁹ On the other hand, the definition of “administrative action” has certain exclusions from its ambit, but these can surely not be seen as an exhaustive list. In requiring the decision to be of an administrative nature, this sets the parameters of which decision can be administrative action and therefore required to be just administrative action.

The phrase bolsters the jurisprudence on the constitutional meaning of administrative action.⁵⁰ This conclusion is reached on the basis that administrative action is concerned with the daily activities of government which is the making of policy within a legislated framework and the implementation of policy that is legislated.⁵¹

In concluding that PAJA does not apply to subordinate legislation the case of *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (“New Clicks”)*,⁵² Sachs J considered the definition of “administrative action” with focus on “decision” as used in that context.⁵³ He held that it concerns itself with “administrative (adjudicative) acts concerning matters like orders, permissions and licences.”⁵⁴

b. Decision made under an empowering provision

An “empowering provision” is defined in section 1 of PAJA as “a law, rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken”.

Commentators on administrative justice are unanimous in concluding that this requirement is broad and an easy one to satisfy.⁵⁵ There is also consensus that this element extends the application of PAJA to private institutions as well based on the use of “instrument”, which can be interpreted to include contracts of a commercial nature.⁵⁶

For so long as there is a law, instrument or other document setting out the administrative action, the decision relating thereto will be seen as “made under an empowering provision”.

c. Failure to take a decision

“Failure”, in relation to the taking of a decision, is defined in PAJA as including “a refusal to take the decision”.⁵⁷ The Supreme Court of Appeal⁵⁸ has held that the term “includes” is not a term of an exhaustive definition, but terms of an extension. The word therefore broadens the scope of administrative action so as to include a failure to take a decision.

⁴⁹ <https://www.parliament.gov.za> accessed 14 June 2018.

⁵⁰ Currie and de Waal (2013) 657.

⁵¹ Currie and de Waal (2013) 657.

⁵² *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2005 (2) SA 311 (CC).

⁵³ *New Clicks* paragraphs 599 – 600.

⁵⁴ *New Clicks* paragraph 600.

⁵⁵ Currie and de Waal (2013) 658; Hoexter (2012) 205; De Vos *et al* (2016) 595.

⁵⁶ Hoexter (2012) 205; De Vos *et al* (2016) 595.

⁵⁷ Section 1.

⁵⁸ In *Bekker and Another v Jika* 2003 (1) SA 113 (SCA) paragraph 20.

3.3.2.2. Organ of state

The definition of “organ of state” is found in section 239 of the Constitution as

- (a) any department of state or administration in the national, provincial and local sphere of government;
- (b) any other functionary or institution -
 - i. exercising a power or performing a public function in terms of the Constitution or a provincial constitution; or
 - ii. exercising a power of performing a public function in terms of any legislation, but does not include a court or a judicial officer;”

This is the definition applied in an administrative action context as section 1 of PAJA defines “organ of state” as bearing the meaning assigned in section 239 of the Constitution.

Hoexter raises an interesting point in considering the administrative action by an organ of state *versus* that by persons other than organs of state.⁵⁹ She indicates that the scope of application of PAJA for persons other than organs of state is wide enough to apply in many instances due to the use of “empowering provision” in the definition of “administrative action”. On the other hand, the definition of “administrative action” limits PAJA’s application for organs of state to only those instances where the organ of state acts in terms of the Constitution or a provincial constitution, or acts in terms of any legislation that PAJA applies.⁶⁰

3.3.2.3. Exercise of public power or performance of public function

This requirement broadens the possibility of an administrative action being carried out by a private functionary. This is due to the fact that action will be administrative action based on the public nature of the power rather than the person exercising it.⁶¹

There is no single test to determine what powers and functions are of a public nature.⁶² The effect of the decision on the public and the public interest in a decision or activity are some factors that may be considered.⁶³

3.3.2.4. Empowering provision (any legislation)

From the discussion of empowering provision in the discussion of “decision” it is evident that an organ of state undertakes administrative action when acting “in terms of any legislation” while a natural or juristic person need only act “in terms of an empowering

⁵⁹ Hoexter (2012) 206.

⁶⁰ See also Hoexter (2012) 206.

⁶¹ Currie and de Waal (2013) 659.

⁶² Currie and de Waal (2013) 659.

⁶³ Currie and de Waal (2013) 659; Hoexter (2012) 207.

provision". That discussion also highlighted how broad the term "empowering provision" is and can encompass a large number of actions by a public body.

Similarly, the requirement of "any legislation" is broad and will be easily satisfied in most cases. Action taken by an organ of state in terms of a contract is not taken "in terms of any legislation".⁶⁴

The liberal interpretation of the "exercising a public power or performing a public function in terms of any legislation" by the Republic's courts should be considered.⁶⁵ The courts have held that the phrase not only covered actions "in terms of legislation" but was also broad enough to cover actions taken "in accordance with legislation".⁶⁶

3.3.2.5. Adversely affects rights⁶⁷

Identified by Hoexter as "one of the most important aspects of the definition of administrative action in PAJA",⁶⁸ it is also one of the more confusing ones.

In the context of rights, the verb "to affect" is ambiguous as it means either to "deprive" someone of a right or to "determine" someone's rights.⁶⁹

The author agrees with Hoexter's view that for purposes of being aligned to section 33 of the Constitution, the phrase be interpreted in line with the determination of rights.⁷⁰ Put differently, as PAJA's purpose is to give effect to the constitutional right to administrative justice, it seems more sensible to apply the determination meaning that does not restrict the application of PAJA to decisions affecting established rights.⁷¹

Any restrictions to be placed when dealing with administrative justice concepts should be placed on the duties to act lawfully, reasonably and fairly or the duty to give reasons.⁷² The interpretation of administrative action should be to give it a broad meaning with no restrictions.⁷³

In determining what rights must be adversely affected, a literal interpretation of the term should be avoided.⁷⁴ In the case of *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public*

⁶⁴ Hoexter (2012) 219.

⁶⁵ In *M&G Media Ltd v 2010 FIFA World Cup Organising Committee South Africa Ltd* 2011 (5) SA 163 (GSJ) the court considered the meaning of the phrase in the context of the Promotion of Access to Information Act 2 of 2000 where it is used in section 1 in the definition of "public body".

⁶⁶ *M&G Media* paragraph 326 read together with paragraph 328.

⁶⁷ Section 3(1) of PAJA also requires for administrative action that substantially and adversely affects the rights or legitimate expectations of a person to be procedurally fair, which speaks to a scope broader than "rights" in the traditional sense.

⁶⁸ Hoexter (2012) 220.

⁶⁹ Currie and de Waal (2013) 661.

⁷⁰ Hoexter (2012) 221.

⁷¹ Currie and de Waal (2013) 661.

⁷² Currie and de Waal (2013) 661.

⁷³ Currie and de Waal (2013) 661.

⁷⁴ Currie and de Waal (2013) 661.

Works (“Greys”)⁷⁵ the Supreme Court of Appeal concluded that it is likely that the phrase refers to “action that has the capacity to affect legal rights...”⁷⁶

The author considered the Constitutional Court case of *Joseph and Others v City of Johannesburg and Others* (“Joseph”),⁷⁷ for guidance on the court’s interpretation of ‘materially and adversely affects rights’.⁷⁸ The three important principles laid down are:

- Where an individual’s rights are “materially and adversely affected” for the purposes of section 3 of PAJA, the decision will by necessary implication have a “direct, external legal effect” on the individual.⁷⁹
- The phrase “materially and adversely affects” simply means that the administrative action must have a significant and not trivial effect.⁸⁰
- The notion of “rights” in respect of administrative action “includes not only vested, private law rights but also legal entitlements that have their basis in the constitutional and statutory obligations of government.”⁸¹

The determination of whose rights must be adversely affected must be undertaken with reference to the wording of the provision, being “which adversely affects the rights of any person” (own emphasis). This means that the rights affected need not be those of an applicant in a matter.⁸²

3.3.2.6. Direct, external legal effect

This phrase, with its origins in German law, means that there must be legal consequences which flow from the action that affect someone other than the functionary that took the action.⁸³ It appears to be included to ensure that only final decisions are covered by PAJA,⁸⁴ which creates a conundrum as the definition of “decision” in PAJA includes decisions “made, proposed to be made, or required to be made”.⁸⁵ Why is it a conundrum??

⁷⁵ 2005 (6) SA 313 (SCA).

⁷⁶ *Grey’s* paragraph 23.

⁷⁷ 2010 (3) BCLR 212 (CC).

⁷⁸ The matter concerned the termination of electricity supply to the applicant’s as a result of their landlord accumulating substantial arrears in payments to the electricity supplier. The applicant’s sought reconnection of the electricity supply. They also sought an order declaring that they were meant to be afforded an opportunity to make representations to the electricity supplier prior to the disconnection, in line with principles of procedural fairness.

⁷⁹ *Joseph* paragraph 26.

⁸⁰ *Joseph* paragraph 30.

⁸¹ *Joseph* paragraph 42.

⁸² See also Currie and de Waal (2013) 663.

⁸³ Currie and de Waal (2013) 663.

⁸⁴ Currie and de Waal (2013) 663.

⁸⁵ Section 1 of PAJA. See also Hoexter (2012) 229.

For “direct, legal effect”, the administrative action must impact immediately and directly on individuals.⁸⁶ On a reading of the *Joseph’s* judgment, it must be borne in mind that “direct, external legal effect” has a direct overlap with the requirements that the “right be adversely affected”.⁸⁷ The court held that if any of the applicants’ rights had been adversely affected for the purposes of section 3 of PAJA, this would necessarily imply that the decision had a direct, external, legal effect on them.

3.3.3. Requirements of just administrative action

Now that the term “administrative action” is understood, the next step is to unpack the requirements for such action to be “just administrative action” as provided for in section 33 of the Constitution.⁸⁸ The first part of this is that the administrative action must be lawful, reasonable and procedurally fair, with the second part being that written reasons must be given where administrative action adversely affects a person’s rights.

