The law of obligations, tax debts, insolvency, and the dissipation of assets to the prejudice of the *fiscus*

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OPSOMMING

Die verbintenisreg, belastingskulde, insolvensie, en die verkwisting van bates tot nadeel van die *fiscus*

Artikel 183 van die Wet op Belastingadministrasie 28 van 2011 maak voorsiening dat die Suid Afrikaanse Inkomstediens ("SAID") enige person wat 'n belastingpligtige bystaan om van sy bates ontslae te raak, wat die gevolg het dat die belastingpligtige nie sy belastingskuld kan nakom nie, gesamentlik en afsonderlik saam met die belastingpligtige verantwoordelik kan hou vir die belastingpligtige se belastingskuld. In hierdie artikel ondersoek ons wat "belastingskuld" vir doeleindes vir die vestiging van die derde party aanspreeklikheid kragtens artikel 183 daarstel. Ten einde hierdie vraag te beantwoord, ondersoek ons die definisie van "belastingskuld" en of die belastingskuld opeisbaar moet wees, en, indien wel, wanneer die belastingskuld opeisbaar moet wees. Hiervoor oorweeg ons die verbintenisreg, die belastingbetaler se aanspreeklikheid vir sy/haar eie belasting-skuld en dan derde-party aanspreeklikheid ten opsigte van die belastingskuld. Hierdie bydrae word verder verryk met 'n bepreking van vernietigbare vervreemdingsbepalings kragtens die Insolvensiewet 24 van 19836 en die *actio Pauliana.*

1 INTRODUCTION

Section 183 of the Tax Administration Act[1] provides that any person who knowingly assists a taxpayer in dissipating that taxpayer's assets in order to obstruct the collection of a tax debt of that taxpayer, is jointly and severally liable with that taxpayer for the tax debt to the extent that the person's assistance in dissipating the assets reduces the assets available to be sold in execution to pay for the tax debt.

Considering this provision, the following pertinent question arises: What constitutes a tax debt that triggers the liability of a person who knowingly dissipates the assets of a taxpayer? To answer this question, we consider the

1 Act 28 of 2011 (TAA).

definition of a "tax debt" and whether the "tax debt" needs to be due or payable, and, if so, when does it need to be due or payable? For the evaluation pertaining to "due or payable", we consider the law of obligations, the position regarding a taxpayer being held liable for his/her own tax debt, and third-party liabilities regarding tax debts. This article then turns to a discussion of the impeachable transaction provisions in the Insolvency Act[2] as well the scope and application of the *actio Pauliana* (the common-law action for setting aside impeachable transactions). The purpose of the insolvency component is to draw an analogy between the rights of a common creditor in civil proceedings and that of SARS where the debtor (the taxpayer in this case) entered into transactions for the dissipation of assets (or transactions which has the effect that the debtor can no longer pay their debt) which prefers one creditor above another or which is to the detriment of the creditor(s).

2 TAX DEBT

2.1 What is a tax debt?

Before it can be determined when a tax debt comes into existence, when it is due or payable, and when is it extinguished, it must be determined what constitutes a tax debt.

A tax debt is defined in section 1 of the TAA as an amount referred to in section 169(1) of the TAA. Section 169(1) provides that "an amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund". Three requirements exist for an amount to constitute a tax debt: it must be an amount of tax, the amount must emanate from a tax Act, and the amount must be due or payable. In respect of the first requirement, Steyn *et al* define a tax as a compulsory payment that is imposed on citizens to raise revenue to fund the state's general expenditure for the benefit of the society as a whole.[3] Although penalties are also compulsory payments, their primary purpose is to ensure tax compliance rather than to raise revenue for the benefit of society.[4] Interest, charged when a taxpayer is in *mora* in terms of Chapter 12 of the TAA, compensates the South African Revenue Service (SARS) for the loss of money as a result of the actions of the taxpayer.[5] Accordingly, penalties and interest do not constitute tax debts in the strict sense of the word. However, for the purpose of the TAA, "tax" includes penalties and interest.[6] As such, a tax debt, for the purpose of the TAA, includes penalties and interest raised and levied in terms of any tax Act.

In relation to the requirement that the tax debt must emanate from a tax Act, it must be noted that section 1 of the TAA defines a tax Act to be the TAA, or an Act, or a portion of an Act, referred to in section 4 of the South African Revenue

2 24 of 1936.

3 Steyn, Franzsen & Stiglingh "Conceptual framework for classifying government imposts relating to the tax burden of individual taxpayers in South Africa" 2013 *International Business and Economics Research Journal* 239 241.

4 Meyer & Van Zyl "Once, twice, three times a penalty, and charging interest on a tax debt" 2021 *THRHR* 588 596–597. The TAA provides for understatement penalties (ch 16) and administrative and non-compliance penalties (ch 15).

5 *Idem* 591–592.

6 See the definition of "tax" in s 1 of the TAA.

Service Act.[7] Section 4 of the SARS Act refers to national legislation listed in Schedule 1 of the SARS Act.[8] Schedule 1 lists, *inter alia*, the Income Tax Act[9] and the Value Added Tax Act.[10]

Section 169(3) of the TAA provides that SARS is the creditor for the purpose of the recovery proceedings relating to a tax debt. This is an important provision, which requires further scrutiny as regards value-added tax ("VAT"). In the case of VAT, the person who bears the burden of the tax is the consumer who pays VAT. The VAT vendor simply collects the VAT from the consumer on behalf of SARS. It can be argued that the VAT vendor, who is regarded as the taxpayer,[11] is a collecting agent on behalf of SARS, and a mere custodian of SARS' money. Accordingly, it could be argued that VAT does not constitute a tax debt for which SARS can be the creditor; rather, SARS is the owner of the money. This was argued in *Director of Public Prosecutions, Western Cape v Parker.*[12] In *Metcash Trading Ltd v Commissioner, South African Revenue Service,* the court ruled that VAT vendors are "in a sense involuntary tax-collectors".[13] Section 40 of the VAT Act, which has since been repealed, described VAT as a debt to the state. Section 40 of the VAT Act has been replaced by section 169 of the TAA which specifically provides that SARS is a creditor in respect of the collection of a tax debt and that VAT is a tax debt. In *Parker*, Pillay JA ruled that to find that the VAT Act creates a relationship of trust where the vendor is a mere collecting agent for money belonging to SARS would require an innovative approach for which the VAT Act read with the TAA simply does not provide.[14]

This ruling must be supported for the following reasons: A VAT vendor is entitled to set off input VAT incurred in making taxable supplies from the output that arises from the supply of goods and services. Therefore, the VAT collected is not necessarily the amount owed to SARS. This settlement of inputs against outputs occurs when the VAT vendor submits a VAT self-assessment. The self-assessment may result in an amount due to SARS (when the VAT outputs exceed VAT inputs), or an amount due to the VAT vendor as a VAT refund (when the VAT inputs exceed the VAT outputs). Put differently, a set-off of output and input VAT is required before the VAT liability or VAT refund is created.

