The remittance of interest on a tax obligation in terms of a voluntary disclosure agreement: Differentiating between taxpayers

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OPSOMMING

Die oorbetaling van rente op 'n belastingverpligting ingevolge 'n vrywillige openbaarmakingsooreenkoms: 'n onderskeid tussen belastingbetalers

Ingevolge artikel 229 van die Wet op Belastingadministrasie 28 van 2011, kan belastingpligtiges wie se belastingsake buite orde is die Kommissaris deur middel van die vrywillige-openbaarmakingsprogram, ingevolge waarvan die belastingpligtige kwytskelding van kriminele vervolging, nie-nakomingsboetes en onderstellingsboetes kan verkry, nader, mits die belastingpligtige met die hele sak patats vorendag kom. Ingevolge die vrywillige-openbaarmakingsprogram is die Kommissaris nie by magte om rente op die ooreengekome belastingbedrag verskuldig terug te skryf nie. Belastingpligtiges wat nie van die vrywillige-openbaarmakingsprogram gebruik maak nie mag die Kommissaris om kwytskelding van nie-nakomingsboetes, onderstellingsboetes sowel as rente nader. Gevolglik onderskei die Wet op Belastingadministrasie tussen belastingpligtiges wat van die vrywillige-openbaarmakingsprogram gebruik maak en die wat nie daarvan gebruik maak nie. Dit blyk dat belastingpligtiges wat nie van die vrywillige-openbaarmakingsprogram gebruik maak nie, moontlik beter af is as diegene wat wel van die program gebruik maak. Hierdie artikel ondersoek die grondwetlikheid van die onderskeid deur, onder andere, die reg op gelykheid, die reg op eiendom, die reg op billike administratiewe optrede en die reg op toegang tot die howe te bespreek.

1 INTRODUCTION

In the seminal work *An inquiry into the nature and causes of the wealth of nations*, Adam Smith explains that a good tax system must, among others, comply with the principle of equity.[1] The principle of equity entails that a tax should be fair and must be perceived to be fair. Of course, what is considered fair differs from person to person. The equity principle is underpinned by the taxpayer's ability to pay the tax as well as the proportion to which the taxpayer benefits from State supplied services. For example, the more a person earns, the higher the rate of personal taxes. While it seems unfair to tax the high-income earner more, the higher income earner has a greater capacity to absorb the impact

1 Smith *An inquiry into the nature and causes of the wealth of nations* (1776) Vol 2 Book V Part II 4244-28.

of higher taxes. Does the equity principle extend to tax administration in that taxpayers must be treated equally and fairly in respect of administrative issues pertaining to their tax liability towards the State?

In the recent case of *Medtronic International v CSARS*,[2] the Gauteng Division of the High Court ruled correctly that the Commissioner of the South African Revenue Service[3] is legally precluded from remitting interest where a taxpayer entered into a voluntary disclosure agreement[4] with the Commissioner.

This article examines the powers of the Commissioner to remit interest, non-compliance penalties, and understatement penalties. In the main, a distinction is drawn between taxpayers who entered into a VDA with the Commissioner in good faith, and taxpayers who did not. The article further examines the differentiation in the treatment[5] of *bona fide* VDA and *bona fide* non-VDA taxpayers[6] with specific reference to the equality clause in the Bill of Rights and Adam Smith's equity principle, the right not to be deprived of property arbitrarily, the right to just administrative action, and the right to access to courts.

2 POWERS OF THE COMMISSIONER TO REMIT INTEREST, NON-COMPLIANCE PENALTIES, AND UNDERSTATEMENT PENALTIES

2 1 Powers of the Commissioner in respect of VDA taxpayers

The Tax Administration Act[7] provides for a permanent framework for voluntary disclosure across all tax types. A taxpayer may apply for voluntary disclosure relief under the following circumstances:

(a) The disclosure is made voluntarily;

(b) The taxpayer is in default[8] and the default has not been disclosed previously;

(c) The disclosure is full and complete in all material aspects;

(d) The default is subject to the potential imposition of an understatement penalty;

(e) The disclosure does not result in a refund due by SARS;[9] and

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2 *Medtronic International v CSARS* (33400-19) ZAGPPHC (17 February 2020).

3 Hereafter "the Commissioner".

4 Hereafter "VDA".

5 The rationale for the analysis is explained in paragraph two below.

6 A *bona fide* non-VDA taxpayer is a taxpayer who is unaware of its tax non-compliance and who does not qualify to enter into a VDA with the Commissioner, because an audit has been completed already. For example, unbeknown to the taxpayer, an employee of the taxpayer fraudulently under-declared cash receipts in the taxpayer's tax returns. It is only after completion of an audit by SARS that the taxpayer becomes aware of the employee's fraudulent activities and its subsequent "correct" tax liability.

7 Act 28 of 2011 (hereafter "TAA").

8 A "default" is defined in s 225 of the TAA to mean

> "the submission of inaccurate or incomplete information to SARS, or the failure to submit information or the adoption of a 'tax position', where such submission, non-submission, or adoption resulted in:
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> (a) the taxpayer not being assessed for the correct amount of tax;
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> (b) the correct amount of tax not being paid by the taxpayer; or
>
> (c) an incorrect refund being made by SARS."

9 Hereafter "SARS".

(f) There is no audit or investigation pending or commenced, but not yet completed, into the affairs of the person seeking relief.[10]

Where an audit or investigation is pending or has commenced, but is not yet completed, a senior SARS official may direct a person to apply for voluntary disclosure where it is unlikely that the default would have been detected during an audit or investigation, and where it is in the interest of good tax management and SARS' recourses to enter into a VDA.[11]

After approval of a voluntary disclosure application, the relevant applicant must enter into a written VDA, which must include the following details:

(a) the material facts of the default on which the voluntary relief is based;

(b) the amount payable by the person, reflecting the tax debt and penalties separately;

(c) the arrangement and dates for payment; and

(d) the relevant undertakings by the parties.[12]

In negotiating the relief to be afforded to the applicant taxpayer, the Commissioner's powers are restricted to the following:

(a) the Commissioner must agree not to pursue criminal prosecution for a tax offence arising from the default;

(b) the Commissioner must grant relief for understatement penalties in accordance with Columns 5[13] or 6[14] of the understatement penalty percentage table in section 223 of the Act;

(c) the Commissioner must grant full relief in respect of administrative non-compliance penalties that were or may be imposed in terms of Chapter 15 of the Act or any other penalty imposed by another tax act;

(d) no relief may be granted for penalties imposed in respect of the late submission of a tax return or the late payment of tax.[15]

In *Medtronic International v CSARS*, Medtronic was a victim of fraud by one of its employees. As a result of the fraud, it placed Medtronic in default with SARS in respect of Value Added Tax[16] compliance. To mitigate its liability, Medtronic entered into a VDA with the Commissioner. After entering into the agreement, Medtronic applied to the Commissioner for remission of interest on outstanding VAT in terms of section 39(7)(a) of the VAT Act.[17] The Commissioner rejected the application and Medtronic launched the review procedure in terms of section 6 of the Promotion of Access to Justice Act.[18] Thompson AJ ruled that, in terms

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10 S 227 read with s 226 of the TAA.