3.3.3.1. Lawful administrative action

This requirement sets out that administrators must comply with the law and have lawful authority for their decisions.⁸⁹ This view is shared by the authors *De Vos et al* who state that “...lawful administrative justice, therefore, prohibits administrators from taking decisions that are not authorised by law or from ignoring any statutory requirements that are attached to the exercise of the power in question.”⁹⁰

At common law, any action by an administrator that was not permitted in law was invalid as the administrator acted unlawfully.⁹¹ The inclusion of this principle in the Constitution has the effect of preventing legislative ouster clauses.⁹² This now means that at the very least, lawful administrative action means legislation may not oust a court’s constitutional mandate and review function.⁹³

Although PAJA provides for grounds of review where administrative action does not meet the requirement of being “lawful administrative action”, it does not provide an explicit definition of what “lawful administrative action” is. In terms of PAJA,⁹⁴ any person can

⁸⁶ *Joseph* paragraph 26 where the court endorsed the Supreme Court of Appeal’s definition of the phrase.

⁸⁷ *Joseph* paragraph 26. See also Currie and de Waal (2013) 664.

⁸⁸ Section 33(3) of the Constitution provides for the enactment of national legislation to give effect to rights to just administrative action. This was achieved with the enactment of PAJA.

⁸⁹ Currie and de Waal (2013) 666.

⁹⁰ *De Vos et al* (2016) 599.

⁹¹ Currie and de Waal (2013) 666.

⁹² Currie and de Waal (2013) 666. The authors explain ouster clauses as “provisions that seek to exclude or restrict the review jurisdiction of the courts, thereby effectively permitting unlawful administrative action.” See also Hoexter (2012) 588 where she explains ouster clauses as “legislative provisions that are intended to prevent the court from exercising its review jurisdiction over specified administrative decisions.” Further discussion of this topic is contained on pages 588 – 592 of Hoexter (2012).

⁹³ Currie and de Waal (2013) 666.

⁹⁴ Section 6(1) of PAJA.

institute judicial review proceedings in any court⁹⁵ or tribunal⁹⁶ with powers to judicially review administrative action.

There are 21 grounds of judicial review⁹⁷ as provided for in section 6(2) of PAJA, with a “catch all” ground of review of administrative “action that is otherwise unconstitutional or unlawful.”⁹⁸ The following are the themes of the grounds of judicial review:⁹⁹

- Lack of authority by an administrator;¹⁰⁰
- Non-compliance with a mandatory and material procedure or condition;¹⁰¹
- Procedurally unfair administrative action;¹⁰²
- Administrative action materially influenced by error of law;¹⁰³
- Manner of the arriving at the administrative action;¹⁰⁴
- Unlawfulness of the administrative action;¹⁰⁵
- Failure to take a decision;¹⁰⁶ and
- Unreasonable exercise of power.¹⁰⁷

Before considering the various grounds of judicial review, it needs to be determined who may institute these proceedings. Section 6(1) of PAJA simply says “any person” may institute the proceedings. Currie is of the view that this does not provide sufficient legal standing for a litigant and concludes that the standing clause in the Bill of Rights¹⁰⁸ should

⁹⁵ “Court” is defined in section 1 of PAJA as either the Constitutional Court; the High Court or another court of similar status; or a Magistrates’ Court designated by the Minister with powers of judicial review under PAJA, for either general or specific class of administrative actions, that is presided over a magistrate with similar designation.

⁹⁶ Section 1 of PAJA defines a “tribunal” as an independent and impartial tribunal established for purposes of judicial review of administrative action under PAJA.

⁹⁷ Currie (2007) 156. Currie calculates this as nine principal grounds for review, with three of these grounds subdividing into 14 grounds of review.

⁹⁸ Section 6(2)(i) of PAJA.

⁹⁹ Currie (2007) 157 – 173. The sub-divisions of the main grounds serve as an elaboration of the main grounds and will only be considered in this study to the extent applicable to the topic.

¹⁰⁰ Section 6(2)(a)(i) – (iii) of PAJA.

¹⁰¹ Section 6(2)(b) of PAJA.

¹⁰² Section 6(2)(c) of PAJA.

¹⁰³ Section 6(2)(d) of PAJA.

¹⁰⁴ Section 6(2)(e) of PAJA.

¹⁰⁵ Section 6(2)(f) of PAJA.

¹⁰⁶ Section 6(2)(g) of PAJA.

¹⁰⁷ Section 6(2)(h) of PAJA.

¹⁰⁸ The standing clause in the Bill of Rights is contained in section 38 of the Constitution and sets out specific people who may approach a court alleging the infringement or threatening of a right in the Bill of Rights. These people are anyone who acts in their own right; anyone who acts on behalf of another person who cannot act in their own name; a group or class of persons; anyone acting in the public

be applied and read into PAJA. This is because PAJA is intended to give effect to the constitutional right of administrative justice.¹⁰⁹

The author is of a different view to Currie. The proceeding discussions on, amongst others, “administrative justice”, “reasonable, lawful and procedurally fair administrative action”, and “administrative action” each had qualifications on who the right vests in and who can challenge it.¹¹⁰ The author is of the view that, in this context, only the person in whom the right vests has standing before a court or tribunal to institute judicial review proceedings.

Section 6(3) of PAJA amplifies the ground of review as contained in section 6(2)(g),¹¹¹ which deals with an administrator’s failure to take a decision.¹¹² A person may institute proceedings on the basis that there has been an unreasonable delay in taking the decision in instances where an administrator fails to take a decision where there are no prescribed time periods to do so.¹¹³ For an administrator who fails to take a decision within prescribed time periods, he/ she can be challenged for failing to adhere to his/ her duty to take a decision.¹¹⁴

3.3.3.2. Reasonable administrative action

The inclusion of reasonableness as a test of administrative action has the principal effect of overriding the common law doctrine of symptomatic unreasonableness.¹¹⁵ This means that administrative action can be reviewed where it is unreasonable in and of itself as opposed to only being reviewed in instances where unreasonableness is part of a list of other grounds for review.

This element has two components; namely rationality and proportionality.¹¹⁶ In respect of the rationality element, the decision must be supported firstly, by the evidence and information placed before the administrator, and secondly, the reasons given for the decision.¹¹⁷ The proportionality element refers to reasonable effects¹¹⁸ meaning that the decision must be reasonable in line with the facts placed before the administrator.

interest and an association acting in the interests of its members. A detailed discussion on the standing clause in the Bill of Rights is in Currie (2007) 179 – 181.

¹⁰⁹ Currie (2007) 179.

¹¹⁰ Such as for example the right to reasons for administrative action that can only be exercised by a person whose rights have been materially and adversely affected by the administrative action.

¹¹¹ Currie (2007) 156.

¹¹² Failure to take a decision within a reasonable time or prescribed time speaks to the procedure followed by an administrator. This ground for judicial review can therefore be used as a basis for a challenge of administrative action for a failure to be procedurally fair.

¹¹³ Section 6(3)(a) of PAJA.

¹¹⁴ Section 6(3)(b) of PAJA.

¹¹⁵ Currie and de Waal (2013) 669. At a high level this doctrine entailed that unreasonableness was not a reviewable defect in itself, and was only a reviewable ground where it was a symptom of some other grounds of review.

¹¹⁶ Currie and de Waal (2013) 669.

¹¹⁷ Smit (ed) (2013) 242.

¹¹⁸ Smit (ed) (2013) 242.

It should be noted that the requirement for “reasonableness” is controversial as it draws the judiciary into the space between a review and an appeal by requiring that the merits of the administrative action be considered.¹¹⁹ An appeal is concerned with the merits of a matter¹²⁰ while a review is concerned with the legality of the administrative action.¹²¹ Therefore, a mid-way point in this balancing act is for the court to consider whether the decision is one that a reasonable administrator could or could not reach.¹²²

PAJA gives effect to this right in section 6(2)(h) by allowing for the review of administrative action that is “so unreasonable that no reasonable person could have” taken it.

3.3.3.3. Procedurally fair administrative action

This requirement deals with the context of administrative action – the specific facts of the individual case are considered¹²³ and the fairness of the process undertaken to reach the decision is looked at, as opposed to the correctness of the decision.¹²⁴

The common law concept of natural justice is encompassed within this requirement,¹²⁵ with the two main components being firstly, *nemo iudex sine causa*, and secondly, *audi alteram partem*.¹²⁶

Nemo iudex sine causa is a Latin maxim meaning “no one may be a judge in his own case”. It is also known as the rule against bias and requires the mere appearance of partiality or absence of impartiality.¹²⁷ “No actual bias or real proof of partiality is required: however the suspicion of bias must be that of a reasonable person.”¹²⁸

Audi alteram partem is a Latin maxim meaning “hear the other side”. Although suggestions are made that this maxim has now been extended to include the requirements of a fair hearing,¹²⁹ the author of this study disagrees with this view as to do so would place a heavy burden on administrators. Further dissent with the view is that it also does not take into account the particular circumstances of each matter as not all matters require a hearing – consultation or an opportunity to make written representations will be adequate in certain circumstances.¹³⁰

¹¹⁹ Smit (ed) (2013) 242.

¹²⁰ De Vos *et al* (2016) 604.

¹²¹ *Pharmaceutical Manufacturers* paragraph 33.

¹²² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) paragraph 44.

¹²³ De Vos *et al* (2016) 606.

¹²⁴ De Vos *et al* (2016) 607.

¹²⁵ *New Clicks* paragraph 596.

¹²⁶ Smit (ed) (2013) 243.

¹²⁷ Smit (ed) (2013) 243.

¹²⁸ Smit (ed) (2013) 243.

¹²⁹ Smit (ed) (2013) 244.

¹³⁰ De Vos *et al* (2016) 607. Our judiciary has also not discussed an extension of the maxim. The judgment of *New Clicks* held in paragraph 483 that the ultimate objective of the requirement is for the person who may be adversely affected by the decision to be afforded an opportunity to make representations to the administrator before the decision is made. ¹³⁰ The *Joseph* judgment held in paragraph 55 that fairness,

PAJA gives effect to this right in the provisions of section 3, in respect of any person, and section 4,¹³¹ in respect of the public. Administrative action which “materially and adversely affects the rights or legitimate expectations of any person” must be procedurally fair.¹³²

The right to procedurally fair administrative action for both a right and a legitimate expectation is broader than the definition of “administrative action” in section 1 of PAJA. A legitimate expectation¹³³ can only come from the conduct of a public authority – either an express promise made by said authority or as a result of a regular practise by the authority which can reasonably be expected to continue.¹³⁴

The circumstances of each case must be considered in determining a fair administrative procedure.¹³⁵ There is an obligation on an administrator to take five compulsory actions¹³⁶ as provided for in sections 3(2)(b)(a) – 3(2)(b)(e) of PAJA to give effect to procedurally fair administrative action. These compulsory actions are:

- a. adequate notice¹³⁷ of nature and purpose of proposed administrative action;¹³⁸
- b. reasonable opportunity to make representations;¹³⁹

in the context of procedural fairness, needs to be determined in light of the circumstances of a particular case.