The third requirement of a "tax debt" – an amount that is due or payable – is discussed in the next section.

2.2 When is a tax debt due or payable?

To evaluate what is meant by the required "due or payable" for a tax debt, we first reflect on the law of obligations before turning to the meaning of "due or payable" in the context of taxation.

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7 Act 34 of 1997 (SARS Act).

8 Important to note is that taxes that are levied at provincial and municipal level are excluded.

9 Act 58 of 1962.

10 Act 89 of 1991 (VAT Act).

11 See s 28 of the VAT Act.

12 *Director of Public Prosecutions, Western Cape v Parker* (103/14) [2014] ZASCA 223 (12 December 2014).

13 *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 1 SA 1109 (CC) para 17.

14 *Parker* para 160.

2.2.1 *The birth and death of a legal obligation*

The law of obligations is, according to Gaius, concerned with the action one has against another person who is under an obligation either by reason of contract or delict to perform to that person.[15] In other words, it is concerned with a *ius in personam* for an obligation that has become due and enforceable. The principal sources of obligations are contract, delict, and enrichment.[16] A legal obligation must be distinguished from the wider sense of the word "obligation" which can include the moral duties persons share with each other.[17] Generally, the law stipulates in which cases a legal obligation exists and in which cases not. In the case of a legal obligation, the law provides for machinery by which one person in whose favour the obligation exists (the creditor) may enforce the legal obligation against the other person (the debtor) for whatever is owed to the creditor.[18] For an obligation to come into existence, there must be at least one creditor and one debtor.[19] Moreover, the obligation must be determined or determinable, lawful, and objectively possible.[20] Yet, the mere existence of an obligation does not mean that the obligation is enforceable. An obligation becomes enforceable when the creditor is entitled to claim performance and when the debtor is under an obligation to perform to extinguish the obligation. In the case of contract, the parties, generally, agree on the date of performance. Where no time of performance is set, the debtor must perform when it is reasonable.[21] In *Cardoso v Tuckers Land and Development (Pty) Ltd*,[22] the court ruled that it is trite law that where the parties do not fix a time of performance in the agreement, the law will imply a term that the performance must take place immediately or within a reasonable time.[23]

In the law of contract, performance is due in three instances. In the first instance, by operation of law (*mora ex lege*).[24] Secondly, by the terms of the contract (*mora ex re*).[25] Thirdly, by demand duly made by the creditor (*mora ex persona*).[26] Where a contract stipulates the date of performance, *mora ex re* arises from the contract itself and no demand is required to put the debtor in *mora*.[27]

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15 Gaius *Institutiones* 4 2.
16 Harms "Obligations" 2022 *LAWSA* para 218.
17 *Idem* para 219.
18 Christie & Bradfield *Christie's law of contract in South Africa* (2022) 4.
19 Harms para 223.
20 *Ibid.*
21 Voet *Commentary on the Pandects* 46.3.12.
22 [1981] 4 All SA 121 (W).
23 126.
24 Christie & Bradfield 624.
25 *Ibid.*
26 See also *Nel v Cloete* [1972] 4 All SA 573 (A); *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2017 12 BCLR 1562 (CC); *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* [2014] ZASCA 46 (SCA); *Kragga Kamma Estates CC v Flanagan* [1995] 1 All SA 486 (A); *Johannesburg City Council v Norven Invests (Pty) Ltd* [1993] 1 All SA 338 (A); *Ver Elst v Sabena Belgium World Airlines* [1983] 2 All SA 51 (A); Christie & Bradfield 630–633.
27 *Cohen v Haywood* [1948] 3 All SA 210 (A); *Legogote Development Co (Pty) Ltd v Delta Trust and Finance Co* [1970] 2 All SA 269 (T); *Trustees Mitchell's Plain Islamic Trust v Weeder* [2001] 2 All SA 629 (C); *Scoin Trading (Pty) Ltd v Bernstein NO* [2011] 2 All SA 608 (SCA);

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It is sometimes necessary to calculate the time of performance. For example, when does "seven days from Friday" expire? Christie and Bradfield suggest that, before turning to recognised methods of computing time, the common intention of the parties must be determined.[28] In this regard, common practice that applies in the relevant business sector may be indicative. For example, in the banking industry, where the last day for payment falls on a Sunday or public holiday, payment may be made on the next business day following the Sunday or public holiday.[29] Where the common intention of the parties cannot be determined, Christie and Bradfield suggest that, in the absence of special circumstances justifying a departure from the general rule, the civil method of computation must apply.[30] This means that the day on which the period begins is counted, but the last day is excluded.[31] Importantly, Christie and Bradfield opine that even where the contract stipulates that the creditor must give the debtor notice to remedy the breach, the debtor is in *mora ex re* when the time for performance as stipulated in the agreement occurs as opposed to being *mora ex persona*.[32] This is because the reasonableness of the notice, as required for *mora ex persona*, is not required in these cases.[33]

Where the contract does not state a time of performance, and immediate performance is impossible and not contemplated, the creditor must put the debtor in *mora* by issuing a notice of demand.[34] In *Mackay v Naylor*,[35] Mason J ruled that where the time of performance is not set, it is enforceable forthwith.[36] Yet, this general rule is subject to reasonableness in that the demand cannot defeat the objects of the contract or allow insufficient time for performance.[37] Whether the demand allows sufficient time depends mostly on the circumstances.[38] As a tax debt arises from an obligation created by law in terms of a relevant tax Act, the rules pertaining to contractual *mora* do not find direct application. In the case of

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Land and Agricultural Development Bank of SA v Ryton Estates (Pty) Ltd 2013 6 SA 319 (SCA).

28 Christie and Bradfield (2022) 626.

29 *National Bank of SA Ltd v Leon Levson Studios Ltd* 1913 AD 213.

30 Christie & Bradfield 626.

31 See, generally, *National Bank of SA Ltd v Leon Levson Studios Ltd* 1913 AD 213; *Holmes v North Western Motors (Upington) (Pty) Ltd* 1968 4 SA 198 (C).

32 Christie & Bradfield 627.

33 *Ibid.* See also *Kabinet van die Oorgangsregering vir die Gebied van Suid-Wes Afrika v Supervision Food Services (Pty) Ltd* 1989 1 SA 967 (SWA); Vambe *A comparative analysis of cancellation, discharge and avoidance as a remedy for breach of contract in South African Law, English Law and the Convention for International Sale of Goods* (LLM dissertation, University of South Africa 2016) 13–14.