11 S 226(2) of the TAA.

12 S 230 of the TAA.

13 Under Column 5, where the VDA was entered into after notification of an audit, the penalties are 5 % for a substantial understatement; 15 % for not taking reasonable care in completing a tax return; 25 % where no reasonable ground exists for the tax position taken; 50 % in the case of gross negligence; and 75 % in the case of intentional tax evasion.

14 Under Column 6, where the VDA was entered into before notification of an audit, the penalties are zero for a substantial understatement; zero for not taking reasonable care in completing a tax return; zero where no reasonable ground exists for the tax position taken; 5 % in the case of gross negligence; and 10 % in the case of intentional tax evasion.

15 S 229(c) read with Ch 15 of the TAA.

16 Hereafter "VAT".

17 89 of 1991.

18 3 of 2000 (hereafter "PAJA").

of section 229 of the TAA, the Commissioner is legally precluded from remitting interest when the Commissioner entered into a VDA with the taxpayer.[19] Accordingly, because the Commissioner is precluded from exercising a discretion in respect of interest, there is no decision that can be the subject of a review procedure in terms of PAJA.[20]

2 2 Powers of the Commissioner in respect of non-VDA taxpayers

In the case of non-compliance penalties imposed in terms of Chapter 15 of the TAA, the Commissioner has a discretion to remit penalties as follows.

In the case of a failure to register for tax, the Commissioner may remit the penalty in whole or in part if the person approaches SARS voluntarily and the person has filed all the returns required under a tax Act.[21]

In the case of a first-time non-compliance or if the non-compliance has been remedied in less than five business days, in respect of penalties imposed under section 210 or 212, the Commissioner may remit the penalty or a portion thereof up to an amount of R2 000 (in the case of a penalty imposed in terms of section 210) or R10 000 (in the case of a penalty imposed in terms of section 212), if the Commissioner is satisfied that the non-compliance has been remedied and reasonable grounds for the non-compliance exist.[22]

In the case of a first-time non-compliance penalty imposed under section 213, SARS may remit the penalty or a portion thereof if SARS is satisfied that the penalty has been imposed on a first-time non-compliance or if the amount is less than R 2000, reasonable grounds for the non-compliance exist, and the non-compliance has been remedied.[23]

Where, because of exceptional circumstances,[24] the taxpayer reasonably could not comply with the relevant tax act, SARS must remit the penalty in full.[25]

Importantly, the Commissioner's decision to remit a non-compliance penalty is subject to objection and appeal.[26] Similarly, the failure by the Commissioner to make a decision in an application for remittance of a non-compliance penalty amounts to a failure to exercise an administrative duty or a discretion that is subject to review under sections 5 and 6 of PAJA.

In respect of an understatement penalty, the Commissioner has a discretion to remit the penalty or part of the penalty. The Commissioner's decision to remit a penalty is subject to objection and appeal.[27] Moreover, the failure to make a

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19 *Medtronics v CSARS* paras 8–10.
20 *Ibid.*
21 S 216 of the TAA.
22 S 217(1) of the TAA.
23 S 217(3) of the TAA.
24 The circumstances are limited to a natural or human-made disaster; civil disturbance or disruption in services; serious illness or accident; serious emotional or mental distress; or an act by SARS causing a capturing error, a processing delay, misinformation, or a delay of information, or a failure by SARS to provide sufficient time to respond to a request for information; or to where the penalty will result in serious financial hardship of the taxpayer or affect negatively the continuation of a business. For example, non-compliance because of financial difficulty because of the continued effect of the Covid-19 Regulations falls under this category.
25 S 218 of the TAA.
26 S 220 of the TAA.
27 S 224 of the TAA.

decision to remit an understatement penalty amounts to a failure to exercise an administrative duty or a discretion that is subject to review under sections 5 and 6 of PAJA.

The Commissioner must remit a penalty imposed for a substantial understatement if he is satisfied that the taxpayer made a full disclosure, and that the taxpayer is in possession of an opinion by an independent tax practitioner, who based his opinion upon the full disclosure of the material facts, and that it is confirmed that the taxpayer's position is likely to be upheld in a court of law.[28]

In the case of interest charged in terms of section 187(6) of the TAA, where a senior SARS official is satisfied that interest for an outstanding tax debt is payable because of circumstances beyond the control of the taxpayer, the official may direct that the interest attributable to the said circumstances must be remitted.[29] It must be noted that these circumstances are limited to natural or human-made disasters, civil disturbance or disruption in service, or a serious illness or accident.[30]

Where interest was raised in terms of section 89*quat* of the Income Tax Act,[31] if the Commissioner is satisfied that interest is payable as a result of circumstances beyond the control of the taxpayer, the Commissioner may direct the remittance of a part or the whole of the interest.[32] The Act is silent on what constitutes circumstances beyond the taxpayer's control. Importantly, a decision by the Commissioner to remit interest in terms of section 89*quat* is subject to objection and appeal. In addition, the failure to exercise the discretion to remit interest upon an application for the remittance of interest is an administrative action subject to review under sections 5 and 6 of PAJA.

Prior to its deletion and replacement, by section 187 of the TAA, section 38(7) of the VAT Act granted a discretion to the Commissioner to remit interest on unpaid VAT in part or in full where the Commissioner is satisfied that the interest was payable due to circumstances beyond the taxpayer's control, or where there was no intent on the part of the taxpayer to postpone the liability for the payment of tax.

2 3 A brief discussion

It is obvious from the discussion above that there is a differentiation in treatment of taxpayers who entered into a VDA with the Commissioner and those who did not. While the taxpayer who entered into a VDA with the Commissioner is granted relief from criminal prosecution and penalties, he is not granted relief from interest on the amount payable to SARS. The decisions by SARS is not subject to objection and appeal.