¹³¹ De Vos *et al* (2016) 614 indicates that section 4 “only applies to cases where the rights of members of the public are concerned” and not cases concerning one or more individuals. As such, it is not covered in this study as it will not find application in the context of the Commissioner’s exercise of his discretionary powers. For a discussion on this provision refer to De Vos *et al* (2016) 613 – 614; Currie and de Waal (2013) 681.

¹³² Section 3(1) of PAJA.

¹³³ For a discussion on the history of “legitimate expectation” as well as application of the term in the Republic’s constitutional dispensation refer to *Premier*. The case deals with the manner of termination of bursaries to white students. In finding that expectations can be of a substantive or a procedural nature (paragraph 36) the Court held that there was a legitimate expectation for payment of the bursaries (paragraph 38). The decision to retroactively terminate payment of bursaries without affording the governing bodies an opportunity to be heard was in contravention of the constitutional right to procedural fairness (paragraphs 39 – 42).

¹³⁴ De Vos *et al* (2016) 609.

¹³⁵ Section 3(2) of PAJA. This was also the conclusion reached in paragraph 42 of *Premier of Mpumalanga and Another v Governing Bodies of State Aided Schools: Eastern Transvaal Case CCT10/98 (“Premier”)* where the Constitutional Court considered the provisions of section 24(b) of the Interim Constitution, which provision is identical to section 3(1) of PAJA.

¹³⁶ *Joseph* paragraph 56 “A literal reading of PAJA suggests that the minimum requirements under section 3(2)(b) are mandatory and must be enforced absent any departure by the administrator in terms of section 3(4).”

¹³⁷ In *Joseph* the court held that in order for a notice “to be “adequate” it must contain all relevant information” (paragraph 60). In that case it includes the date, time and reason of the proposed disconnection, the place at which a challenge to the proposed disconnection can be made, sufficient time for applicants to make enquiries and investigations, seek legal advice and organise collectively (paragraph 60).

¹³⁸ Section 3(2)(b)(i) of PAJA.

¹³⁹ Section 3(2)(b)(ii) of PAJA. Per De Vos *et al* (2016) 611 the test for “reasonable” opportunity depends on the circumstances of each case. See also *New Clicks* paragraph 630.

- c. clear statement of administrative action;¹⁴⁰
- d. adequate notice of right of reconsideration of decision (through either a right of review or internal appeal as applicable);¹⁴¹
- e. adequate notice of right to request reasons in terms of section 5 of PAJA.¹⁴²

These compulsory actions are however, not cast in stone as section 3(4) of PAJA allows for the departure from these where it is “reasonable and justifiable in the circumstances” to do so.¹⁴³ This subsection can be seen as PAJA’s aim to prevent the imposition of duties on a state that are onerous enough to make the administration of the state difficult or impossible.¹⁴⁴

3.3.3.4. Right to written reasons

In the common law, there was no right to reasons for administrative action, with reasons only being given in certain circumstances.¹⁴⁵ The courts did however; occasionally find an implied statutory duty to provide reasons.¹⁴⁶

This right is now framed in section 33(2) of the Constitution. Every person whose rights have been adversely affected by an administrative action is entitled to be given written reasons for the administrative action.¹⁴⁷ This right only applies to the person involved in or affected by the administrative action.¹⁴⁸

Providing this right to persons ensures that administrators apply their minds when taking administrative action.¹⁴⁹ The provision serves to ensure better decision making by administrators,¹⁵⁰ by placing on them a duty to rationalise their decisions.¹⁵¹ This duty also complies with the requirements for accountability and transparency by

¹⁴⁰ Section 3(2)(b)(iii) of PAJA. Per De Vos *et al* (2016) 611 this statement must be provided once an administrator has made a decision accordingly.

¹⁴¹ Section 3(2)(b)(iv) of PAJA.

¹⁴² Section 3(2)(b)(v) of PAJA.

¹⁴³ In departing from the compulsory requirements of procedural fairness, an administrator must consider the factors in section 3(4)(b) of PAJA to ensure that the departure is reasonable and justifiable. Section 3(5) of PAJA also allows for a departure from the compulsory requirements by allowing for an administrator to follow the procedure set out in an empowering provision which is different from the requirements of PAJA, but fair.

¹⁴⁴ De Vos *et al* (2016) 611. See also *Premier* paragraph 41 where the court held that this principle is a common law principle, being “a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively”.

¹⁴⁵ Currie and de Waal (2013) 682.

¹⁴⁶ Currie and de Waal (2013) 682.

¹⁴⁷ The courts have held that there is no general duty on administrators to furnish reasons for every decision made (*BCE Food Service Equipment (Pty) Ltd v The Commissioner for SARS Gauteng Local Division*, Case No. 27898/ 2015 (“*BCE Food*”) paragraph 11).

¹⁴⁸ Smit (ed) (2013) 245. See also Currie and de Waal (2013) 683.

¹⁴⁹ Hoexter (2012) 464.

¹⁵⁰ Hoexter (2012) 464.

¹⁵¹ De Vos *et al* (2016) 615.

administrators, being requirements of a democratic state.¹⁵² This in turn allows for criticism and scrutiny of the decision.¹⁵³

The right to written reasons is give effect to in section 5 of PAJA, although framed slightly differently than the Constitutional right.¹⁵⁴ Section 5 of PAJA provides anyone “whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action”¹⁵⁵ with a right to request written reasons from an administrator. (emphasis added to highlight differences with the Constitutional right) The request for written reasons must be made “within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action”.¹⁵⁶ The administrator in turn has 90 days from receipt of the request¹⁵⁷ to provide the person with adequate reasons in writing for the administrative action,¹⁵⁸ which takes the constitutional right one step further by placing an obligation on the administrator to provide the reasons. Although there is no test of what constitutes adequate reasons, reasons that provide an aggrieved person with an explanation or justification of the decision should be seen to comply with this standard.¹⁵⁹

The author submits that there are two differences between the two provisions. Firstly, the Constitution grants the right to written reasons, while PAJA provides for the right to “request adequate reasons in writing”.¹⁶⁰ Secondly, the constitutional right to reasons only covers administrative action that materially affects a person, whereas PAJA covers administrative action that “materially and adversely affects” a person.¹⁶¹

Regardless of these differences in the two provisions, an administrator is still required to provide reasons. The exception to this is where it is reasonable and justifiable in the

¹⁵² Smit (ed) (2013) 245. Section 195 of the Constitution provides for the basic value and principles governing public administration which include accountability and transparency in subparagraphs (1)(f) and (g).

¹⁵³ De Vos *et al* (2016) 615.

¹⁵⁴ Hoexter (at Currie and de Waal (2013) 686) holds the view that section 5 of PAJA “does not implement a right to reasons, but rather a right to request reason and a corresponding duty to provide reasons upon request.” The author disagrees with this view and submits that the right to request written reasons, coupled with the obligation to be provided adequate written reasons, equates to a full right to reasons. The author also submits that PAJA broadens the right to reasons by providing for the issuing of adequate written reasons, whereas the Constitution requires only that “written reasons” be provided.

¹⁵⁵ Section 5(1) of PAJA.

¹⁵⁶ Section 5(1) of PAJA.

¹⁵⁷ On the basis of section 9(1)(a) of PAJA, this period may be reduced by agreement between the parties. If the parties cannot agree, the court or tribunal may reduce the period on application by a party where the interests of justice require it.

¹⁵⁸ Section 5(2) of PAJA.

¹⁵⁹ Currie and de Waal (2013) 685.

¹⁶⁰ Currie and de Waal (2013) 685. The authors indicate that although there is no test of what constitutes “adequate reasons”, reasons that provide an aggrieved person with an explanation for and justification of the decision should be seen to comply with this standard. Although it may seem that there is no real difference between “reasons” and “adequate reasons”, the author of this study submits that “adequate reasons” presupposes that the administrator provide detailed reasons for the administrative action. The requirement to provide just “reasons” does not place a similar duty on an administrator.

¹⁶¹ Unlike the right to procedurally fair administrative action, the right to reasons under PAJA is limited to an infringement of rights and is not broad enough to cover legitimate expectations.

circumstances not to provide adequate reasons.¹⁶² Should an administrator fail to provide adequate reasons when requested,¹⁶³ the inference drawn is “that the administrative action was taken without good reason.”¹⁶⁴

Similar to following a fair procedure in administrative action, an administrator is entitled to depart from providing written reasons within 90 days of receipt of the request where an empowering provision provides for a different procedure.¹⁶⁵

The study now considers PAJA and the remaining provisions thereof, particularly the rights of recourse contained therein.

3.4. PAJA

3.4.1. Nature and relationship

PAJA was enacted on February 2000¹⁶⁶ with a very detailed purpose.¹⁶⁷ The opening paragraph, the one preceding the preamble, provides that PAJA gives effect to the constitutional right to just administrative action. The PAJA does so “by providing an elaborated and detailed expression of the rights to just administrative action and providing remedies to vindicate them.”¹⁶⁸ The enactment of PAJA followed law reform mandated by the Constitution.¹⁶⁹

Some authors have labelled PAJA as a “codification of the common law of administrative law”,¹⁷⁰ with Currie’s going so far as to label it as a codification-reform.¹⁷¹ The position is not yet conclusive on whether PAJA is indeed a codification of the common law principles on administrative law, with such debate being outside the scope of this study. It is clear that the administrative law principles that were contained in the common law are now subsumed into the Constitution through the enactment of section 33.

Subsequent to the common law principles being subsumed into the Constitution, the principles were incorporated into PAJA upon its enactment. The result of this is that

¹⁶² Section 5(4)(a) of PAJA. The administrator must notify the applicant of its decision not to provide adequate written reasons. Prior to deciding not to provide adequate written reasons, the administrator must consider the factors in section 5(4)(b) of PAJA to ensure that its decision is reasonable and justifiable.