34 See *Breytenbach v Van Wijk* 1923 AD 541 549.

35 1917 TPD 533.

36 537.

37 *Mackay v Naylor* 1917 TPD 533 537–538.

38 The factors which may be considered to determine if sufficient time was allowed are, *inter alia,* (a) the intention of the parties as contemplated in the agreement; (b) the nature of the performance and difficulties associated with performance of that nature; (c) obstacles and delays that are contemplated by the parties; (d) the prompt, appropriate and diligence on the part of the performing party; (e) the commercial and other interests of both parties, and (f) the period between conclusion of the agreement and the giving of notice. See also *Nel v Cloete* 1972 2 SA 150 (A); *St Martin's Trust v Willowdene Landowners (Pty) Ltd* 1970 3 SA 132 (W).

a tax debt, *mora* arises by law. The statutory provisions set out when the tax debt exists, when it becomes due or payable, and when it extinguishes. Thus, in the case of a tax debt, *mora ex lege* applies. Accordingly, the "birth and death" of a tax debt is discussed below.

2.2.2 *The birth and death of a tax debt in general*

A tax liability consists of three stages: a triggering event, determining the tax liability, followed by the obligation to pay the outstanding tax.[39] The triggering event depends on the specific type of tax. For income tax, taxable income must be received by, or it must have accrued to the taxpayer in the relevant year of assessment.[40] For VAT, the triggering event is either when a vendor supplies goods or services in the course or furtherance of any enterprise,[41] when goods are imported into South Africa,[42] or when services are imported into South Africa.[43] Once a triggering event has occurred there is a tax obligation, but it is not yet enforceable.[44]

Generally, the second stage – determining the tax liability – requires an assessment.[45] Here it is important to draw a distinction between a self-assessment by the taxpayer and an assessment made by SARS. The former is done when a tax Act requires a taxpayer to submit a tax return which contains "a determination of a tax liability".[46] An example of where assessment occurs by way of self-assessment is VAT.[47] In turn, in the case of income tax, SARS makes the assessment.[48]

An assessment requires more than the mental process of determining the tax liability. Rather, the "visual representation by words and figures of that mental process" is required,[49] so that there are "outward manifestations" of the mental process to determine the tax liability.[50] In addition to a written determination, in

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39 Fritz *An appraisal of selected tax-enforcement powers of the South African Revenue Service in the South African constitutional context* (LLD thesis, University of Pretoria 2017) 152–153.

40 S 5(1) of the Income Tax Act 58 of 1962 ("the ITA").

41 S 7(1)(*a*) of the Value-Added Tax Act 89 of 1992 ("the VAT Act").

42 S 7(1)(*b*) of the VAT Act.

43 S 7(1)(*c*) of the VAT Act. S 1 of the VAT Act defines "imported services" as "a supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies".

44 *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 56 SATC 91 (A) 114. See also the minority judgment in *C:SARS v Medtronic International Trading SARL* (456/2021) [2023] ZASCA 20 (3 March 2023) para 69 where Goosen AJA ruled that in the absence of "an assessment, liability, and the concomitant duty to pay, do not arise, even though at law the underlying tax obligation subsists".

45 S 1 of the TAA defines "assessment" as "the determination of the amount of a tax liability or refund, by way of self-assessment by the taxpayer or assessment by SARS". Croome and Olivier *Tax Administration* (2015) 236 point out that an income tax liability may come about without an assessment. This would be the case when the employer is liable to pay over the employees' tax as part of pay-as-you-earn.

46 S 91(2) of the TAA.

47 S 28(1) of the VAT Act.

48 Theron *Practical guide to handling tax disputes* (2020) 37.

49 *Irving & Johnson (SA) Ltd v Commissioner for Inland Revenue* 14 SATC 24 28.

50 *Singh v CSARS* 2003 4 SA 520 (SCA) para 15.

instances of an assessment by SARS, SARS must also provide a notice of assessment, which contains the date of the assessment, the tax period in respect of which the assessment is made, and the date for paying the assessed amount.[51] The purpose of this notice of assessment is to enable informed engagement between SARS and a taxpayer.[52]

The third stage of tax liability is when the tax liability becomes outstanding, and the taxpayer has an obligation to pay "by the day and at the place notified by SARS, the Commissioner by public notice, or as specified in a tax Act".[53] When the date specified has arrived, the taxpayer has a tax debt that is due and payable as the taxpayer is then in *mora ex lege*.

The mere fact that a taxpayer might be dissatisfied with the amount that has been determined with the assessment in stage two, does not mean that the tax liability cannot become enforceable. This is the case as, normally in terms of section 164(1) of the TAA, the payment obligation and SARS' right to proceed with its enforcement are not suspended pending an objection or appeal. This is commonly referred to as the "pay now argue later" principle. If SARS decides to suspend the payment obligation pending the dispute resolution process, the enforcement of the taxes is placed on hold.[54] Nonetheless, it remains an outstanding tax debt and only if the dispute is resolved in favour of the taxpayer would this change. In other words, when the dispute is resolved in favour of the taxpayer, the tax debt either falls away or it is reduced.

In relation to the three stages, the Supreme Court of Appeal recently held that even though there might in law be an underlying tax obligation (triggering event), the tax liability and the related payment arise only when an assessment has been issued.[55] The court emphasised the importance of an assessment:

> "Important consequences attach to the assessment process. It is the mechanism by which a tax is levied or imposed. It renders the tax debt payable. It establishes liability for the payment of penalties, where imposed, and interest. In the latter case the assessed liability is the foundation upon which the calculation of interest occurs. As stated above, in the absence of an assessment a tax debt is not payable."[56]

The important role assessments play in tax is also emphasised by the fact that when the collection of taxes might be in jeopardy, section 94 of the TAA provides for jeopardy assessments. With a jeopardy assessment, SARS may issue an assessment event before a return is due, when necessary "to secure the collection of tax that would otherwise be in jeopardy".[57] Thus, even when it might be problematic to collect taxes, a determination (assessment) is still required.[58]

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51 S 96(1) of the TAA.

52 Fritz "*Nondabula v Commissioner: SARS* (2018 (3) SA 541 (ECM) (27 June 2017)) 'Victory' for taxpayer after SARS fails to fulfil its duties" 2019 *De Jure* 181 182.

53 S 1 read with s 162(1) of the TAA.

54 In terms of s 164(2) of the TAA, a taxpayer may request a suspension of payment of an assessed subject to dispute resolution. A senior SARS official has a discretion to suspend this payment obligation and needs to consider the factors listed in s 164(3) of the TAA.