The non-VDA taxpayer potentially can be granted relief from criminal prosecution,[33] penalties *and* interest. In addition, any decision by SARS to remit

28 S 223(3) of the TAA.
29 S 187(6) of the TAA.
30 S 187(7) of the TAA.
31 Act 58 of 1962.
32 S 89*quat*(3).
33 While the prospect of criminal prosecution is not removed for the *bona fide* non-VDA taxpayer, it becomes irrelevant because of the absence of intent. Other non-VDA taxpayers may enter into a plea-bargain or similar agreement with the National Prosecuting Authority (hereafter "NPA") to stay criminal prosecution in exchange for testifying against another taxpayer or assisting the NPA in other criminal investigations.

penalties and interest is subject to objection and appeal. Furthermore, a failure by the Commissioner to make a decision is subject to review under sections 5 and 6 of PAJA. Whether or not the taxpayer acted in good faith or disclosed the default voluntarily or the default is due to the taxpayer's fault is irrelevant. In other words, the *mala fide* taxpayer, whose default was discovered after completion of a SARS audit, potentially can have penalties and interest remitted in part or in full but may still face criminal prosecution. While it is unlikely that SARS will remit an understatement penalty in the case of a *mala fide* repeat offender, it must be stressed that such a taxpayer is entitled to have his application for remittance adjudicated by a court of law.

In the paragraphs that follow, I examine whether or not this differentiation infringes on a taxpayer's right to equality,[34] right not to be deprived of property arbitrarily,[35] right to just administrative action,[36] and right to access to the courts.[37]

3 DIFFERENTIATION AND THE BILL OF RIGHTS

3 1 Right to equality

Section 9 of the Constitution states that

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

The differentiation in treatment of the *bona fide* VDA and the *bona fide* non-VDA taxpayers is not a differentiation based on the grounds listed in section 9(3). Accordingly, the differentiation is not *prima facie* unlawful. However, that is not the end of the enquiry. Important to note is that section 9(1) states specifically that everyone is equal before the law. That said, Cachalia *et al* notes that "equal before the law" does not mean all people must be treated identically.[38] Currie and De Waal argue that people who are similarly situated in relevant ways must be treated the same.[39] What is viewed as "relevant" to

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34 S 9 of the Constitution, 1996.

35 S 25 of the Constitution.

36 S 33 of the Constitution.

37 S 34 of the Constitution.

38 Cachalia *et al Fundamental rights in the new Constitution: An overview of the new Constitution and a commentary on Chapter 3 on fundamental rights* (1994) 25; See also Smith "Equality constitutional adjudication in South Africa: focus: twenty years of the South African Constitution" 2014 *African Human Rights Law Journal* 611–612.

39 Currie and De Waal *The Bill of Rights handbook* (2005) 230.

determine similarity can be contentious. Consider the subject matter of this article. Are the VDA taxpayer and the non-VDA taxpayer who disclose a default voluntarily different in circumstances by virtue of the existence of a VDA? I think not. Both taxpayers are in default towards SARS. Both taxpayers disclose the default to SARS voluntarily. The only difference is that one of them entered into a formal agreement with SARS for the remittance of penalties and a permanent stay of prosecution, while the other will apply for remittance of penalties, interest, and a permanent stay of prosecution[40] by way of an application process that is subject to objection and appeal. Yet, the test is not necessarily whether a differentiation exists, but rather whether "there is a reason for the differentiation that is rationally connected to a legitimate government purpose."[41] In *Harksen v Lane NO*,[42] Goldstone J beautifully sets out the stages of the enquiry to determine if a statutory provision unlawfully violates the right to equality. The stages are:

(a) Does the provision or conduct differentiate between people or categories of people? If so, is there a reason that is rationally connected to a legitimate government purpose? If there is not, there is a violation of section 9(1). Even in the existence of a legitimate government purpose, it can still result in discrimination.

(b) Does the discrimination result in an unfair discrimination? This is a two-stage test:

   a. Is it a discrimination on the specified grounds listed in section 9(3)? If the discrimination is not based on the listed grounds, the discrimination must, objectively, show the attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

   b. A discrimination on one or more of the listed grounds is presumed to be unfair. If the discrimination is not based on one of the listed grounds, the unfairness must be established by the complainant. The test of unfairness relies mainly on the impact of the discrimination on the complainant or others in the same situation.

(c) If the discrimination is found to be unfair, it must be determined if the provision can be justified under the limitation clause.[43]

In the example above, in the case of a VDA taxpayer, the Commissioner *must* stay criminal prosecution, remit non-compliance penalties and remit understatement penalties in accordance with Columns 5 and 6 of the understatement penalty table. In the case of the non-VDA taxpayer, the Commissioner *may* remit non-compliance penalties in part or in full, remit understatement penalties in part or in full and remit interest in part or in full.[44] Potentially, the *bona fide*

40 See s 229(a) of the TAA in respect of a stay in criminal prosecution for criminal liability that arises from the "default".

41 *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council* 1998 2 SA 61 (CC) para 24; see also Swart "An outcomes based approach to the interpretation of equality" 1998 *SA Public Law* 221; Smith 2014 *African Human Rights Law Journal* 616; Rautenbach "Riglyne om die reg op gelykheid toe te pas" 2012 *Litnet Akademies* 243–244.

42 *Harksen v Lane NO* 1998 1 SA 300 (CC).

43 *Idem* para 54.

44 As explained above, the NPA has a discretion to enter into an agreement with the taxpayer to stay criminal prosecution.

non-VDA taxpayer is at an advantage compared to the VDA taxpayer.[45] Of course, the potential advantage comes at a risk. The Commissioner may reject the application of the non-VDA taxpayer, resulting in costly litigation should the taxpayer proceed with objection and appeal. At this junction, it must be noted that a VDA application is no guarantee that a VDA will be entered into. However, the Commissioner has a discretion to reject the VDA application as well.

The question is whether this differentiation is rational and whether it achieves a legitimate government purpose? Consider that SARS must grant the VDA taxpayer the relief as listed; it almost appears as if there are no repercussions for a VDA taxpayer irrespective of that taxpayer's perceived *mala fides*. Surely, it can be argued that it is only rational to deny the VDA taxpayer the right to have interest remitted too? Yet, when one compares the *bona fide* VDA taxpayer with the *bona fide* non-VDA taxpayer, the non-VDA taxpayer is still at an advantage. The non-VDA taxpayer can merely remedy his tax default and *potentially* pay no penalties or interest.