¹⁶³ If an applicant in judicial review proceedings has not requested reasons, and the administrative action is not part of the list of administrative action for which reasons must automatically be provided, the applicant cannot allege that the administrator has failed to provide reasons or that the reasons are inadequate (*BCE Food* paragraph 11).

¹⁶⁴ Section 5(3) of PAJA.

¹⁶⁵ Section 5(5) of PAJA.

¹⁶⁶ Government Gazette Notice No 20853. There were transitional provisions in section 23 of Schedule 6 of the Constitution that applied during a suspension period prior to the enactment of PAJA. See also Currie and de Waal (2013) 648.

¹⁶⁷ This is evidenced by PAJA’s preamble which is four paragraphs long.

¹⁶⁸ Currie and de Waal (2013) 649.

¹⁶⁹ Currie (2006) *Acta Juridica* Volume 2006 325.

¹⁷⁰ See Smit and Oosthuizen (2013) 238; Currie (2006) 328.

¹⁷¹ Currie (2006) 328 - 334. A “codification-reform” is the complete consideration of the law in a particular field with a view to its reform.

administrative law review now having a legislative basis.¹⁷² The common law still applies, but only where PAJA or the Constitution do not apply, therefore only in the exercise of public power.¹⁷³

Although PAJA has been enacted, the constitutional right to administrative justice remains a free-standing right as provided for in section 33(1) and (2) of the Constitution. Should PAJA unjustifiably limit this right, it can be challenged under the Constitution. Such a constitutional challenge can only be brought in exceptional circumstances.¹⁷⁴ This is on the basis of the principle of avoidance which provides that remedies must be found in the common law or legislation before resorting to constitutional remedies.¹⁷⁵ The related principle of subsidiary provides that the norms of greater specificity must be relied on before resorting to norms of greater abstraction.¹⁷⁶

PAJA is seen as a supplementary Act to other legislation as it places a duty on administrators when exercising administrative action in accordance with legislation, to do so in a way which complies with PAJA.¹⁷⁷ “PAJA provides in other words a set of legislated rules and principles with general effect aimed at ensuring the lawful, reasonable and procedurally fair exercise of a particular administrative power.”¹⁷⁸ Any legislation granting an administrator power to act must be read subject to, and in light of, PAJA.¹⁷⁹

Certain legislation provides for judicial review on specific grounds that are narrower than PAJA, for example the Promotion of Access to Information Act.¹⁸⁰ In certain instances the review provided for, by the legislation, operates as an alternative to PAJA review, thereby affording the litigant with an opportunity to choose remedies.¹⁸¹

In weighing up which remedy to lean on, the provisions of PAJA must be considered. This entails considering when PAJA can be relied upon and what remedies are available in terms of it. The study has already considered instances when PAJA is applicable and moves now to consider the remedies available under PAJA.

3.4.2. PAJA remedy – judicial review of administrative action

The preceding discussions touched on the ability of an aggrieved person to take on judicial review administrative action which is unlawful, unreasonable or not procedurally

¹⁷² Currie and de Waal 651.

¹⁷³ Currie and de Waal 651. At paragraph 96 of *New Clicks* the Constitutional Court held that for purposes of seeking redress in the instance of “administrative action” a litigant cannot ignore PAJA and rely either on the common law or the principle of legality.

¹⁷⁴ Reliance on the constitutional right to administrative justice is permissible in the following three instances: i) the direct challenge on the validity of the PAJA provisions; ii) challenge of parliamentary legislation and other original legislation thought to infringe rights to administrative justice, and iii) indirect interpretation of PAJA (ensure its compliance with section 33 of the Constitution). See Currie and de Waal 650 – 651 for in-depth discussion in this regard.

¹⁷⁵ Currie and de Waal (2013) 649.

¹⁷⁶ Currie and de Waal (2013) 649.

¹⁷⁷ Currie (2006) *Acta Juridica* 325 at 335.

¹⁷⁸ Currie (2006) *Acta Juridica* 325 at 335.

¹⁷⁹ Currie and de Waal (2013) 652.

¹⁸⁰ Act No. 2 of 2000.

¹⁸¹ Currie and de Waal (2013) 652.

fair. Judicial review proceedings (referred to hereafter as “review proceedings”) are provided for in section 7 of PAJA, with the process to be followed in such review proceedings set out in Rule 53 of the Uniform Rules of Court.¹⁸² This part of the study considers the procedure to be followed in, and the remedies available under, review proceedings.

3.4.2.1. Instituting review proceedings

Section 7(1) of PAJA requires that review proceedings be instituted without unreasonable delay and not later than 180 days after the date on which the internal remedies were concluded. Where there are no internal remedies available, the proceedings must be instituted after the date on which the person became aware, or could be expected to have become aware, of the administrative action.¹⁸³

Review proceedings can only be instituted once internal remedies provided for in any other law have been exhausted.¹⁸⁴ The absence of a definition of “internal remedies” in PAJA is not an issue as the internal remedies are found in another law.¹⁸⁵ This limitation may be waived on application, on showing the existence of exceptional circumstances and it is deemed by the court or tribunal to be in the interests of justice.¹⁸⁶

3.4.2.2. Remedies in judicial review proceedings

Section 8 of PAJA grants the court or tribunal the power to grant any order that is just and equitable. The provision goes on to provide examples of remedies that can be awarded by a court or tribunal. These include declaratory orders, setting aside of administrative action, orders directing the administrator to act in an appropriate way, and orders prohibiting the administrator from acting in a particular manner.

3.5. CONCLUSION

Administrative justice is just administrative action. Administrative action is a broad and intricate concept, but one which requires interpretation in line with section 33 of the Constitution.

Administrative action in its simplest form is a conclusion reached by an administrator that impacts or infringes on a person’s rights. This conclusion must be exercised in line with an empowering provision or legislation, and have a direct effect on a person other than the administrator who took the decision.

Once a conclusion is characterised as administrative action it must adhere to the standards of being lawful, reasonable and procedurally fair. Lawful in that must be taken

¹⁸² Hoexter (2012) 525 and Currie (2007) 178.

¹⁸³ In terms of section 9(1)(b) of PAJA, this period may be extended for a fixed period on agreement between the parties. If the parties cannot agree, the court or tribunal may extend the period on application by a party where the interests of justice require it.

¹⁸⁴ Section 7(2)(a) of PAJA. Where an applicant has failed to exhaust internal remedies, a court or tribunal is given power by section 7(2)(b) to order an applicant to do so first.

¹⁸⁵ Currie (2007) 184. There is no necessity to exhaust remedies provided for in contract (Currie (2007) 184).

¹⁸⁶ Section 7(2)(c) of PAJA.

in terms of enabling legislation, reasonable in the sense that a reasonable administrator would have reached a similar decision based on the information provide, and procedurally fair in that the conclusion was reached with no bias and after providing the affected person with an opportunity to make representations.

PAJA gives effect to these constitutional requirements and sets out in greater detail what the expectation in relation to each one. Should the administrative action not be in line with these requirements, it can be challenged under the administrative justice provisions. The starting point for such challenge is PAJA, with limited instances where such challenge can be brought directly under the Constitution.

PAJA contains administrative justice considerations, echoing the rights enshrined in the Constitution. The Act then goes further to grant aggrieved persons a right to have administrative action in contravention of administrative justice provisions reviewed under a judicial review process, going so far as to outline the process to be followed and setting out remedies that can be granted by a court or tribunal.

Administrative justice affords a right to a person affected by the action to request written reasons from an administrator. This right is restricted only to the party affected by the action and only to a request for written reasons, not the reasons themselves. PAJA details how this right can be exercised and on the basis of constitutional interpretation where provisions must be interpreted broadly as opposed to restrictively, there is an obligation on an administrator to provide the written reasons once requested to do so.

As a fledgling democracy the Republic's courts are still grappling with creating an extensive jurisprudence on the codified and constitutional administrative justice provisions.

CHAPTER 4

ROLE OF ADMINISTRATIVE JUSTICE IN COMMISSIONER'S DISCRETIONS

4.1. INTRODUCTION

As an organ of state,¹ SARS has a duty to comply with, and uphold, the provisions of the Constitution. It then follows by necessary implication that all administrative action by SARS and its Commissioner must be 'just administrative action'. This was expounded in the previous chapter. The Commissioner's administrative actions must therefore be taken in terms of empowering legislation (be lawful); be rational and proportional (be reasonable); and be in accordance with the procedure laid out in tax legislation, with regard to the principles of natural justice (be procedurally fair).²

This chapter considers whether the exercise of the discretions afforded to the Commissioner in respect of applications for suspension of payment and waivers of penalties and interest constitute administrative action.³ The discussion then moves on to consider how the discretions should be exercised to ensure that they are "just administrative action". Lastly, the chapter considers what remedies are available in instances where the discretions are exercised contrary to the provisions of "just administrative action".

4.2. DISCRETIONS AS ADMINISTRATIVE ACTION

Chapter 3 of this study contains an in-depth discussion of the elements of the definition of "administrative action", which is defined in section 1 of PAJA as

"any decision taken, or any failure to take a decision, by –

(a) an organ of state, when

- i. exercising a power in terms of the Constitution or a provincial constitution; or
- ii. exercising a public power or performing a public function in terms of any legislation;

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

¹ Section 2 of the SARS Act

² Croome & Olivier (2015) 576.

³ It is important to draw a distinction between the existence of the discretions and the exercise of the discretions. This is because although "decision" is defined to include 'any decision of an administrative nature proposed to be made', the "decision" is "administrative action" once it has a "direct, external, legal effect". This means that the "decision" must be final, which can only be the case once the Commissioner exercises his discretions.

which adversely affects the rights of any person and which has a direct, external, legal effect ...”⁴

For purposes of this study, paragraph (a) subparagraph (ii) of the definition of “administrative action” applies to the Commissioner’s exercise of his two discretions. The Commissioner, in his role as the CEO of SARS, exercises each of the discretions afforded to him by legislation is “an organ of state ... exercising public power or performing a public function in terms of any legislation”. The part of the definition of “decision” that remains to be tested is whether the exercise of the discretions are the exercise of a public power or performance of a public function “which adversely affects the rights of any person and which has a direct, external, legal effect”.

Of course not all of the Commissioner’s decisions are of “an administrative nature made under an empowering statute”, such as for example the office hours of the branches.⁵ Those decisions would therefore not be subject to the provisions of “just administrative action”.