55 *Medtronic International Trading* para 69.

56 Para 84.

57 S 94(1) of the TAA.

58 SARS *Short guide to the Tax Administration Act, 2011 (Act No. 28 of 2011)* (2018) 45.

Another weapon in SARS' arsenal when it anticipates a problem to collect taxes is obtaining a preservation order. This order is obtained "to prevent any realisable assets from being disposed of or removed which may frustrate the collection of" taxes.[59] Interestingly, it appears that SARS may apply for such a preservation order in the absence of there being an assessment to establish the tax liability. This is so, as section 163(1) of the TAA facilitates the preservation of assets to ensure the collection of a "tax that is due or payable or the official on reasonable grounds is satisfied *may be* due or payable".[60] As indicated earlier, a tax becomes due or payable only when it has reached the third stage, which necessitates that the second stage of tax liability, issuing an assessment, must have occurred. The phrase "*may be* due or payable" opens the door for a preservation order to be obtained when something short of an assessment has occurred.[61] In this respect, the court in *C:SARS v Hamilton Holdings (Pty) Ltd* indicated that

> "the very premise of the section and the utility of the preservation order is that the true tax liability is unknown and remains to be determined. The officials can, on the basis of the fragmentary information available, at best make an estimate, and self-evident practicality dictates that the estimate should be generous rather than conservative because the purpose is to ensure that all due tax shall be collected".[62]

In contrast, in the case of an application for a repatriation order in terms of section 186 of the TAA, it is a requirement, amongst others, that the taxpayer must have an outstanding tax debt. In *South African Revenue Service v Angelo Agrizzi*,[63] Basson J confirmed that for the purpose of a repatriation order, an "outstanding tax debt" is not akin to a "tax debt" as referred to in section 169(1) of the TAA.[64] Basson J further confirmed that an outstanding tax debt requires there to be an assessment and a notice of the assessment to have been issued.[65]

Whilst a preservation order can be granted without an assessment, it must be borne in mind that a preservation order preserves realisable assets – it is not a collection power.[66] Yet, a repatriation order is a tax collection power. Generally, the powers available to SARS to ensure the collection of taxes, being the judgment procedure,[67] instituting sequestration, liquidation or winding-up proceedings,[68] a repatriation order, and appointing a third party on behalf of a taxpayer,[69] require there to be an outstanding tax debt. Consequently, SARS can collect taxes only when assessed taxes have not been paid when they were supposed to be paid and the payment obligation has not been suspended in terms of section 164(1) of the TAA.[70] In other words, when the taxpayer is in *mora*.

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59 S 163(1) of the TAA.
60 Emphasis added.
61 See, eg, *Commissioner for South African Revenue Service v Tradex (Pty) Ltd* 77 SATC 121 para 7, where a preservation order was granted even though the exact amount of tax liability was unknown as the taxpayer had failed to file the required returns.
62 (2020/35696) [2021] ZAGPPHC 138 (1 March 2021) para 20.
63 [2023] 45008/2021 (GP).
64 Paras 33–36.
65 Paras 35–36.
66 *Tradex* para 74.
67 S 172 of the TAA.
68 S 177 of the TAA.
69 S 179 of the TAA.
70 See the definition of "outstanding tax debt" in s 1 read with s 162 of the TAA.

2.2.3 *Third-party liability for tax*

Does the importance that is placed on assessments apply only when dealing with the enforcement against a taxpayer as opposed to attracting consequences for third parties? This question was considered in *Commissioner for the South African Revenue Service v Wiese*[71] as regards sections 183 and 184 of the TAA. The former section provides that a third party who "knowingly assists in dissipating a taxpayer's assets" will be liable jointly and severally if the dissipation was done to obstruct the collection of a "tax debt". The latter section stipulates that SARS can use its ordinary recovery powers to collect this tax debt from such liable third party.

In *Wiese*, the meaning of *tax debt* in relation to third parties came under scrutiny, because, as the taxpayer argued, no assessment had been issued at the time that the dissipation occurred.[72] The court held that a third party, who knowingly assisted in the dissipation of assets which then frustrates the collection of taxes, can be held liable even if at the time of the dissipation there had not been an assessment.[73] To reach this conclusion, the court relied on the fact that section 1 of the TAA, which assigns a specific meaning to concepts used in the TAA, stipulates that the definitions should be assigned "unless the context indicates otherwise".[74] The court held that the fact that section 183 is situated in Chapter 11 part D, which is concerned with the liability and collection of tax from a third party, offers such a different context.[75] Considering the specific context of section 183, the court reasoned that there should be a departure of "tax debt" constituting a tax that is due or payable, as it would

> "lead to absurd consequences where, for instance, a party who knowingly assists the taxpayer dissipating assets where an assessment had been raised and a tax debt established due or payable to SARS, would be struck by the section, but if the same person assists the taxpayer, a day before the event that renders the tax debt due or payable, disposes of the assets in order to obstruct the collection thereof, would escape liability".

Thus, the court found that for purposes of sections 183 and 184 of the TAA, the tax debt can arise without an assessment.[76] Accordingly, the third party was declared to be jointly and severally liable with the taxpayer, as the third party obstructed the collection of tax debts even though there was not a "tax debt" as defined when the third party assisted in the dissipation.[77]

This judgment requires further discussion. Apart from the TAA specifically indicating that there can be a departure from the assigned definitions when "the context indicates otherwise", interpretation of legislation, especially in a constitutional dispensation, requires one to consider the context, irrespective of whether the words that require interpretation are clear and unambiguous.[78] Accordingly, it is important to consider the context of sections 183 and 184.