In the matter of *City Council of Pretoria v Walker*,[46] the Constitutional Court was called upon to rule on the constitutionality of the differentiated treatment of taxpayers based on the residential area where the taxpayers reside.[47] Walker argued that the City Council discriminated against persons living in old Pretoria on two grounds. The first ground of differentiation was that, in old Pretoria, the water and electricity levies were imposed based on metered consumption, while in Atteridgeville and Mamelodi, it was levied at a flat rate per household.[48] According to Walker, the different rates resulted in residents of old Pretoria subsidising the other areas.[49] The second point of differentiation related to selective enforcement of debt. The City Council enforced debt from old Pretoria only.[50]

In respect of the first point of differentiation, the court identified that the different rates imposed were connected to a legitimate government purpose.[51] The different ways in which the water and electricity usage was measured were a temporary measure to ensure continuous service delivery by the City Council, until these areas all had the same infrastructure and resources.[52]

Section 9 requires one to not only consider whether there is direct discrimination but also that the consequences of the differentiation play an equally important role in the inquiry.[53] The court held that, due to apartheid, race and geography were "inextricably linked".[54] Yet, Sachs J in his minority judgment ruled that the differentiation "was based on objectively determinable characteristics of different geographical areas, and not race".[55] The majority judgment

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45 As a result of the absence of intent, the prospect of criminal prosecution in the case of the *bona fide* non-VDA taxpayer is effectively removed. In the case of the *mala fide* non-VDA taxpayer, criminal prosecution remains a reality.

46 *City Council of Pretoria v Walker* 1998 2 SA 363 (CC).

47 *Idem* para 6.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

51 *Idem* para 27.

52 *Ibid.*

53 *Idem* para 32.

54 *Idem* para 33.

55 *Ibid.*

rejected Sach J's view. In other words, treating persons differently based on their geographical location constituted indirect discrimination in this case. This is so because the geographical areas were predominantly occupied by white people in old Pretoria and black people in Atteridgeville and Mamelodi.[56]

Because the different rates are discriminatory based (indirectly) on race, the court had to consider whether the discrimination was unfair. The court considered the factors identified in *Harksen v Lane*. Considering the nature and the purpose of the discriminatory practice, the court held that the City Council was obliged to ensure effective collection of consumption levies.[57] The flat-rate system that applied in Atteridgeville and Mamelodi was a temporary measure until such time that meters are installed. It would have been irrational to extend the flat rate to old Pretoria until the meters were installed. The court held that Walker failed to present evidence that he has been adversely affected by the different methods used to ascertain the levies.[58] Moreover, the differentiation was as a result of a legitimate and rational government purpose.[59]

Accordingly, the court concluded that Walker's human dignity was not impaired by the differentiated treatment. As a result, the discrimination was not unfair, and it did not infringe on Walker's right to equality.[60] Consequently, it was unnecessary to consider section 36 of the Constitution in this matter.

In respect of selective enforcement, although it was not decided on the basis of rationality, the court ruled that the City Council's selective enforcement of debts of defaulting residents by way of secretive meetings by City Council officials, was not based on a rational and coherent policy.[61] Consequently, this selective enforcement practice infringed on the right to equality. Because this practice was not in terms of "law of general application",[62] it could not be limited in terms of section 36 of the Constitution. In essence, the judgment confirms that, absent a legitimate and rational government purpose, a differentiation in the treatment of taxpayers is unconstitutional. Thus, it is prudent to determine if the differentiation in the treatment of VDA and non-VDA taxpayers subscribes to a legitimate and rational government purpose. Zuckermann points out that to be treated equally is the cornerstone of justice.[63] This entails that – in relation to access to justice – no litigant receives preferential treatment and no litigant is exposed to greater risks compared to others.[64] Rautenbach posits that human dignity remains

56 *Idem* para 35.
57 *Idem* paras 50–56.
58 *Ibid.*
59 *Idem* para 68.
60 *Idem* para 68.
61 *Idem* paras 73 and 76. In *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC), the court found that presumption of negligence in term of the Forest Act 122 of 1984 that differentiates between landowners outside a fire-control area and those within the fire-control area was connected to a legitimate government purpose of preventing veld fires; In *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC), it was found that a distinction between departmental and school employees in developing a staffing policy is not rational; In *Jordan v The State* 2002 11 BCLR 1117 (CC), it was found to be rational to target the criminal conduct of a particular group (sex workers) and not another (the clients).
62 *Premier Mpumalanga v Executive Committee of the Association of the Governing Bodies of State-aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC).
63 Zuckerman "Justice in crisis: Comparative dimensions of civil procedure" in Anon *Comparative perspectives* (1999) 3.
64 Hurter "Access to justice: To dream the impossible dream?" 2011 *CILSA* 415.

the cornerstone of an enquiry as to whether a differentiation in subjects is unfair and unconstitutional.[65] Jagwanth mentions that the severity of the impact of differentiation on vulnerable groups dictates whether a differentiation is unfair.[66] Can it then be argued that the unequal treatment between VDA and non-VDA taxpayers miscarries the very cornerstone of equality before the law? In the main, the differentiation results in a financial loss for the VDA taxpayer in the form of interest not being remitted. Does that impair on the taxpayer's fundamental human dignity or affect him adversely in a comparable manner?[67] This is a rather difficult test to determine objectively. Perhaps it can be compared to coriander. Some people strongly advocate that a curry without coriander is significantly lacking. Yet, due to an olfactory receptor gene, several persons cannot stand the taste of coriander.[68] Must coriander be removed as an ingredient from all curry recipes? Not at all. The person who dislikes coriander must merely request his curry to be served without it. Similarly, interest, specifically *mora* interest, is an expected concomitant of outstanding debt.[69] That said, interest on an *outstanding tax debt* – which must be distinguished from interest on a loan agreement – may cause serious financial hardship for that taxpayer. In turn, this may have a ripple effect in communities where the taxpayer is the financial backbone in that community.[70] These are the vulnerable groups that are affected most significantly when the VDA taxpayer must lay-off staff because of an interest liability on a tax default. While the interest liability affects the taxpayer personally, objectively, it could affect the basic human dignity of others. Albertyn argues that employment status, financial hardship, poverty and geographical location all fall under the ambit of human dignity.[71] Goldswain supports this view and adds that it resonates with the principles of *ubuntu*.[72] Accordingly, the differentiation between the VDA and non-VDA taxpayer in respect of the remittance of interest can be seen to impact on the human dignity of the VDA taxpayer indirectly as well as on persons whose livelihoods depend on the

65 Rautenbach 2012 *Litnet Akademies* 249–251.

66 Jagwanth "Expanding equality" 2005 *Acta Juridica* 133.

67 See Swart 1998 *SA Public Law* 223 where he argues that the more vulnerable a person or group of persons, the greater the impact of the differentiation. He posits that all the subjective factors must be considered in an objective manner to determine the overall impact of the differentiation on the taxpayer.