Considering the definition of “decision” as discussed in Chapter of this study, the author concludes that the exercise of each of the Commissioner’s discretions is a “decision” as it is a “decision of an administrative nature ... required to be made... under an empowering provision”. Thus follows an application of the requirements of administrative action that is lawful, reasonable and procedurally fair in the exercise of the Commissioner’s two discretions.

4.2.1. Suspension of payment application

As discussed in Chapter 1 of this study, the general position in respect of tax debts is the “pay now, argue later” principle. The Constitutional Court upheld the constitutionality of the “pay now, argue later” principle in *Metcash Trading*. The exception to this rule is the suspension of payment provisions that are contained in section 164 of the TAA.

The Constitutional Court held that the Commissioner’s discretion in relation to a suspension of payment application falls within the administrative justice provision of the Constitution.⁶ This means that the decision must be able to be justified as rational.⁷ The decision must be “just administrative action” for purposes of section 33 of the Constitution and in line with applicable review legislation of administrative action.⁸

The author agrees with this view as the Commissioner’s decision on a suspension of payment application is administrative in nature. This decision is carried out by an organ of state under an empowering provision, being section 164 of the TAA. The decision will only have an adverse effect on a taxpayer where the Commissioner’s decision is not to approve the suspension application. The Commissioner’s communication of this decision to the taxpayer will give it the desired “direct, external, legal effect” in “administrative action” definition.

⁴ The exclusions listed in the definition are not applicable to the Commissioner and the exercise of his two discretions.

⁵ Croome & Olivier (2015) 579.

⁶ *Metcash Trading* paragraph 42.

⁷ *Metcash Trading* paragraph 42.

⁸ *Metcash Trading* paragraph 42.

4.2.2. Applications for waiver of interest and penalties

4.2.2.1. Waiver of interest

The waiver of interest provisions applicable for purposes of this study are contained in section 187(6) read together with sections 187(7) and 187(8) of the TAA. The Commissioner may only exercise his discretion to waive interest imposed where a taxpayer can show that the interest is imposed as a result of circumstances beyond the taxpayer's control. These circumstances are however limited to circumstances that are 'exceptional circumstances', being (i) natural or human-made disaster, (ii) a civil disturbance in services, or (iii) a serious illness or accident.⁹

The Commissioner's decision on an application for the waiver of interest is administrative in nature. This decision is carried out by an organ of state, SARS, under an empowering provision, being section 187 of the TAA. In essence, the exercise of the discretion will only have an adverse effect on a taxpayer where it is not exercised in the taxpayer's favour. It is at this point that the taxpayer can question the administrative action of the Commissioner deciding not to approve the waiver application.¹⁰

The Commissioner must communicate his decision on the interest waiver application to the applicant taxpayer, which would then result in a "direct, external, legal effect" on the taxpayer. Therefore, the Commissioner's decision not to remit interest (and thereby not exercise his discretion in the taxpayer's favour) meets the definition of "administrative action" and can be challenged on judicial review in terms of PAJA.

4.2.2.2. Waiver of penalties

The two types of penalties which enjoy discretion for their waiver are administrative non-compliance penalties, made up of fixed amount penalties, and percentage based penalties. Chapter 2 of this study discussed their imposition and remittance in detail, with this chapter's focus being the exercise of the Commissioner's discretion.

Similar to the preceding two discretions discussed herein, the waiver of penalties will only be granted where a taxpayer meets certain prescribed requirements. For penalties, the requirements are specific to the action for which the penalty was imposed. Such as for example where a taxpayer fails to register as a taxpayer, SARS may remit the penalty if the failure is discovered upon voluntary disclosure by the person and the person has filed the required returns.¹¹ The penalty for nominal or first incidence of non-compliance in turn

⁹ Section 187 (7) of the TAA.

¹⁰ It is concerning to the author that the legislation is worded in such a way that the Commissioner's will likely not be able to exercise the discretion in favour of the applicant taxpayer. This is due to the fact that the legislation only allows the Commissioner to waive the interest on the existence of circumstances that are not only outside the taxpayer's control, but are also exceptional in nature. A natural or human made disaster, a civil disturbance or a serious illness or accident, being the exceptional circumstances upon which interest will be waived, are rare occurrences in everyday commercial life based on what the author has seen in practise. In the author's experience the imposition of interest has mainly been due to human error or oversight, either by the taxpayer or taxpayer's representative, and which will now not qualify for interest remission. Was something similar not already stated in a previous chapter??

¹¹ Section 216 of the TAA.

may be remitted up to an amount of R2 000 where there are reasonable grounds for the non-compliance and the non-compliance has been remedied.¹²

The Commissioner's decision on a waiver of penalties application is administrative in nature. This decision is carried out by an organ of state, SARS, under an empowering provision, being section 215 of the TAA read together with Part E of the TAA. The adverse effect on a taxpayer will be present in circumstances where the Commissioner decides not to waive the penalties. The Commissioner's communication of this decision to the taxpayer will give it the desired "direct, external, legal effect" in "administrative action" definition. Thus the exercise of the discretion not in a taxpayer's favour meets the definition of "administrative action".

4.3. DISCRETION DECISIONS TO BE "JUST ADMINISTRATIVE ACTION"

On the exercise of a discretion contrary to a taxpayer's benefit being "administrative action", section 33(1) requires that it must be just administrative action. This means that the exercise of the discretion must amount to a decision that is lawful, reasonable and procedurally fair. The Commissioner's decision is now tested against each of these requirements, which were discussed more fully in chapter 3 of the study.

4.3.1. Lawful administrative action

The essence of this requirement is for an administrator to comply with the law and have lawful authority for his or her or its decisions.¹³

PAJA protects taxpayer's with its sections 6(2)(a)(i) and 6(2)(a)(ii) (amongst other provisions) where an administrator takes administrative action on lack of authority and unlawful delegation as such a decision can be taken on judicial review. An administrative action taken on the basis of an error in law can also be challenged on the basis of section 6(2)(d) of PAJA.

4.3.1.1. Suspension of payment

In the context of a suspension of payment application, section 164(4) of the TAA sets out clear parameters within which the Commissioner can exercise his discretion to suspend the payment. A taxpayer is not precluded from providing other information to the Commissioner, even though not specifically listed in section 164(4), as those factors are not exhaustive.

In terms of the requirement for lawful administrative action, this means that the person exercising the discretion must be authorised to do so as only a "senior SARS official" is entitled to decide on a suspension application.¹⁴ If an official other a senior SARS official were to exercise the discretion, a review application can be brought in terms of section

¹² Section 217(1) of the TAA.

¹³ Currie and de Waal (2013) 666.

¹⁴ De Lange & Van Wyk (2017) 20 *PER/ PELJ* 11.

6(2)(a)(i) or (ii) of PAJA on the basis that the administrative action was taken by an administrator who did not have the authority to do so.¹⁵

Further, a decision on the suspension application may only be made once all the factors of section 164(4) of the TAA have been considered.¹⁶ Each suspension application must be considered on the basis of its own merits in line with the factors, which SARS have indicated must be addressed by a taxpayer as a senior SARS official must apply its mind to each of them.¹⁷ A review application can be brought on the basis of section 6(2)(e)(iii) of PAJA in instances where a taxpayer suspects that the senior SARS official who considered the suspension application considered irrelevant considerations or did not consider relevant considerations when making the decision.¹⁸ An alternative review ground is section 6(2)(b) of PAJA that allows for review of a decision where an empowering provision's mandatory and material procedure or condition was not complied with.¹⁹

In those instances that are common in the author's practise where the Commissioner does not respond to a suspension application, the applicant taxpayer could take this on judicial review. The reason for this is that failure to take a decision is a "decision" and falls within the ambit of "administrative action". Reliance can therefore be placed on section 6(2)(g) of PAJA to lodge a judicial review application as this provision caters for instances where the administrative action in question consists of a failure to take a decision.

4.3.1.2. **Waiver discretions**

The waiver discretions also have legal parameters on which the interest and penalties imposed will be waived. Section 187 of the TAA provides for the waiver of interest, with section 215 read with Part E of the TAA providing for the waiver of penalties. Although these legislative provisions exist, the author is of the view that these provisions are impossible for corporate taxpayers to comply with.²⁰ Where the taxpayer has shown circumstances outside of his or her or its control of an exceptional nature in an interest waiver application, and the Commissioner denies the application, the taxpayer may bring a review application against this decision. The review ground in this instance is that "the action was taken because irrelevant considerations were considered or relevant considerations were not considered".²¹

The position would be the same for a penalty waiver application where a taxpayer showed its eligibility for waiver of penalties on the basis of section 215 of the TAA.

Another possible review ground relating to the interest waiver application is in section 6(2)(d) of the PAJA which provides for a review of administrative action that was

¹⁵ De Lange & Van Wyk (2017) 20 *PER/ PELJ* 12.

¹⁶ De Lange & Van Wyk (2017) 20 *PER/ PELJ* 11.

¹⁷ De Lange & Van Wyk (2017) 20 *PER/ PELJ* 14.

¹⁸ De Lange & Van Wyk (2017) 20 *PER/ PELJ* 14.

¹⁹ De Lange & Van Wyk (2017) 20 *PER/ PELJ* 14.

²⁰ The author submits that these provisions should be amended to take into account the realities of corporate taxpayers, and reflect requirements for waiver which taxpayers can actually meet.

²¹ Section 6(2)(e)(iii) of PAJA.

materially influenced by an error of law.²² This would be specific to the taxpayer who can prove that although interest was levied due to circumstances outside of his/ her/ its control, these circumstances are not the exceptional circumstances listed in section 187 of the TAA. These exceptional circumstances are a high threshold and will not be easily met. A taxpayer must satisfy the court of this when submitting that there is an error in the legislation granting the Commissioner the waiver discretion.

4.3.2. Reasonable administrative action

This element has two components; namely rationality and proportionality.²³ In respect of the rationality element, the decision must be supported firstly, by the evidence and information placed before the administrator, and secondly, the reasons given for the decision.²⁴ For the proportionality component, the decision taken must be proportionate to the facts placed before the administrator.

The requirement for reasonable administrative action is to ensure that the administrative action can be objectively substantiated regardless of the administrator's subjective view or expertise on the matter.²⁵ This addresses the situation where an administrator has access to endless resources which can be used to intimidate an individual.