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71 Case number 15065/17 Western Cape Division, Cape Town (9 September 2022).
72 Para 35.
73 Paras 44–51.
74 Para 40.
75 Para 46.
76 Paras 44–51.
77 Paras 1, 90.
78 See *Jaga v Donges; Bhana v Donges NO* 1950 4 SA 653 (A) 662G–H, 664H; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC)

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As the court indicated in *Wiese*, the sections under consideration fall under Part D of Chapter 11. This part deals with the collection of tax debt from third parties. There are four other collection powers at SARS' disposal against third parties. In the first instance, SARS can make a third-party appointment where the third party becomes liable for the taxpayer's outstanding tax debt because the third party holds (or will hold) money of the taxpayer or owes (or will owe) money to the taxpayer.[79] Secondly, a shareholder can be held jointly and severally liable for an outstanding tax debt of a company if the company is wound up (excluding by means of an involuntary wounding up) and the shareholder received assets of the company within a year before the winding up. A shareholder can be held liable only if the tax debt existed (due or payable) at the time the shareholders received the assets, or if the tax debt would have existed if the company complied with its obligations.[80] Thirdly, a person can be held liable for the outstanding tax debt of a taxpayer, if the taxpayer, who is a "connected person"[81] transferred assets to the third party without adequate consideration.[82] In this instance, the liability is restricted to the amount of tax debt that existed, or would have existed, if the taxpayer complied with its obligations provided for in the tax Acts when the third party received the asset or the market value of the asset when it was transferred (less the market value of the consideration paid, if any).[83] Furthermore, this liability can arise only if SARS notified the third party of this liability within one year after the third party received the assets.[84] Fourthly, a person involved in the financial management of a taxpayer can be personally liable for the tax debt of a taxpayer if the person negligently or fraudulently failed to pay the outstanding tax debt.[85]

Observing these third-party collection powers, each one of them requires specific jurisdictional facts and an outstanding tax debt, which means that the tax debt should not have been paid on the required day.[86] The specific reference to "outstanding tax" emphasises the fact that tax collection should take place when the amount of liability has been determined and the taxpayer has not made payment by the required time – stage three has occurred.

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para 90; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18. However, also see *Capitec Bank Holdings Ltd v Carol Lagoon Investments 194 (Pty) Ltd* 2002 1 SA 100 (SCA) para 49 where the court cautioned against using the interpreting in-context approach (as envisaged in *Natal Joint Municipal Pension Fund v Endumeni Municipality*) as "an open-ended permission to pursue undisciplined and self-serving interpretations".

79 S 179 of the TAA. For further reading on this specific power, see Keulder & Legwaila "The constitutionality of third party appointments – before and after the Tax Administration Act" 2014 *THRHR* 53–71; Fritz "Third-party appointments by SARS – a look into the future" 2018 *THRHR* 85–94; Fritz "Plucking goose feathers with the least possible hissing – suggestions for tax collection in respect of third-party appointments" 2020 *THRHR* 111–116.

80 S 181 of the TAA.

81 See the definition of "connected person" in s 1 of the TAA read with the definition of "connected person" in s 1 of the ITA.

82 S 182(1) of the TAA.

83 S 182(2) of the TAA.

84 S 182(3) fo the TAA.

85 S 180 of the TAA.

86 See the definition of "outstanding tax debt" in s 1 of the TAA.

However, one must carefully scrutinise *when* the tax debt needs to be outstanding in terms of these provisions. Is it when the third-party liability provisions are invoked, or when the specific facts that trigger the relevant power have occurred?

In *SIP Project Managers (Pty) Ltd v C:SARS*,[87] SARS attempted a section 179 third-party appointment before the tax liability became due or payable. As SARS failed to serve a final demand notice on the taxpayer,[88] which is a prerequisite before appointing a third party, the court only made a few observations regarding the reference of "outstanding tax debt" in section 179 of the TAA. The court remarked that, as the notice (if the notice was validly served on the taxpayer) was issued before the tax debt became outstanding, it would have been premature.[89] Hence, there should have been an assessment of the tax liability and it should have become due or payable before the third-party appointment process could commence. The basis for interpreting "outstanding tax debt" in this way was attributed to the *contra fiscum* rule, which dictates that a phrase should be interpreted against SARS.[90]

Fritz also opines that the debt must be due or payable before the final demand letter can be issued – and consequently before the third-party appointment can be made. She remarks that the purpose of this final demand notice is to inform a taxpayer of the collection powers available to SARS when the taxpayer fails to pay the taxes, on the one hand, and demand payment "one last time", on the other hand.[91] It would be nonsensical for this demand notice to apply to instances where the debt is not yet due or payable. The use of the words "final" and "demand" points to the fact that a demand notice in terms of section 179(5) cannot simply serve as a reminder from SARS that a taxpayer should pay its taxes when it becomes due or payable in the future.[92]

Thus, if the prerequisite of appointing a third party in terms of section 179 – the final demand notice, necessitates taxes to be due or payable when the notice is issued, it would mean that at the time a third-party appointment is made the tax would also need to be due or payable.

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87 Case number: 11521/2020 Gauteng Division, Pretoria (30 April 2020).

88 The first step in appointing a third party on behalf of a taxpayer, unless it would prejudice the collection of taxes, is to issue a final demand for payment to the taxpayer. See s 179(5) of the TAA in this regard. See also Fritz "Prosecution of tax offences by the South African Revenue Service: Time to take stock" 2022 *THRHR* 233 237–239 for a discussion of the consequences if SARS fails to adhere to this first step.

89 *SIP Project Managers* para 21.

90 *Ibid.* Legwaila "Third-party appointments – may the tax collector please comply?" 2021 *TSAR* 136 143 criticises this reasoning as the *contra fiscum* rule applies when legislation is ambiguous. He points out that in *SIP Project Managers* there was no ambiguity regarding what "outstanding tax debt" meant.

91 Fritz "Old habits die hard – the South African Revenue Service's inability to comply with its own legislation – *SIP Project Managers (Pty) Ltd v C:SARS* case number: 11521/2020 Gauteng Division, Pretoria (30 April 2020)" 2021 *Obiter* 442–443. Unfortunately, neither the Explanatory Memorandum to the Tax Administration Law Amendment Bill, 2015 (which deals with the inclusion of s 179(5) of the TAA) nor the SARS *Short Guide to the Tax Administration Act, 2011 (Act 28 of 2011)* (2018) considers the purpose of the s 179(5) final demand notice.

92 Fritz 2021 *Obiter* 443.

As regards the liability of shareholders for debt as contained in section 181 and the liability of a connected person in terms of section 182, both sections require there to be a tax debt that "existed at the time of receipt of the assets *or would have existed had the company complied with its obligations*".[93] An example of where a tax debt would have existed if the taxpayer complied with its obligations, is when the taxpayer failed to self-determine its VAT liability. This inclusion of "would have existed had the company complied with its obligations" shows that the jurisdictional facts can be present without the tax debt being due or payable at that stage. Accordingly, these respective third parties can be held liable when only the first stage of the tax liability – the triggering event – has occurred when the assets were disposed. Thus, in the absence of a self-assessment and ensuing specific day to pay the outstanding tax at the time the dissipation occurred, the third-party liability occurs.

Moving to the fourth type of third-party liability, this liability can exist only if, due to the financial manager's[94] negligence or fraudulent behaviour, the taxpayer failed to pay its tax debt.[95] As the failure to pay debt can be established only when a taxpayer has failed to pay due or payable taxes by the stipulated date, it is clear that the tax debt must be outstanding before a financial manager can be held liable.