68 Eriksson *et al* "A genetic variant near olfactory receptor genes influences cilantro preference" 2012 *Flavour* 1.

69 It must be noted that the discussion hinges on interest on debt outstanding. This must be distinguished from interest on loan agreements. At common law, loans of consumption are gratuitous, and interest is not an *essentialia* of loan agreements. Later, in the case of a loan for money, interest was allowed. In modern day, interest is a natural concomitant for commercial loans between persons trading at arm's length. See Henning in Joubert *LAWSA* (2008) para 295.

70 See in general *Vuyisile Zamindlela Nondabula v Commissioner: South African Revenue Service* case no. 4062/2016 (EC) (27 June 2017).

71 Albertyn "Equality" in Cheadle, Davis and Haysom *South African constitutional law: The Bill of Rights* (2019) para 4.4.1. See also the 2007 edition of the same publication at para 4.8.22; See also Albertyn and Goldblatt "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" (2007) *South African Journal on Human Rights* 343–344; Albertyn and Goldblatt "Equality" in Woolman *et al* (eds) *Constitutional law of South Africa* (2007) 35.

72 Goldswain "Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law" (2011) *Southern African Business Review* 11.

financial stability of the VDA taxpayer.[73] But, is it fair and rational to discriminate between VDA and non-VDA taxpayers? Is there a legitimate government purpose that must be fulfilled?

In the main, the VDA serves as a binding settlement of the dispute between the taxpayer and SARS. Moreover, the voluntary disclosure programme is designed primarily to settle disputes with defaulting taxpayers on terms favourable to the taxpayer to eliminate long and costly audits followed by long and costly litigation.[74] Accordingly, the governmental purpose of the differentiation is to resolve disputes amicably and to avoid costly litigation. Denying the VDA taxpayer a right to have interest remitted, while the non-VDA taxpayer has the potential to have interest remitted, does not relate to the purpose of the voluntary disclosure programme. To me, there seems no rationality or fairness in the differentiation between VDA and non-VDA taxpayers in respect of the remittance of interest. As the differentiation has the potential to impair on a person's human dignity (within the extended meaning of dignity as explained above), and the differentiation cannot be reasoned to be fair or sanctioned by a rational and legitimate governmental purpose, it is apt to determine if the differentiation can be justified under the limitations clause in section 36 of the Constitution. The limitation clause is discussed in para 3 5 below.

3 2 Right not to be deprived of property arbitrarily

In terms of section 25 of the Constitution, the right to property entails the following:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
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> (2) Property may be expropriated only in terms of law of general application –
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> (a) for a public purpose or in the public interest; and
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> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
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> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –
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> (a) the current use of the property;
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> (b) the history of the acquisition and use of the property;
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> (c) the market value of the property;
>
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
>
> (e) the purpose of the expropriation.
>
> (4) For the purposes of this section –
>
> (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
>
> (b) property is not limited to land."

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73 In the United States case of *Griggs v Duke Power Co* 401 US 424 (1971), the court found that a company's hiring and promotion requirements, which required a high school diploma, had the effect of keeping black people unemployed because disproportionally fewer were able to meet the requirements.

74 See, in general, SARS *Memorandum on the objects of the Tax Administration Bill* (2011) 199; Rudnicki and De Jager "The voluntary disclosure programme" 2010 4(1) *Business Tax and Company Law Quarterly* 27–34.

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*,[75] Ackermann J ruled that ownership lies at the heart of the constitutional concept of property, with the result that the nature of the right to property and the property itself must enjoy the protection of section 25.[76] Croome argues that "property" must be given a wide meaning to also include the rights that a person may have that entitle him to benefits or other rights.[77] So, for example, a personal right to a salary at the end of the month constitutes "property", which must be afforded protection under section 25.[78] It must be noted that the potential to have interest and penalties remitted is not a personal right and cannot constitute "property" under the wide meaning of "property" as argued above. However, it can be argued that, where the circumstances in section 187(7) of the TAA are present and the SARS official refuses to remit interest unreasonably, the taxpayer is deprived of his property (money). This must be distinguished from a deprivation of the potential to apply for the remittance of interest.

It is common knowledge that money is a form of payment. Unless specific notes and coins are concerned – like antique notes and coins – one cannot take "ownership" of money.[79] However, while one cannot have ownership in commercial money, money can be the subject of a personal right. Van der Merwe, in the first reissue of *LAWSA*, supports the view that these personal rights constitute property in South African law, but that they do not constitute things for purposes of ownership.[80]

It must be noted that an infringement of the right to property is not restricted to an expropriation of property but rather any form of deprivation of property. Expropriation is but one form of deprivation of property. Accordingly, any interference with the use, enjoyment, the right of exploitation or any like right in respect of property comes down to a deprivation of property.[81] According to Ackermann J, the test is simple: If the deprivation limits section 25, and the infringement cannot be justified under section 36, the provision is unconstitutional.[82]

The imposition of taxes is a principle that is acceptable in a democratic society and ensures that the State has enough resources to fund expenditure to, among

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75 2002 4 SA 768 (CC).

76 *Idem* para 51.

77 Croome *Taxpayers' rights in South Africa* (2010) 18.

78 See also *National Credit Regulator v Opperman* 2013 2 SA 1 (CC), where the court included personal rights in the broader meaning of "property"; *Transkei Public Servants Association v Government of the Republic of South Africa* 1995 9 BCLR 1235 (Tk), where the court ruled that the right to a housing subsidy constitutes property; yet in *Chairman of the Public Service Commission v Zimbabwe Teachers Association* 1996 9 BCLR 1189 (ZS), the court ruled that an annual bonus that has not yet vested in the employee does not constitute property.

79 Van der Merwe "Things" in Joubert *et al LAWSA* (2001); *Woodhead Plant & Co v Gunn* 1894 11 SC 4; Thomas and Boraine "Ownership of money and the *Actio Pauliana*: *Commissioner of Customs and Excise v Bank Lisbon International Ltd* 1994 1 SA 205 (N)" 1994 *THRHR* 678–680; Pretorius "The *bona fide* purchaser of a Krugerrand" 2004 *SA MercLJ* 466.

80 Van der Merwe paras 204, 294–295. See also Pretorius 474.

81 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* paras 57–58.