4.3.2.1. Suspension of payment

Croome and Olivier indicate that the Commissioner may not summarily dismiss a taxpayer's application – he must properly exercise the discretion granted by taking into account all the relevant facts.²⁶ It is therefore imperative that a taxpayer ensure that he/ she/ it provides the Commissioner with as much relevant information as it can gather to support its suspension of payment application. This will assist the Commissioner make a rational and proportional decision.

The judiciary has cautioned the legislature in granting broad discretionary powers to administrators. This was seen in *Dawood v Minister of Home Affairs ("Dawood")*²⁷ where the Minister was given discretionary powers that were wide, but did not have any criteria to guide the exercise of the discretionary powers. The Constitutional Court held that the legislature must take care when legislation is drafted to limit the risk of unconstitutional exercise of discretionary powers it confers.²⁸ This will ensure that administrators act on a reasonable basis when taking an administrative decision.

De Lange and Van Wyk echo the sentiments on the danger of granting a discretionary power without clear guidance on how it must be exercised. The authors submit that given that there are no clear guidelines by SARS in respect of the information to be submitted

²² See also Croome & Olivier (2015) 593.

²³ Currie and de Waal (2013) 669.

²⁴ Smit (ed) (2013) 242.

²⁵ LAWSA Vol 5(3) *The existence of the rule of law in South Africa* last updated 31 January 2012, page 211.

²⁶ Croome & Olivier (2015) 583.

²⁷ 2000 (3) SA 936 (CC).

²⁸ *Dawood* paragraph 48.

in support of suspension applications, there is a risk that the decision on a suspension application may be irrational.²⁹

A review application in instances where the decision is irrational can be brought on the basis of either sections 6(2)(f)(ii) or section 6(2)(h) of PAJA. The former section applies where the administrative action taken is not rationally connected to the purpose of the empowering provision³⁰ the information before the administrator,³¹ while the latter provides for the exercise of a public power is so unreasonable that no reasonable person could have exercised it as such.

The proportionality component requires that instead of SARS denying a suspension application outright, SARS should first consider other powers available to it to secure the payment of the disputes tax.³² Proportionality is linked to reasonableness and the ground for review where there is a lack of proportionality is contained in section 6(2)(h) of PAJA – the exercise of a public power is so unreasonable that no reasonable person could have exercised it as such.

The Commissioner must be able to show that his exercise of discretions is in line with reasonable administrative action in that it is both rational and proportional.

4.3.2.2. **Waiver discretions**

For the taxpayer who meets the interest waiver requirements, but is not granted the waiver, the decision can be challenged for a lack of reasonableness. This could be in instances where the Commissioner is not satisfied that the circumstances provided by the taxpayer are of an exceptional nature. In such instances the review application could be brought on the basis of section 6(2)(f)(ii) subsections (bb)³³ and (cc).³⁴

In determining reasonableness of a decision, the purpose of the empowering provision must be considered. In the context of the waiver discretions the purpose is to grant relief to a taxpayer who is not *mala fide* in his or her or its tax affairs on the basis that the interest accrues due to circumstances outside of the taxpayer's control.

The review grounds for a negative response on an application for waiver of penalties is also section 6(2)(f)(ii) subsections (bb) and (cc). These are the provisions which test the rationality and proportionality of administrative action to ensure that the administrative action is 'reasonable'.

4.3.3. **Procedurally fair administrative action**

The third and final requirement for just administrative action is that it must be 'procedurally fair'. This requirement deals with the context of administrative action – the specific facts

²⁹ De Lange & Van Wyk (2017) 20 *PER/ PELJ* 16.

³⁰ Section 6(2)(f)(ii)(bb) of PAJA.

³¹ Section 6(2)(f)(ii)(cc) of PAJA.

³² De Lange & Van Wyk (2017) 20 *PER/ PELJ* 17.

³³ Administrative action taken is not rationally connected to the purpose of the empowering provision.

³⁴ The exercise of a public power is so unreasonable that no reasonable person could have exercised it as such.

of the individual case are considered³⁵ and the fairness of the process undertaken to reach the decision is looked at, as opposed to the correctness of the decision.³⁶

PAJA gives effect to this right in the provisions of section 3, with the opening provision stating in essence that administrative action must be procedurally fair. The two main components are firstly, *nemo iudex sine causa* (no one may be a judge in his own case), and secondly, *audi alteram partem* (hear the other side).³⁷ Section 3(2) of PAJA goes on to provide instances when administrative action will be procedurally fair and provides some peremptory indications to an administrator to ensure that administrative action is procedurally fair.³⁸

A discussion on the requirement of “procedurally fair administrative action” is incomplete without reference to case law. Prinsloo J in *Plasma View Technologies (Pty) Ltd v CSARS (“Plasma View”)*³⁹ considered whether the Commissioner’s decision to retrospectively amend a tariff heading on the import of plasma screens could be said to be ‘procedurally fair administrative action’. Prinsloo J set out that administrative action compliant with the provisions of section 3 of PAJA would consist of SARS giving the applicant adequate notice of the nature and proposed administrative action; a reasonable opportunity to make representations; adequate notice of any right of review, and adequate notice of right to request reasons.⁴⁰ The court then held that since the Commissioner had failed to comply with the requirements of “procedurally fair administrative action” as set out in section 3 of PAJA, the second tariff determination was set aside with the first tariff determination remaining valid.⁴¹

In *Degussa Africa (Pty) Ltd v ITAC (“Degussa”)*⁴² the dispute related to provisional safeguard measures. The first respondent had requested the Commissioner, the third respondent, to impose provisional safeguard measures for a period of 200 days in relation to lysine imports. The first respondent had done so without notice to the applicant or any other affected parties for that matter.⁴³ The applicant argued that this was contrary to the provisions of administrative justice and was therefore contrary to the Constitution and the common law.

Seriti J held that the applicant did indeed have a right to adequate notice of the administrative action sought to be taken by the first respondent as it was a ‘drastic measure’. This was coupled with the right to be provided with an opportunity to make representations on the administrative action. The court also found that there was no evidence placed before the court that it was reasonable and justifiable for the first and third respondents to depart from this requirement. An important maxim from *Degussa* is

³⁵ De Vos *et al* (2016) 606.

³⁶ De Vos *et al* (2016) 607.

³⁷ Smit (ed) (2013) 243. See also *New Clicks* paragraph 596.

³⁸ Section 3(2)(b). These are discussed in Chapter 3 of this study.

³⁹ *Plasma View Technologies (Pty) Ltd v Commissioner for the South African Revenue Service* 72 SATC 44.

⁴⁰ *Plasma View* paragraph 56.

⁴¹ *Plasma View* paragraph 63.

⁴² *Degussa Africa (Pty) Ltd and Another v International Trade Administration Commission and Others* 69 SATC 146.

⁴³ *Degussa* pages 149 and 150.

that when considering “procedurally fair administrative action” there is a need to balance the interests of those negatively impacted by the decision with the interests of those being protected by the decision.⁴⁴

4.3.3.1. Suspension of payment and waiver applications

In reaching a determination of whether a fair administrative procedure was followed, each set of facts must be considered by itself. This means that even though there are peremptory conditions for ensuring procedural fairness, they might not all apply to a particular set of facts.

There is no adequate notice that can be provided to the taxpayer of the nature and purpose of the administrative action⁴⁵ in respect of applications submitted for the exercise of the Commissioner’s discretion. This is due to the fact that the taxpayer requests the Commissioner to exercise his discretion. Therefore for the application part of the process the Commissioner does not have to comply with this requirement. However, the Commissioner can provide adequate notice in relation to the decision it intends on making once he has considered the suspension application and waiver applications, respectively.

The next peremptory requirement is for the Commissioner to give the taxpayer a reasonable opportunity to make representations.⁴⁶ The taxpayer is entitled to submit a suspension application on the basis of section 164(3) of the TAA, with reference to the factors in section 164(4) of the TAA. By ensuring that all relevant documentation and information is included in the suspension application, the taxpayer exercises his or her or its right to be heard and tries to influence the decision in his or her or its favour.⁴⁷ The position is the same for an interest waiver in section 187 of the TAA and sections 215 and 218 of the TAA for the penalty waiver.

The third peremptory requirement is in section 3(2)(b)(c) of PAJA and provides that the Commissioner must provide a clear statement of the administrative action. This will be communication of the Commissioner’s decision on the suspension and waiver applications, setting out whether the application is successful or not. It is submitted that this statement will assist the taxpayer in evaluating the reasonableness of the decision.⁴⁸

“Adequate notice of any right of review or internal appeal, where applicable”⁴⁹ is the fourth peremptory requirement. In respect of the suspension application it will only partly apply. This is because there is a right of review set out in section 9 of the TAA which the Commissioner is responsible to notify the taxpayer about, but there is no right of internal appeal in respect of a suspension application. For the waiver applications the internal review provision in section 9 of the TAA applies along with a right of internal appeal through lodging an objection against the Commissioner’s decision on either application.

The last peremptory provision is section 3(2)(b)(e) of PAJA and provides that the Commissioner must provide the taxpayer with “adequate notice of the right to request reasons in terms of section 5” of PAJA. The author’s experience is that the Commissioner

⁴⁴ *Degussa* page 157.

⁴⁵ Section 3(2)(b)(a) of PAJA.

⁴⁶ Section 3(2)(b)(b) of the PAJA.

⁴⁷ *De Lange & Van Wyk (2017) 20 PER/ PELJ 19.*

⁴⁸ *De Lange & Van Wyk (2017) 20 PER/ PELJ 20.*

⁴⁹ Section 3(2)(b)(d) of PAJA.

currently does this when issuing additional assessments, so it should also be possible in respect of suspension applications. This can be contained in the “clear statement of administrative action” wherein the Commissioner sets out his decision on the suspension and waiver applications.

In instances where a fair procedure is not followed in considering the suspension and waiver applications, the taxpayer may lodge review application on the basis of section 6(2)(c) by showing that the procedure followed in reaching the administrative action was procedurally unfair.

It is not in all instances that a taxpayer must be afforded an opportunity to present his case, but as shown in Chapter 3 and this chapter, the courts have made it clear that this is required in instances where the decision will have a significant impact on a taxpayer. The refusal by the Commissioner to grant a suspension of payment application or the waiver applications might have a significant impact on a taxpayer depending on the quantum involved and of course the particular facts of the specific taxpayer.