From the discussion of the other four third-party liability powers, it is apparent that in this part of the Act, the moment the outstanding tax debt should be established depends on whether specific jurisdictional facts require the tax debt to be outstanding at the moment the third party falls within the ambit of the specific third-party liability provision. Therefore, this part of the Act requires one to consider the specific workings of the relevant powers to determine when a third-party liability can be established.

In summary, Part D of Chapter 11 of the TAA provides for different requirements of a "tax debt" depending on the context. Consequently, there is merit in the court's approach in the *Wiese* matter of interpreting "tax debt" differently to its provided definition. The discussion that follows further illustrates the importance of context as regards a tax debt.

3 INSOLVENCY

This section considers debt in another area of law – insolvency – to provide some insight regarding "tax debts" and third-party liability. To have a proper understanding of third-party liability and insolvency, we first situate this discussion by highlighting the similarities of a debt/claim for insolvency purposes, and that of the life and death of a tax debt. Thereafter, we discuss third-party liability for the debt of an insolvent.

3.1 The birth and death of a debt for insolvency purposes

When a debtor is unable to satisfy the claims of the creditors, insolvency proceedings may be initiated, either by way of voluntary surrender, where the

93 See s 181(2)(*a*) and s 182(2)(*a*) in this regard.

94 In terms of s 180(*a*) of the TAA a person would be a financial manager if "he/she controls or is regularly involved in the management of the overall financial affairs of a taxpayer".

95 S 180 of the TAA.

debtor or debtor's agent applies to have the estate surrendered,[96] or compulsory sequestration, where the process is initiated by a creditor or creditors.[97] If a creditor wants to participate in this collective enforcement, she would need to prove a claim against the estate.[98] Generally, a valid claim requires the creditor, or representative, to prove a liquidated claim against the insolvent estate, which arose before the sequestration of the estate.[99] For the claim to be liquidated, the amount of the claim must be determined, which can be done in terms of an agreement, court order, or otherwise.[100]

Nonetheless, if the claim is unliquidated, and proof of it was tendered at a meeting of the creditors, once this claim has been compromised, admitted, or settled by a court, the claim would be a valid claim against the insolvent estate.[101] Importantly, determining the amount owed to the creditor cannot be delayed indefinitely. This is so as section 104(1) of the Insolvency Act provides that, generally, a person cannot share in the distribution of assets in an insolvent estate if he/she has not proven a claim (which requires a determined amount) by the time the trustee submits the liquidation account and distribution plan to the Master of the High Court.[102] After the account and plan has been submitted, the account must lie open for inspection by the creditors,[103] and thereafter the account is confirmed by the Master.[104] It is only at this stage that the trustee can proceed with paying the creditors who submitted valid claims.[105]

The stages of enforcing a valid claim against an insolvent estate are akin to the stages of a tax liability. In the first instance, there must be a triggering event that occurred. In this specific instance, the triggering event must have occurred before the sequestration, and it should give rise to a claim. Secondly, the amount of the claim must be determined. Thirdly, certain processes must be completed before a creditor would be able to receive payment with the allocation of proceeds.

3.2 Third-party liability in insolvency proceedings

Similar to the provisions in the TAA in respect of a tax debt, the Insolvency Act also provides for instances where a third party incurs liability. This is the case

96 S 4 of the Insolvency Act 24 of 1936 ("the Insolvency Act").

97 S 9 of the Insolvency Act.

98 In terms of s 98A(3) of the Insolvency Act an employee does not need to prove a claim for the preferent portion pertaining to its employment.

99 S 44(1) of the Insolvency Act.

100 *Kleynhans v Van der Westhuizen* NO 1970 2 SA 742 (AD) 749.

101 S 78(3) of the Insolvency Act. See *Rabinowitz v De Beer NO* [1983] 2 All SA 264 (T) 265 where the court indicated that an unliquidated claim is initially only noted and recorded at the first meeting of creditors. Only once the amount has been determined will the creditor have voting rights and a valid claim to share in the proceeds of the estate.

102 S 104(1) of the Insolvency Act. S 104(2) provides an exception where the Master can allow a creditor to share in the proceeds even when his/her claim was not proven prior to the distribution plan being submitted. This is when the Master "is satisfied that the creditor had a reasonable excuse for the delay in proving his[/her] claim". In terms of s 91 of the Insolvency Act the trustee needs to within six months after being appointed, submit a liquidation account and plan detailing how to distribute the proceeds.

103 See s 108 of the Insolvency Act.

104 In terms of s 112 of the Insolvency Act the confirmation will occur when there was no objection lodged by the creditors or if an objection was lodged, it has been resolved.

105 S 113(1) of the Insolvency Act.

when a third party benefitted from an impeachable transaction, which is provided for in sections 26, 29–31, and 34 of the Insolvency Act. In addition to these transactions being voidable,[106] the trustee may institute proceedings to recover the value of the property or right of the transaction that is voidable from the relevant third party.[107]

The first impeachable transaction that can attract third-party liability is a disposition without value provided for in section 26 of the Insolvency Act. This section provides:

> "Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –
>
> (*a*) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;
>
> (*b*) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:
>
> Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess."

From the wording of this section, the third-party liability can be invoked before or after the insolvency proceedings have commenced. Section 32 of the Insolvency Act provides that proceedings to set aside impeachable transactions in terms of sections 26, 29–30, or 31 of the Insolvency Act may be taken by the trustee. Where the trustee fails to take any such proceedings, it may be taken by *any creditor*[108] in the name of trustee upon that creditor indemnifying the trustee against the cost of such proceedings.[109] Importantly, section 32(1)(*b*) does not refer to a proven creditor. Rather, it refers to any creditor.

Section 26 is premised on the principle of *concursus creditorum*, which means that

> "[t]he sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."[110]

Although section 26 does not require the applicant to prove an intention to prefer one creditor above another, the applicant must still have *locus standi* to bring the application. That means, the applicant must have an interest in the setting aside of the disposition of the assets – for example, the trustee or creditor. In the case of the creditor applicant, a "triggering event" must be present – a debt must exist. It is not necessary for it to be a liquidated debt. In the context of a tax debt, for SARS to have *locus standi* to bring such an application, it must show that it has

106 Boraine "A perspective on the doctrine of voidable dispositions in South African insolvency law" 2000 *Int'l Insolvency Rev* 65 68 remarks that these transactions are set aside to avoid a situation where assets are disposed of to the detriment of the creditors as a collective.