82 *Ibid.*

others, realise the fundamental rights of every person in the country.[83] Therefore, in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*, Conradie J ruled correctly that the imposition of taxes is not an unfair deprivation of property.[84] The Constitutional Court confirmed this view, albeit *obiter*.[85] Croome notes that although taxes, in essence, deprive a person of property, such deprivation is generally lawful and does not violate the right to property.[86] He argues that a taxing measure that would cause undue hardship to taxpayers is unlikely to pass Constitutional muster.[87] Similarly, penalty and interest provisions that are reasonable, necessary, and justifiable in a democratic society to ensure that the revenue authority collects taxes due to it timeously do not amount to an unconstitutional deprivation of property.[88] In other words, the deprivation is not arbitrary. A logical and sufficient reason exists for the deprivation.[89] As explained above, while the imposition of penalties and interest does not amount to a deprivation of property, the unreasonable refusal by SARS to remit penalties and interest in accordance with the provisions of the TAA may amount to a deprivation of property. What is unreasonable differs from case to case. In my view, where the penalties and interest cause the taxpayer serious financial hardship that may have a ripple effect on a community financially dependent on the taxpayer, a refusal to remit at least part of penalties and interest is likely to constitute a deprivation of property.[90] Iles notes that a deprivation of property of a particular class or group of persons is likely to be perceived as an arbitrary deprivation of property.[91] Accordingly, it does not seem reasonable nor logical that interest cannot be remitted in the case of VDA taxpayers where the circumstances in section 187(7) of the TAA are also present. Again, it can be argued that VDA taxpayers benefit from the VDA provisions already and that they cannot merely remedy the tax default, without incurring any monetary penalty. In my view, it is not reasonable and logical to grant the non-VDA taxpayer the potential to remedy its tax default without incurring any penalties or interest while VDA taxpayers are not afforded the same benefit. For this reason,

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83 Rousseau *The social contract or principles of political right* (1762) translated by Cole (public domain); Blackman "The surprising relationship between taxes and charitable giving" (2015) *The Wall Street Journal* available at https://www.wsj.com/articles/the-surprising-relationship-between-taxes-and-charitable-giving-1450062191 (accessed on 03-04-2018); Alm, Mclelland and Schulze "Why do people pay taxes?" 1992 (48) *Journal of Public Economics* 21–38; Fjelstad, Schulz-Herzenberg and Sjursen "People's views of taxation in Africa: A review of research on determinants of tax compliance" 2012 *ICTD Working Paper 8* 8; Uslaner "Tax evasion, corruption, and, the social contract in transition" in Alm, Martinez-Vazquez and Torgler (eds) *Tax compliance* (2010) 175.

84 At 328.

85 Para 27.

86 Croome 22.

87 *Idem* 23.

88 *Idem* 58.

89 See *National Credit Regulator v Opperman* para 68; *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) paras 34–35.

90 See for example *Vuyisile Zamindlela Nondabula v Commissioner: South African Revenue Service*, where the court ruled that the application of the pay-now-argue-later principle must be relaxed where the application of the rule will cause the taxpayer to close business, and where an entire community is dependent on the continuation of that taxpayer's business. See also *X v CSARS* unreported case no. 13380 (27 January 2016) (JHB), where the court ruled that, while a R5 million penalty appears harsh to the ordinary taxpayer, it will not have a huge financial impact on the applicant's finances.

91 Iles "Property" in Currie and De Waal *The Bill of Rights handbook* (2005) 540.

section 229 of the TAA indirectly deprives a VDA taxpayer of its property.[92] Because the differentiation between VDA and non-VDA taxpayers is neither reasonable, nor logical, it is unlikely that the deprivation of the VDA taxpayer's property can be justifiable in a democratic society in terms of section 36 of the Constitution. Section 36(1)(d) specifically provides that the relation between the infringed right and the purpose of the infringement must be examined. In other words, if another less restrictive path[93] can be followed to achieve the same objectives, the more restrictive method or rule is not justifiable.[94] In the case of interest, a less restrictive way entails that SARS must be granted a discretion to remit interest in accordance with a rule-standard similar to the understatement penalty table.

3 3 Right to just administrative action

In terms of section 33 of the Constitution, the right to just administrative action entails that

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must –
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> (c) promote an efficient administration."

In the main, the right to just administrative action is subject to the existence of the power of an official to exercise an administrative task.[95] In other words, where an official does not have the power to exercise a discretion or to make a decision that affects the rights of a person, that person does not have a right of just administrative action against the said official. Section 229 of the TAA does not confer the power on SARS to remit interest in the case of a VDA taxpayer.[96] Accordingly, a VDA taxpayer cannot rely on the right to just administrative

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92 Note that the deprivation referred to here is the payment of interest itself and not the absence of a possibility to apply for remittance of interest.

93 S 36(1)(e).

94 See *National Credit Regulator v Opperman* para 76; see also *Prophet v National Director of Public Prosecutions* 2007 6 SA 169 (CC) where the court lists the factors to be considered as

> "(a) The relationship between the purpose of the deprivation and the person whose property is affected;
> (b) The relationship between the purpose of the deprivation, the nature of the property affected and the extent of the deprivation;
> (c) A more compelling purpose is required where the property rights involved are the ownership of land or corporeal movables;
> (d) The reasons should be more compelling as more incidents of ownership are affected;
> (e) Depending on the nature and extent of the rights affected, the test is one that comprises elements of rationality and proportionality, moving closer towards proportionality as the effects increase; and
> (f) The inquiry takes full account of the relevant circumstances of each case."

95 Hoexter "Administrative action" in Currie and De Waal 654–656.

96 See discussion of *Medtronic International v CSARS* above.

action where SARS refuses or fails to entertain an application by a VDA taxpayer for the remittance of interest. However, the fact that SARS is precluded by law not to consider such an application may in itself be an unjust administrative action on the part of the legislator. Hoexter argues that legislation that removes a person's right to just administrative action, or that does not provide for same can be challenged against the provisions of section 33 of the Constitution.[97] This is so when the legislation itself lacks rationality. Yet, law-making activities by a democratically elected legislature and properly promulgated by parliament are specifically excluded from the definition of "administrative action" as defined in PAJA.[98] This exclusion is based on the principle of separation of powers. In *Democratic Alliance v President of the Republic of South Africa*,[99] Yacoob ADCJ ruled that a decision cannot become rational simply because of the doctrine of separation of powers.[100] An irrational decision remains irrational, irrespective from which sphere of government the decision originates from.[101] In addition, PAJA must be interpreted in accordance with the principle that all legislation must be consistent with the Constitution.[102] Rautenbach correctly points out that, generally, the courts and jurists struggle to distinguish between actions or law that are arbitrary and those that are rational.[103]

In the case of section 229 of the TAA, the power to remit interest is simply not listed. In other words, the Act does not prohibit SARS to remit interest in the case of a VDA taxpayer expressly.[104] Rather, because it is not listed as a power of SARS, it is precluded. If Hoexter's argument is followed, section 229 of the TAA can be challenged on the basis that it lacks the necessary provision to grant SARS the power to remit interest in the case of a VDA taxpayer. This, of course, is a challenge in terms of section 33 of the Constitution and not in terms of PAJA. As pointed out above, there does not seem to be a logical or reasonable justification for the differentiation between VDA and non-VDA taxpayers in respect of the remittance of interest. Hence, the absence of the power to remit interest seems to be an irrational decision on the part of the legislator. In addition, because this causes a differentiation between VDA and non-VDA taxpayers for which no argument of good or legitimate cause can be brought forward, I doubt that the absence of the administrative power can be justified under the general limitations clause as a just limitation of the VDA taxpayer's right to just administrative action.