Where a suspension application is refused, or the waiver applications are not granted, a taxpayer has a right to request to reasons for this exercise of the Commissioner’s discretion. As discussed in Chapter 3 of this study, the right is contained in section 33(2) of the Constitution and is provided for in section 5 of PAJA. This right is now applied to the exercise of the Commissioner’s discretions.

4.4. RIGHT TO WRITTEN REASONS FOR ADMINISTRATIVE ACTION

This right entails that everyone whose rights have been adversely affected by an administrative action is entitled to be given written reasons for the administrative action.⁵⁰

The Tax Court rules promulgated in terms of section 103 of the TAA (“the Rules”)⁵¹ also provide taxpayers with a right to request reasons from SARS. Unlike the right to written reasons in PAJA, the right in Rule 6 of the Rules only affords taxpayers who are aggrieved by an assessment to request reason. The request for reasons must be done for purposes of formulating an objection against the said assessment.

The author submits that taxpayers are better protected in section 5 of PAJA and would be better off requesting reasons in line with the PAJA provisions as opposed to the provisions of Rule 6 of the Rules. This is on the basis that the request for reasons in terms of the Rules is only for purposes of lodging an objection, whereas PAJA is to obtain “adequate reasons” for a decision. Further, the 180 days’ time period in PAJA is longer than the 30 day time period under the Rules read together with the TAA. This is most helpful in instances where a taxpayer discovers a decision or assessment outside of the TAA time periods as tends to often happen in the author’s practise.

⁵⁰ Section 33(2) of the Constitution.

⁵¹ *Rules promulgated under section 103 of the Tax Administration Act, 2011 (Act No. 28 of 2011), Prescribing the Procedures to be Followed in Lodging an Objection and Appeal against an Assessment or Decision Subject to Objection and Appeal referred to in section 104(2) of that Act, Procedures for Alternative Dispute Resolution, the Conduct and Hearing of Appeals, Application on Notice before a Tax Court and Transitional Rules* Government Gazette No. 550 of 11 July 2014.

However, it is expected that the Commissioner will provide reasons when exercising his discretions, so as to comply with the requirement of “reasonable administrative action”. In instances where he does not do so, when communicating a refusal to grant the requested relief, taxpayers may still request written reasons from the Commissioner. The receipt of reasons will then place the taxpayer in a position to explore other legislative relief mechanisms.

The court set out the principle to be applied in determining whether the Commissioner has provided a taxpayer with adequate reasons for purposes of lodging an objection in *ITC 0032/2016* and *ITC 0033/2016* (“*the ITCs*”).⁵² In essence the *Phambilii* principle⁵³ provides that the party whom the decision has been taken against, must be given adequate reasons that will make the party understand why the decision went against him, even if he does not agree with the decision.⁵⁴

As a result of applying the *Phambilii* principle in the *ITCs*, the Tax Court held that in order to comply with the *Phambilii* principle, reasons must be properly informative and must explain why a decision was taken.⁵⁵ In this case the court held that the Commissioner had satisfied the *Phambilii* requirements and the application was merely a delaying tactic on the taxpayer’s part.⁵⁶ This conclusion was reached by looking at the correspondence between SARS and the taxpayer and the application was dismissed with costs as “the applicant will not be prejudiced in formulating its objection against SARS assessment letter.”⁵⁷

Taxpayers should be mindful not to abuse the right to written reasons by requesting these even in instances where the Commissioner has already provided these. The courts have shown that they do not take kindly to taxpayers who institute superfluous litigation as a delay tactic by issuing costs awards. In respect of the suspension application and the waiver applications, should communication of the Commissioner’s decision not contain reasons the taxpayer can request these. However, given that notification of the right to request reasons is a peremptory action for procedurally fair administrative action, it is advised that the Commissioner either supply reasons for the decision as a standard or notify the taxpayer of this right when communicating his decision.

Should it happen that a taxpayer is unsatisfied with the Commissioner’s exercise of his discretions, the taxpayer can institute judicial review proceedings in terms of PAJA.

⁵² Case numbers 0032/2016 & 0033/2016 which were identical cases for request for reasons.

⁵³ Referred to as the “*Phambilii* principle” as it was taken from the judgment of *Minister of Environmental Affairs and Tourism and Others v Phambilii Fisheries (Pty) Ltd and Another* [2003] 2 All SA 616 (SCA) (“*Phambilii*”).

⁵⁴ *Phambilii* paragraph 40.

⁵⁵ *The ITCs* paragraph 30.

⁵⁶ *The ITCs* paragraph 37.

⁵⁷ *The ITCs* paragraph 38.

4.5. REMEDIES

A taxpayer or the taxpayer's representative can approach a court or tribunal with powers to judicially review administrative action, to institute judicial review proceedings.⁵⁸

The person instituting judicial review proceedings needs to show that the administrative action has failed to meet either the tests set out in section 6(2) of PAJA,⁵⁹ or the "catch all" ground of review in section 6(2)(i) of PAJA.⁶⁰

Judicial review proceedings can only be instituted once all internal remedies have been exhausted.⁶¹ The exception to this is where a court or tribunal deems it in the interest of justice, a person may be exempted from exhausting internal remedies where exceptional circumstances exist and the person has submitted an application to the court or tribunal of such.⁶²

PAJA does not set out what constitutes an 'internal remedy', but as it is limited remedy set out in another law, it should be readily ascertainable in particular instances.⁶³ In a tax context, a taxpayer is expected to follow the objection process before it can implement judicial review proceedings.⁶⁴

In *Reed v Master of the High Court ("Reed")*⁶⁵ on the meaning of 'internal remedy', the court held that

"The dictionary definitions of the words "internal" and "remedy" that I have cited are in harmony with the way the composite term "internal remedy" is understood in the more specialised context with which this matter is concerned: when the term is used in administrative law, it is used to connote an administrative appeal, usually on the merits, to an official tribunal within the same administrative hierarchy as the initial decision-maker – or, less common an internal review. Often the appellate body will be more senior than the initial decision-maker, either administratively or politically, or possess greater expertise. Inevitably, the appellate body is given power to confirm, substitute or vary the decision of the initial decision-maker on the merits. In South Africa there is no system of administrative appeals. Instead internal appeal tribunals are created by statute on an ad hoc basis."⁶⁶

⁵⁸ Section 6(1) of PAJA.

⁵⁹ Currie I *The Promotion of Administrative Justice Act: A Commentary* 2nd Edition, 2007 156. The author calculates this as nine principal grounds for review, with three of these grounds subdividing into 14 grounds of review.

⁶⁰ Provides for the judicial review of administrative "action that is otherwise unconstitutional or unlawful."

⁶¹ Section 7(2) of PAJA.

⁶² Section 7(2)(c) of PAJA.

⁶³ Currie (2007) 184.

⁶⁴ Croome and Olivier (2015) 591.

⁶⁵ *Reed v Master of the High Court* [2005] All SA 429 (E).

⁶⁶ *Reed* paragraph 25.

In the tax context, the Tax Court is the “internal appeal tribunal” which the learned judge in *Reed* speaks of.⁶⁷ This position is confirmed in the High Court judgment of *Ackermans Limited v CSARS* (“*Ackermans*”).⁶⁸ *In casu* the court considered the taxpayer’s request for relief in the form of an order for the review and setting aside of a decision made by the Commissioner to raise additional assessments to the taxpayer’s original assessments.⁶⁹ The taxpayer raised three possible grounds for judicial review of the Commissioner’s decision⁷⁰ while the Commissioner raised two defences. The first defence was that the Tax Court has the powers of review for the relief sought by the taxpayer and the second ground, raised in the alternative, was that the taxpayer has failed to exhaust the internal remedies before the Tax Court. On the strength of the alternative ground, the Commissioner argued that the taxpayer’s request for review of the Commissioner’s decision should therefore not be entertained.⁷¹

The court agreed with SARS in that the taxpayer had not exhausted all internal remedies before bringing the review application. These remedies lay with the Tax Court should the taxpayer be dissatisfied with SARS’ decision on an objection⁷² to be lodged against the additional assessments.

Prior to these two preceding judgments on internal remedies, the Constitutional Court also considered what the phrase meant. This was in the context of looking at the constitutionality of the “pay now, argue later” rule in *Metcash Trading*. In the context of internal remedy, the court held that the “appeal” provided for in tax legislation, was not an appeal in the judicial context. The term “appeal” rather referred to a special procedure for review of the Commissioner’s decision by a specialist tribunal. If this were not provided for in tax legislation, the Commissioner’s decision would have been subject to common law judicial review, as now covered by section 33 of the Constitution and fleshed out in PAJA.⁷³ The court highlighted that regardless of the appeal avenue available in tax, the other avenues of relief remain available to a taxpayer.⁷⁴ It was subsequent to *Metcash Trading* that SARS issued guidelines of what it would consider when reviewing an application for suspension of payment of a debt pending resolution of a dispute.

For those instances where there is no internal remedy, like where a suspension of payment application is declined, the author considers the case of *Medox Ltd v CSARS*

⁶⁷ The Tax Court is created in terms of section 116 of the TAA, with jurisdiction conferred upon it by section 117 of the TAA to hear tax appeals lodged under section 107 of the TAA.

⁶⁸ *Ackermans Limited v Commissioner of the South African Revenue Service* HG 16408 – 2013 NG (20 February 2015).

⁶⁹ *Ackermans* paragraph 1.

⁷⁰ *Ackermans* paragraph 12 where these were (i) SARS was precluded by section 79 of the Income Tax Act, as amended, to raise or decide to raise the additional assessments; (ii) there was a lengthy period of delay in raising or deciding to raise the additional assessments, which additional assessments were also unreasonable and procedurally unfair; and (iii) the SARS decision was materially influenced by an error in law, irrelevant considerations were taken into account or relevant considerations were ignored, the decision was not rationally connected to the information before the Commissioner, the Commissioner failed to take a decision, and the raising of the additional assessments was so unreasonable that no reasonable person would have taken it.

⁷¹ *Ackermans* paragraph 13.

⁷² *Ackermans* paragraph 40.

⁷³ *Metcash Trading* paragraphs 32 – 33.

⁷⁴ *Metcash Trading* paragraph 33.