107 S 32 of the Insolvency Act.

108 Own emphasis added.

109 S 32(1)(*b*) of the Insolvency Act.

110 *Walker v Syfret NO* 1911 AD 141 166.

an interest in the setting aside of the disposition. At that moment, it is not necessary for SARS to prove its claim against the estate. It is sufficient to prove that the disposition resulted in the taxpayer becoming insolvent.[111] To show *locus standi*, in our view, it is sufficient to prove that because of the disposition and subsequent insolvency, its rights against the taxpayer is prejudiced should it wish to proceed with debt collection proceedings against the taxpayer.[112] In this regard, we believe that it is sufficient for SARS to show that a tax debt (the triggering event) exists. It is not necessary for the tax debt to be due or payable; in other words, it is not necessary that an assessment or a notice of assessment has been issued.[113]

The second impeachable transaction that can attract third-party liability, a voidable preference,[114] is contained in section 29(1) of the Insolvency Act. This section provides that "[e]very disposition of his property made by a debtor not more than *six months before* the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets".[115]

From the wording of this section, it is apparent that a third party's liability can arise before the insolvency proceedings have commenced. It is not necessary for the debt to be due or payable. The mere existence of a debt is sufficient. In the context of a tax debt, subject to the indemnifying of the trustee as discussed above, SARS may rely on the section 29(1) voidable disposition provisions to set aside the dissipation of a taxpayer's assets by merely proving that the dissipation has the effect of preferring one creditor above another creditor (SARS). In this regard, we argue that it is not necessary for the creditor to have proven the existence of a claim (debt) that is due or payable. It is sufficient for the triggering event to have occurred. In the context of a tax debt, it is not necessary for an assessment or notice of assessment to have been issued for SARS to rely on section 29(1) of the Insolvency Act.

Similarly, the third type of impeachable transactions, undue preference under section 30 of the Insolvency Act points towards third party liability being triggered before insolvency proceedings commenced as it indicates that "[i]f a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is sequestrated *thereafter*, the court may set aside the disposition".[116]

The Insolvency Act also contains a provision, which is analogous to section 183 of the TAA, that holds a third party liable for participating in collusive

111 *Ibid.*

112 In this regard, see *Strydom NO v Snowball Wealth (Pty) Ltd* 2022 5 SA 438 (SCA) para 32 where the court explains the purpose of s 26 is "to prevent a person from impoverishing his estate by giving his assets away without receiving any present or contingent advantage in return".

113 Also see the discussion below in respect of the *actio Pauliana.*

114 For a discussion of the tax consequences associated with a voidable preference, see Legwaila & Fritz "The income tax position of a creditor on the insolvency and/or business rescue of a debtor" 2022 *SA Merc LJ* 297–299.

115 Emphasis added.

116 Emphasis added.

dealings before sequestration.[117] The collusive dealings provision requires there to be "a conniving together between two persons – in this case, the insolvent and the defendant – to practise a fraud on the creditors"[118] which prejudices the creditors or prefer one creditor above the others.[119] In the context of a tax debt, it is sufficient for SARS (as a creditor) to show the existence of a tax debt (triggering event) to rely on section 31 of the Insolvency Act to set aside collusive dealings. It is not necessary for an assessment to have been issued or notice of it to have been issued.

The third party can be considered to have colluded with the insolvent only if the third party knew that the transaction would result in prejudicing the insolvent's creditors.[120] Furthermore, the third party should have known at the time of the transaction that the insolvent's financial position was "hopeless".[121] Consequently, a concerted action must have taken place by the debtor and third party to defraud the creditors of the insolvent.[122]

Section 32(2) of the Insolvency Act further provides that "[a]ny person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate".

The compensation and penalty may be recovered in any action that was launched to set aside the collusive transaction. In the context of a tax debt, subject to indemnifying the trustee, SARS may recover compensation from colluding parties where the collusive dealings resulted in prejudice to the creditors or preferring one creditor above another. It is not necessary for the creditor who recovers such compensation and penalty to have a liquidated or proven claim against the estate. The mere existence of a debt (triggering event) is sufficient. In contrast with section 183 of the TAA, the compensation and penalties recovered in terms of section 31 of the Insolvency Act goes to the insolvent estate for the benefit of all the creditors.

Alternative to the provisions in the Insolvency Act, at common law, a creditor can set aside a transaction, aimed at defrauding the creditors, by the *actio Pauliana*. The creditor can rely on the *actio Pauliana* in cases where the debtor is sequestrated or liquidated, but also where there is no sequestration or liquidation.[123] To set aside a fraudulent dissipation of assets under the *actio Pauliana*,

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117 S 31(2) of the Insolvency Act.

118 *Finn's Trustees v Prior* 1919 EDL 133 137. Quoted with approval in *Gert de Jager (Edms) Bpk v Jones en McHardy* 1964 3 SA 325 (A) 330.

119 S 31(2) of the Insolvency Act.

120 *Estate Lala v Mahomed* 1944 AD 324 332; *Gert De Jager (Edms) Bpk v Jones & Mchardy* 326. See also Boraine 81.

121 *Bayus v Estate Moosa* 1941 AD 62 74; *Gert de Jager (Edms) Bpk v Jones & McHardy*.

122 *Estate Lala v Mahomed* 331. In terms of s 31(2) of the Insolvency Act, if a third party is found to have colluded with the insolvent in terms of s 31(1) of the Insolvency Act, the third party will be liable for any loss caused by this transaction. Moreover, the court may levy a penalty against the third party, which is limited to the benefit the third party would have derived if the transaction was not set aside. If the third party is also a creditor, he/she would not have any claim against the insolvent estate.

123 *Fenhalls v Ebrahim* 1956 4 SA 723 (D); *Commissioner of Customs and Excise v Bank of Lisbon* 1994 1 SA 205 (N).

the applicant must prove that (a) the dissipation diminished the debtor's assets; (b) the recipient of the property so dissipated did not receive their own property that they are entitled to; and (c) the debtor must have had the intention to defraud the creditors. However, where value was given in exchange for the alienation, the recipient must also be aware of the intention to defraud;[124] (d) the fraud must result in a prejudice to the creditors.[125] A creditor who relies on the *actio Pauliana* need not prove that it has a liquidated claim against the debtor's estate. The existence of a triggering event – that is a debt – is sufficient. The primary factor in establishing a claim is the intention to defraud.[126] In the context of a tax debt, it is not necessary for an assessment to have been issued nor for a notice of the assessment to have been issued. SARS, as a creditor under the *actio Pauliana*, must prove that the taxpayer intended to defraud the creditors or to prefer one creditor above the others. By comparison, section 183 of the TAA does not require SARS to prove intent. The intent is implied where the dissipation results in the taxpayer being unable to pay its tax debts.