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97 Hoexter 648–649; see also *Minister of Health v New Clicks SA (Pty) Ltd* 2006 1 BCLR 1 (CC), where Chaskalson CJ found that administrative action includes legislative administrative action.

98 S 1(1)(dd) and (ee) of PAJA; See also *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC); *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374; *Nel v Le Roux NO* 1996 4 BCLR 592 (CC).

99 *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC).

100 *Idem* para 44.

101 *Ibid.* See also *Sanral v Cape Town City* 2017 1 SA 468 (SCA); *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC).

102 For this reason, Hoexter argues that the validity of the provisions of PAJA can be challenged by the rights afforded in s 33 of the Constitution (650); see also *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA).

103 Rautenbach 2012 *Litnet Akademies* 240.

104 It must be noted that the *Memorandum on the objects of the Tax Administration Bill* (2011) specifically mentions that the remittance of interest is not available for VDA taxpayers.

3 4 Right to access to the courts

Section 34 of the Constitution provides that –

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Essentially, section 34 secures three distinct rights. First, it creates the right to access to a court or tribunal.[105] Second, the courts or tribunals must be independent in adjudicating disputes.[106] Third, due process must be followed when adjudicating disputes.[107] Importantly, the dispute must be capable of being adjudicated by a suitable court or tribunal. In essence, any law that prevents or limits a person's right to access to a court or tribunal is inconsistent with the Constitution.[108]

Once a taxpayer has entered into a VDA with the Commissioner, the terms on which the VDA are entered into cannot be objected to or appealed against. Thus, a decision to remit penalties in accordance with the provisions of section 229 of the TAA is not subject to objection and appeal. However, note that the decision by the Commissioner to reject an application for VDA remains an administrative action subject to review in terms of PAJA.[109] Accordingly, once a VDA has been entered into, the taxpayer is effectively stripped of the right to have a dispute adjudicated by a court of law. First, this is so because the VDA serves as a binding settlement of the dispute between the taxpayer and SARS. Second, the voluntary disclosure programme is primarily designed to settle disputes with defaulting taxpayers on terms favourable to the taxpayer to eliminate long and costly audits followed by long and costly litigation.[110]

In *Telcordia Technologies v Telkom*,[111] the Supreme Court of Appeal ruled that parties to a dispute may waive the right to access to a court provided that such waiver does not take away any other right enshrined in the Constitution or that the waiver would not be *contra bonos mores*.[112] In the minority judgment in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews*,[113] Kroon AJ agreed with the judgment in *Telcordia*. The majority judgment by O'Regan ADCJ disagreed with *Telcordia* that the right to access to the courts can be waived. Rather, the parties can agree not to exercise the right to access to the courts.[114]

Our common law has long recognised the right of an aggrieved party to resolve disputes through adjudication in a court of law. In *Schierhout v Minister of Justice*,[115] the then Appellate Division ruled that a clause in a contract

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105 Iles "Access to courts" in Currie and De Waal 711.
106 *Ibid.*
107 *Ibid.*
108 Budlender "Access to courts" 2004 *SALJ* 339. See also *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC); *Moise v Greater Germiston Transitional Local Council* 2001 4 SA 491 (CC) and *De Lille v Speaker of the National Assembly* 1998 3 SA 430 (C).
109 The decision to reject a VDA application is not subject to objection and appeal. However, where a VDA is approved and later withdrawn, the decision to withdraw the VDA is subject to objection and appeal; see s 231(2) of the TAA. See also Visser "When voluntary disclosure is not voluntary" 2019 November *Tax Breaks* 3–4.
110 See, in general, SARS *Memorandum on the objects of the Tax Administration Bill* (2011) 199; Rudnicki and De Jager 2010 4(1) *Business Tax and Company Law Quarterly* 27–34.
111 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA).
112 *Idem* para 48.
113 *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC).
114 *Idem* para 216.
115 *Schierhout v Minister of Justice* 1925 AD 417.

preventing an aggrieved party to approach a court for the adjudication of a dispute is invalid and contrary to public policy.[116] Yet, in *Napier v Barkhuizen*,[117] the Supreme Court of Appeal correctly notes that

> "... intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."[118]

On appeal in *Barkhuizen v Napier*,[119] the Constitutional Court ruled that freedom of contract must be given less weight when the limiting clause is so unreasonable that it vulgarises public policy.[120]

The voluntary disclosure application can be equated to an offer by the taxpayer to SARS to enter into an agreement of settlement of debt. Once the offer is accepted by SARS, SARS lays down the terms and conditions of the agreement in accordance with the powers granted to it in terms of section 229 of the TAA. A natural outflow of the settlement agreement is that neither of the parties will lodge a dispute in a court of law. This is an obvious result of and the main purpose of entering into a settlement agreement. Generally, settlement agreements are entered into voluntarily, and they are based on mutual consensus. In the case of the VDA, the taxpayer applies for relief under the voluntary disclosure programme voluntarily. However, the terms and conditions of the VDA are prescribed by law. Consensus is visibly absent. Can it then be said that the parties agreed voluntarily not to exercise their rights to access to the courts? Of course, it can be argued that the taxpayer who does not wish to relinquish his rights to access to the courts will simply not enter into a VDA with SARS, but will rather pursue the dispute through objection and appeal. Accordingly, it can be argued that consensus exists the moment the taxpayer applies for voluntary disclosure relief. This is so because all the terms and conditions of the VDA, save for the agreement on the amount of tax payable, are known to the taxpayer before he applies. It could just be that the majority taxpayers who apply for voluntary disclosure relief do so without the help of legal representation.[121] Their fear of the might of the law puts them at a disadvantage compared to SARS, which has an entire voluntary disclosure team –consisting of various experts – at its disposal. That said, it is not a requirement that parties to an agreement must be on an equal footing.