(“*Medox*”).⁷⁵ Unfortunately, the lack of internal remedies was as a result of the taxpayer’s own doing - the time periods to exhaust the internal remedies had lapsed without the taxpayer taking advantage of them. The taxpayer’s solution in this instance was to approach the court for a declaratory order that all assessments issued in respect of its 1997 year of assessment were null and void. The court held that the taxpayer had failed to invoke the internal remedies when it was still able to and seeking a declaratory order was tantamount to forum shopping.⁷⁶ The court held that it therefore did not have jurisdiction to consider the matter and dismissed the application with costs.⁷⁷

Given that the decision on a suspension of payment application is not subject to objection and appeal, an aggrieved taxpayer in those instances can immediately institute judicial review proceedings.⁷⁸ This must be within 180 days after the date of becoming aware of the decision and reasons, or might reasonably have become aware of the decision and reasons.⁷⁹

The remedy available from a judicial review is for the court or tribunal power to grant any order that is just and equitable.⁸⁰

4.6. CONCLUSION

The Commissioner’s exercise of his discretions in respect of suspension of payment application and waiver application are administrative action. In instances where they infringe on a taxpayer’s rights, these can be challenged on the basis of a judicial review under PAJA.

The provisions of section 6 of PAJA will be relied upon for institution the review proceedings while section 7 of PAJA sets out the procedure to be followed for this. A taxpayer who is successful on judicial review will be awarded with an order that is ‘just and equitable’, which is a standard that varies from each case to case.

A taxpayer must first exhaust the internal remedies where applicable prior to lodging a review application. This entails following the objection and appeal route in respect of unsuccessful waiver applications. This route is unavailable for suspension of payment application and in such an instance a taxpayer can rely on section 9 of the TAA and request for SARS to review its decision. Another alternative is to approach the High Court to judicially review the Commissioner’s decision not to grant a suspension of payment on the basis of the review grounds set out in section 6 of PAJA.

The decision on the waiver applications is subject to objection and appeals. A taxpayer must therefore exhaust this process first before approaching the courts for relief through judicial review proceedings.

⁷⁵ *Medox Limited v Commissioner for the South African Revenue Service* 76 SATC 369.

⁷⁶ *Medox* paragraph 27.

⁷⁷ *Medox* paragraph 31.

⁷⁸ Burt K (2017) March 2017 *Taxpayer Journal* 46.

⁷⁹ Section 7(1)(b) of PAJA.

⁸⁰ Section 8 of PAJA.

CHAPTER 5

CONCLUSION

The study set out to consider the role played by administrative justice in the Commissioner's decision making. The study focused on only two of the Commissioner's decisions that constitute an exercise of the Commissioner's discretion. These two decisions were chosen as they affect a taxpayer's financial position. Given the recent budget deficit by SARS it was a justified concern that taxpayers could have their financial position impacted as SARS may become desperate to reduce the deficit.

The interplay between the Constitutional right to just administrative action and discretions exercised in terms of tax legislation is an important one. This is so especially given the fact that the Constitution is the Republic's yardstick for all actions and legislation taken in the Republic. The short answer to the study's main research question is that these discretions are "administrative action" in nature. The exercise of each of these discretions must therefore be carried out in a manner that is lawful, reasonable and procedurally fair to ensure that a taxpayer's right to just administrative action is upheld.

In reaching this conclusion, the study considered the extent of the Commissioner's decision-making powers in the form of the exercise of discretions as provided for in the TAA. The TAA sets out the requirements to be met by taxpayers in requesting suspension of payment, and interest and penalty waivers. A taxpayer's submission of an application in compliance with the TAA requirements assists the Commissioner in reaching a rational decision when exercising his discretions.

The study's first research question in Chapter 2 of the study was to consider the detail of the Commissioner's discretionary powers. This was done to determine the extent of these powers, and involved looking at how wide they are, on what basis they can be exercised in favour of a taxpayer and whether the exercise of the powers can be challenged.

Chapter 2 shows that for a successful suspension of payment application, the taxpayer must submit sufficient evidence to the Commissioner on why he or she or it is eligible for a suspension of the "pay now, argue later principle". This is evidence to show that the dispute is not vexatious, frivolous or a dilatory tactic and that the upfront payment of the tax debt will prejudice the taxpayer in some way or other. The exercise of discretion in respect of a suspension of payment application is not subject to objection and appeal. There is however a potential remedy to taxpayer who is dissatisfied with the Commissioner's decision in section 9 of the TAA. This remedy provides the taxpayer with an opportunity to request that the Commissioner reconsider his decision.

A waiver of interest was found to be more difficult to obtain as it is limited to circumstances beyond a taxpayer's control, which circumstances are further limited to exceptional circumstances. The exercise of this discretion is subject to objection and appeal in instances where a taxpayer is dissatisfied with the decision. The taxpayer also has the option of relying on section 9 of the TAA to request that the Commissioner reconsider his decision.

The waiver of penalties can be obtained by showing that the penalties are imposed either as a first incidence of non-compliance or nominal incidence of non-compliance. There are also the exceptional circumstances which can be relied upon to obtain relief from penalties if the preceding two scenarios are not present in a particular fact set. A request

for review of the Commissioner's decision on the basis of section 9 of the TAA is also an option available to the taxpayer.

The study found that for purposes of ensuring that the discretion is exercised in a taxpayer's favour, it is important for the taxpayer to ensure that all relevant information is provided to the Commissioner at the time of applying for the suspension and waivers.

The next research question addressed by the study is what is administrative justice? The study looked at this concept in Chapter 3, with reference the role this concept plays in decisions made by organs of state.

Administrative justice is just administrative action as provided for in section 33 of the Constitution. Just administrative action in turn is administrative action which is lawful, reasonable and procedurally fair.

There must first be administrative action before there can be a consideration on whether it is just or not. Administrative action in its simplest form is a conclusion reached by an administrator that impacts or infringes on a person's rights. This conclusion must be exercised in line with an empowering provision or legislation, and must have a direct effect on a person other than the administrator who took the decision.

The requirements for just administrative action are that it must be lawful in that it must be taken in terms of enabling legislation; reasonable in the sense that a reasonable administrator would have reached a similar decision based on the information provided; and procedurally fair in that the conclusion was reached with no bias and after providing the affected person with an opportunity to make representations in instances where this is necessary.

PAJA gives effect to these constitutional requirements and sets out in greater detail the expected standard in relation to each one. Should the administrative action not be in line with these requirements, it can be challenged under the administrative justice provisions by launching judicial review proceedings against such action. The starting point for such challenge is PAJA, and in limited instances such a challenge can be brought directly under the Constitution.

Administrative justice also affords a person affected by the action, with right to adequate written reasons from an administrator. The Tax Court rules also provide the taxpayer with a right to reasons for purposes of formulating an objection. In instances where the Commissioner's exercise of a discretion is not supported by reasons or is unclear, the taxpayer is best advised to lodge a reasons request in terms of PAJA.

The Commissioner's exercise of discretions was then tested against the administrative justice principles to determine the impact of the principles, if any, in Chapter 4 of this study. This was done to answer the third research question being what role does administrative justice play in the Commissioner's exercise of his discretions?

Given that the starting point in an administrative justice context is to determine the existence of administrative action, the study tested the Commissioner's discretions against the definition of "administrative action". The study found that the Commissioner's discretions are indeed administrative action. The discretions are therefore subject to the requirements of being lawful, reasonable and procedurally fair in order for them to meet the constitutional requirement of "just administrative action".

The conclusions reached in the determination of the Commissioner's discretions as "administrative action" are set out schematically in the following table:

Administrative action element	Suspension of payment	Waiver of interest and penalties
A "decision"	Yes	
Administrative nature	Yes	
Empowering provision	Yes, section 164 of the TAA	Yes, section 187 of the TAA in respect of interest and section 215 of the TAA in respect of penalties
An organ of state	Yes	
Adversely affects rights	<p>Yes, in instances where the discretion is not exercised in a taxpayer's favour.</p> <p>A taxpayer has the obligation to make payment of the tax debt, which is defined in the TAA to include interest and penalties, regardless of any dispute. Such payment is a deprivation of a taxpayer's property <i>albeit</i> a lawful deprivation as the State requires funds from its citizens to meet its obligations.</p>	
Direct, external, legal effect	<p>Communication is sent to the applicant taxpayer of the Commissioner's exercise. This is a final decision on the part of the Commissioner and results in the tax debt being payable immediately. Should the taxpayer fail to adhere to this, SARS may initiate collection steps to recover the tax debt.</p>	

In instances where the Commissioner's exercise of his discretions infringes on a taxpayer's right to just administrative action, a taxpayer can challenge the decision. The challenge is in the form of launching a judicial review application under PAJA with either a court or a tribunal. The safeguard of judicial review is important in the tax context given the fact that where an exercise of the Commissioner's two discretions result in a decision not in favour of a taxpayer, this results in deprivation of a taxpayer's property.

Some of the possible grounds in terms of PAJA upon which a judicial review application can be brought for present purposes are identified in the study as:

- a failure by the Commissioner to consider relevant considerations or to consider irrelevant considerations;
- an empowering provisions mandatory and material procedure was not complied with;
- the administrative action taken is not rationally connected to the purpose of the empowering provision;

- the exercise of a public power so unreasonable that no reasonable person could have exercised it as such, and
- a fair procedure, as provided for in section 3 of PAJA, was not followed in exercising the discretion.

Prior to lodging a judicial review application, a taxpayer must first exhaust all internal remedies. In a tax context this refers to the processes catered for by the Tax Court. However, given that a decision on a suspension application is not subject to objection and appeal, the taxpayer can approach a court directly to review the Commissioner's decision in such an instance.

On conclusion of a judicial review application, the court or tribunal will grant an affected taxpayer an award that is fair and equitable given the merits of the matter. This may be, amongst others, to either set aside the Commissioner's decision, to refer the decision back to the Commissioner for review or to replace the Commissioner's decision with the court or tribunal's own decision. Substitution of the Commissioner's decision will only happen in exceptional circumstances.

As the Commissioner's discretions must be exercised in line with the Constitutional yardstick of "just administrative action", any exercise contrary to this can, and must be, taken on judicial review. The Commissioner must therefore ensure that he exercise his discretions in a manner that is lawful, reasonable and procedurally fair to avoid finding himself as a party to judicial review proceedings.

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