3.3 Overlap between insolvency and the section 183 scenario

Of course, it is possible that where a section 183 scenario is present – someone assisted in the dissipation of a taxpayer's assets in order to obstruct the collection of a tax debt – the taxpayer is also rendered insolvent. Can SARS still rely on section 183 of the TAA in such an event? We do not think so. Under these circumstances, reliance on section 183 of the TAA would prefer SARS (as creditor) above another. This is because section 183 enables SARS to recover the tax debt (compensation) from the person who colluded with the taxpayer. Under these circumstances, we argue that section 183 of the TAA goes against the founding principle of insolvency law – *consursus creditorum*.[127] Although the amount can be recovered from the taxpayer and the third party in terms of the Insolvency Act or the *actio Pauliana*, in terms of the principle of *consursus creditorum*, the amount so recovered must go to the insolvent estate. Where SARS invokes section 183, the amounts recovered go to SARS directly. In this regard, we believe that section 31 of the Insolvency Act must take precedence over section 183 of the TAA.

4 CONCLUDING OBSERVATIONS

There are similarities in the lifecycle of debts (obligations) in general and tax debts. There are also similarities in the remedies available to a creditor in circumstances where a debtor dissipated assets which has the effect that the debtor could not pay its debts or preferred one creditor above another and SARS' remedies under section 183 of the TAA. However, some important observations are necessary.

The debt collection powers granted to SARS in terms of the TAA are more powerful than those available to the ordinary creditor. To list a few: a pending

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124 *Scharff's Trustee v Scharff* 1915 TPD 476.

125 See also Boraine 71.

126 *Idem* 72.

127 See Fritz & Legwaila "The intersection between taxation and insolvency – The South African Revenue Service's preference" 2021 *SALJ* 799 808 where a similar argument is made in relation to a third-party appointment in terms of s 179 of the TAA, when the appointment notice is issued after the sequestration order has been granted.

tax dispute does not stay SARS' debt collection proceedings,[128] and SARS may appoint third party agents to collect the outstanding taxes on its behalf. On this basis, it makes sense that the third-party liability provisions in the TAA grant SARS more powerful rights than the impeachable transaction provisions in the Insolvency Act and/or the *actio Pauliana.*

Third-party liability in terms of the impeachable transaction provisions in the Insolvency Act requires there to be an application to the High Court by the trustee for the estate, failing which, by a creditor who has indemnified the trustee of any costs. Similarly, third-party liability in terms of the *actio Pauliana* requires the creditor to bring an application to the High Court. In contrast, section 183 of the TAA does not require SARS to bring an application to the High Court. SARS must simply identify the parties involved in the dissipation of assets and hold them accountable. None of the other third-party tax debt collection mechanisms in Part D of Chapter 11 of the TAA require SARS to exercise their rights by way of a court application. Therefore, it makes sense that SARS need not bring an application to a court to invoke its rights in terms of section 183 of the TAA. For a creditor to bring an application in terms of the *actio Pauliana*, *locus standi* is established by the mere existence of a debt (the triggering event). It is not necessary for the debt to be due or payable. Similarly, in the case of an application in terms of the impeachable transaction provisions of the Insolvency Act, it is sufficient for the creditor applicant to show the existence of a debt (the triggering event) to establish *locus standi.* It is not necessary for the debt to be due or payable. The impeachable transaction provisions are an extension of the *actio Pauliana.* Similarly, section 183 of the TAA is, in our view, an extension of the *actio Pauliana.* This supports the argument that the requirement for relying on section 183 of the TAA should not be different from that of the *actio Pauliana* or the relevant impeachable transaction provisions in the Insolvency Act; in other words, it supports the argument that it is sufficient for the tax debt (the triggering event) to exist. It is not necessary for the tax debt to be outstanding. It is not necessary that an assessment has been issued or that notice of an assessment has been issued. However, it can be argued that because reliance on section 183 of the TAA does not require judicial oversight, the powers afforded to SARS must be limited to cases where the tax debt is due or payable. But Part D of Chapter 11 of the TAA provides for different requirements of a "tax debt" depending on the presence of jurisdictional facts. This supports the argument that if the legislator intended the tax debt in section 183 to be due or payable, the words "outstanding tax debt" – as it appears in the other provisions in Part D – would appear in the wording of the Act. In line with the arguments above, we do not believe the word "outstanding" to have been omitted by mistake for purposes of section 183 of the TAA.

Importantly, when relying on section 183 of the TAA, SARS must, in terms of section 184(2)(*a*), unless it puts the tax collection in jeopardy, allow the third party the opportunity to make representations before such third party can be held liable. Although this is not akin to judicial oversight, in our view, it provides for some accountability on the part of SARS. Of course, "jeopardy" is an easy scapegoat to plead. What constitutes "putting the debt collection in jeopardy" is a factual investigation that differs from case to case.

128 S 164(1) of the TAA.

Unlike the *actio Pauliana* and the impeachable transaction provisions in the Insolvency Act, section 183 does not empower SARS to set aside the dissipation transactions. Such an outcome must be sought by way of an application in terms of the *actio Pauliana* or the Insolvency Act.

The *actio Pauliana* and the impeachable transaction provisions in the Insolvency Act are premised on the principle of *consursus creditorum*. For that reason, any amounts recovered when invoking the third-party liability provisions go to the insolvent's estate for the benefit of all the creditors. Any amounts recovered in terms of section 183 of the TAA goes to SARS and the other creditors receive no benefit from it. This leaves the question of whether section 183 can be invoked in cases where insolvency is present. On the basis of our argument that section 183 is an extension of the *actio Pauliana*, in our view, section 183 can be invoked only where no insolvency is present. Where insolvency is present, section 183 has the effect of preferring SARS above the other creditors. This argument is compounded by the fact that enforcing section 183 does not require judicial oversight. Furthermore, as section 183 of the TAA resembles section 31 of the Insolvency Act on collusive dealings prior to insolvency, we argue that SARS, when insolvency is present, cannot be put in a better position than other creditors by invoking section 183 of the TAA. This is because invoking section 183 when insolvency is present goes against the spirit of the principle of *concursus creditorum* established in our insolvency law.[129] Moreover, the trustee (or failing which, any other creditor who has indemnified the trustee) is likely to be successful to recover any amounts received by SARS (in invoking sections 183 and 184 of the TAA) in terms of section 26, 29 or 30 of the Insolvency Act, whichever finds application.

129 In this regard, see also *South African Revenue Service v Angelo Agrizzi* (45008/2021) [2023] ZAGPPHC 604 paras 37–42 where the court ruled that, for a court to grant an order, it must be legally possible to execute such an order. Put differently, even though an aggrieved party (like SARS) may have statutory rights (as those provided in the TAA), it must still be legally possible to execute those rights for the rights to be enforced.