Granting the taxpayer the right to object to or appeal against the terms of a VDA defeats the very purpose of the voluntary disclosure programme. Accordingly, the VDA, as a settlement agreement between the taxpayer and SARS, does not limit the right to access to courts unfairly and does not offend public policy. It is obvious that the limitation of the VDA taxpayer's right to access to the courts is both rational and reasonable.

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116 *Idem* 424. See also *Administrator, Transvaal v Traub* 1989 4 SA 729 (A) 764E; *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 1 SA 617 AD 621F–G; *Stokes v Fish Hoek Municipality* 1966 4 SA 421 (C) 423H–424C; *Gibbons v Cape Divisional Council* 1928 CPD 200; and *Benning v Union Government (Minister of Finance)* 1914 AD 31.

117 *Napier v Barkhuizen* 2006 4 SA 1 (SCA).

118 *Idem* para 13. This passage was approved in the majority judgment by Ngcobo J in *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 71.

119 *Barkhuizen v Napier* 2007 5 SA 323 (CC).

120 See minority judgment by Moseneke DCJ in *Barkhuizen v Napier* para 96.

121 Visser 2019 November *Tax Breaks* 3–4.

3 5 Limitation of the VDA taxpayer's rights

The existence of a general limitation clause in section 36 of the Constitution does not mean that the rights enshrined in the Bill of Rights can be limited willy-nilly.[122] The limitation must serve a purpose that most people regard as compellingly important.[123] Furthermore, there must not exist any other less-restrictive method of achieving that overwhelming purpose.[124] Two basic requirements must be met. The limitation must be done in terms of a law of general application, and the limitation must be justifiable in an open and democratic society based on human dignity, equality and freedom.[125] The requirement of law of general application entails that the law must not apply to specific groups of persons only and it must not apply arbitrarily.[126] While it can be argued that sections 226 to 233 of the TAA applies to a specific group of taxpayers (VDA taxpayers), it does not remove the fact that the legislation (the TAA) is law of general application.[127] In addition, the criteria for the application of these provisions are not arbitrary. In *S v Makwanyane*, Chaskalson P explains that a justifiable limitation translates to a series of tests. This includes determining the importance of the limitation in an open democratic society;[128] the nature of the right infringed; the extent and success of the limitation in reaching the objectives of an open and democratic society; and whether the objectives can be achieved by way of a less restrictive means.[129] In short, the rights of the individual must be weighed against the purpose of the limitation (public policy), and there must exist a valid, rational, and legitimate reason why the values of the limitation outweigh the values of the rights infringed.[130]

As I have pointed out above, the purpose of the voluntary disclosure programme is to allow SARS to reach a settlement with defaulting taxpayers to avoid long and costly audits followed by long and costly dispute resolution. Morally, it is rational to argue that a defaulting taxpayer cannot simply come forward and expect not to be penalised for the default some way or another. Therefore, the powers of SARS to remit understatement penalties in the case of VDA taxpayers must be aligned with Columns 5 and 6 of the understatement penalty table. However, the differentiation between the VDA and non-VDA taxpayer in respect of the remittance of interest cannot be justified. As explained

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122 Currie and De Waal 151.

123 *Ibid.* See also Meyerson *Rights limited* (1997) 36–43.

124 *S v Manamela* 2000 3 SA 1 (CC).

125 S 36(1) of the Constitution.

126 Currie and De Waal 157. See also *S v Makwanyane* 1995 3 SA 391 (CC), where the court rejected the argument that s 277 of the Criminal Procedure Act 51 of 1977 is not a law of general application because it does not apply to all citizens of South Africa.

127 See Cheadle "Limitation of rights" in Cheadle, Davis and Haysom para 30.4.

128 See also *Freedom of Religion South Africa v Minister of Justice and Constitutional Development (Global Initiative to End All Corporal Punishment of Children as Amici Curiae)* 2019 11 BCLR 1321 (CC), where the court considered the importance of chastising children as a manner of enforcing discipline.

129 *S v Makwanyane* para 104; See also *Brümmer v Minister for Social Development* 2009 6 SA 323 (CC); Currie "Balancing and the limitation of rights in the South African Constitution" (2010) *Southern African Public Law* 411.

130 See Currie 408 where he criticises the balancing act as *quasi*-scientific, bordering arbitrariness, rather subjective, and that it does not take the values of human rights seriously. See also Rautenbach "Proportionality and the limitation clauses of the South African Bill of Rights" 2014 *PELJ* 2234.

above, the result of the differentiation is irrational and cannot be explained or justified through proper reason.

While the payment of interest and penalties on taxes due does not infringe on the right to property arbitrarily, the differentiation in treatment between VDA and non-VDA taxpayers results in the arbitrary infringement of the right to property in the hands of the VDA taxpayer. Again, no legitimate or rational reason exists why interest cannot be remitted in the case of the VDA taxpayer. Surely, a less restrictive method of "penalty" can be applied to achieve the same objective. I recommend that an interest table similar to the understatement penalty table must apply for both VDA and non-VDA taxpayers. I recommend the following table:

Behaviour	*Percentage of interest to be remitted*			
	Standard case	Obstructive taxpayer or repeat offender	VDA taxpayer: VDA approved while audit pending	VDA tax-payer: No audit pending
Bona fide taxpayer or default not because of fault of taxpayer	100%	25%	50%	100%
Reasonable care not taken	50%	0%	25%	50%
No reasonable grounds for tax position taken	10%	0%	0%	10%
Impermissible avoidance arrangement	5%	0%	0%	5%
Gross negligence	0%	0%	0%	0%
Intentional tax evasion	0%	0%	0%	0%

This table is likely to minimise litigation based on the "fairness" of the Commissioner's decision to remit interest or not. In the case of the last two columns, the remittance of interest must not be subject to objection and appeal, because this would defeat the purpose of the voluntary disclosure programme. Of course, in all other cases, the classification of the behaviour remains an exercise of a discretion by the Commissioner and must be subject to objection and appeal.

4 CONCLUSION

In this article, I argue that the TAA differentiates between VDA and non-VDA taxpayers in respect of the remittance of interest. The *Memorandum on the objects of the Tax Administration Bill* is clear that the legislator does not grant SARS the power to remit interest in the case of VDA taxpayers.[131] Nevertheless,

131 SARS *Memorandum on the objects of the Tax Administration Bill* (2011) 199.

it is obvious that no legitimate and reasonable grounds can be brought forward for the differentiation in treatment. I believe that section 229 of the TAA must be amended to include the power of SARS to remit interest in the case of a VDA taxpayer in accordance with the interest remittance table suggested in this article.