Law by decree: A critique of section 5(2) of the Income Tax Act

BENJAMIN CRONIN

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

In fulfilment of the requirement for the degree

LLM (COMMERCIAL LAW)

(Word Count: 35 823)

Supervisor: Associate Professor Afton Titus

Research dissertation presented in fulfilment of the requirements for the Masters in Commercial Law by dissertation.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University and the Faculty of Law, and that this dissertation conforms to those regulations.

Signed by candidate

Benjamin Cronin

13 February 2022

ACKNOWLEDGEMENTS

I thank my supervisor Associate Professor Afton Titus for the comments and encouragement on this academic journey.

To my wife, Jameelah Omar, for being a sounding board for the ideas in this thesis, and for the ongoing support.

Law by Decree: A critique of section 5(2) of the Income Tax Act

Abstract

This thesis addresses the question of whether section 5(2) of the Income Tax Act 58 of 1962 (the Income Tax Act) infringes upon the Separation of Powers Doctrine and constitutes an unlawful delegation of the power to impose or reduce taxes, in terms of the Constitution. The power to determine the rate of income tax is a fiat legislative power that directly impacts upon the lives of millions of people in South Africa.

This question, while one centred on the law of taxation, also implicates fundamental public law questions related to the powers of law-making by the Legislature and delegated law-making powers to the Executive. Balancing these different powers in the area of tax law has increasingly become contentious, as more powers have been delegated over the years, raising separation of powers concerns.

In terms of sections 5(2)*(a)* and *(b)* of the Income Tax Act, the Minister of Finance is purportedly empowered to 'alter' the income tax rate by virtue of the annual national budget, with effect from the 'date or dates determined by the Minister in that announcement'. This power to 'alter' or amend tax rates by virtue of an 'announcement' will, in terms of section 5(2)*(b)* of the Income Tax Act, remain in force for a period of 12 months from the date announced 'subject to Parliament passing legislation giving effect to that announcement'.

While the unique power to raise or lower national taxes has been provided for in an Act of Parliament, the exercise of this power remains to be tested in court against the objects and language of the South African Constitution. During the course of this thesis, I will endeavour to determine whether section 5(2) of the Income Tax Act would likely survive a challenge in light of the apparent assignment of a purely legislative function to a member of the executive.

Table of Contents

Chapter 1: Introduction

1.1. Introduction

This thesis addresses the power to increase and decrease the rate of income tax and specifically looks at the question of whether section 5(2) of the Income Tax Act[1] (the Income Tax Act) infringes upon the Separation of Powers Doctrine and constitutes an unlawful delegation of the power to impose or reduce taxes, in terms of the Constitution.[2] The power to impose taxation is one of the central features of the state and in the case of an income tax directly affects the lives of millions of South Africans.

The question posed in this thesis requires a consideration of not only the law of taxation, but also fundamental public law questions related to the powers of law-making by the Legislature and delegated law-making powers to the Executive. Balancing these different powers in the area of tax law has increasingly become contentious, as more powers have been delegated over the years, raising separation of powers concerns.

In terms of sections 5(2)*(a)* and *(b)* of the Income Tax Act,[3] the Minister of Finance is ostensibly empowered to 'alter' the income tax rate by virtue of the annual national budget, with effect from the 'date or dates determined by the Minister in that announcement'.[4] This power to 'alter' or amend tax rates by virtue of an 'announcement' will, in terms of section 5(2)*(b)* of the Income Tax Act, remain in force for a period of 12 months from the date announced 'subject to Parliament passing legislation giving effect to that announcement'.[5]

While this novel power to raise or lower national taxes has been provided for in an Act of Parliament, the exercise of this power remains to be tested in court against the objects and language of the South African Constitution. During the course of this thesis, I will endeavour

[1] Act 58 of 1962.
[2] Constitution of the republic of South Africa, 1996.
[3] Section 5(2)*(a)* of the Income Tax Act holds 'The Minister may announce in the national annual budget contemplated in section 27(1) of the Public Finance Management Act 1999… that, with effect from a date or dates mentioned in that announcement, the rates of tax chargeable in respect of taxable income will be altered to the extent mentioned in the announcement.'
Section 5(2)*(b)* of the Income Tax Act holds 'If the Minister makes an announcement of an alteration contemplated in paragraph *(a)*, that alteration comes into effect on the date or dates determined by the Minister in that announcement and continues to apply for a period of 12 months from the date or those dates subject to Parliament passing legislation giving effect to that announcement within that period of 12 months'.
[4] Section 5(2)*(a)* of the Income Tax Act.
[5] Section 5(2)*(b)* of the Income Tax Act.

to determine whether section 5(2) of the Income Tax Act would likely survive a challenge in light of the apparent assignment of a purely legislative function to a member of the executive.

1.2. Contribution of the research

There is a substantial body of scholarship on the separation of powers as well as the exercise of legislative power and the delegation thereof in the context of our Constitutional dispensation. Separately, there is significant literature regarding the process of passing and implementing taxation legislation. Scholars involved in tax specific research have engaged with the interface between the introduction of new tax legislation by the Minister of Finance and the enactment of final statutes by Parliament. This is represented and reflected in the commentary preceding and subsequent to the *Pienaar Brothers (Pty) Ltd v CSARS* ('Pienaar Bros Judgment')[6] judgment.

This thesis, while conversing with both these bodies of literature, intends to shift the focus to what has now become the key overlapping concern, namely, the apparent assignment of legislative powers to the Minister of Finance. The issue of over-lapping Executive law-making has become an issue of ever greater judicial interest during the period of researching this thesis. In the wake of the Covid-19 crisis and the introduction of quasi-law-making powers under the auspices of the Disaster Management Regulations,[7] ('Covid-19 Regulations') a number of cases have come to light of Ministerial law-making being challenged.

In the judgment of *Afriforum NPC v Minister of Tourism and Others*,[8] Plasket JA found that the Minister of Tourism had acted outside of her delegated authority to make directions by including factors beyond the scope of the empowering Covid-19 Regulations with the result that the directions issued were 'invalid'.[9] Similarly in the judgment of *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others*,[10] Plasket JA was again to find a Minister had trespassed upon constitutionally protected rights in issuing overly broad regulations. Finally, in the judgment of *Skole-Onsersteuningsentrum NPC and Others v Minister of Social Development and Others*,[11] Fabricius J held that the directions issued in

[6] 2017 (6) SA 435 (GP).
[7] Issued in terms of section 27(2) of the Disaster Management Act, 2002 (Government Gazette 43107, No 318).
[8] (499/2020; 498/2020) [2021] ZASCA 121 (22 September 2021).
[9] Op cit note 8 para 54.
[10] 2021 (3) SA 593 (SCA).
[11] [2020] 4 SA All SA 285 (GP).

respect of early childhood centres was 'not done lawfully and not within the Minister's powers'.[12]

Since the purported assignment of law-making powers to the Minister of Finance only became a 'live' legal question as a result of the Taxation Laws Amendment Act of 2016 (the 2016 Amendment Act)[13] promulgated on 19 January 2017, this overlap and the questions it raises have not been satisfactorily addressed as yet. This is the contribution that I hope to provide in this thesis.

1.3. Background to research question

1.3.1. The legal context

An Act of Parliament which is intended to impose or reduce national taxes in South Africa constitutes a 'Money Bill'. Unlike every other bill before Parliament, in terms of section 73(2)*(a)* of the Constitution only the Cabinet Minister responsible for financial matters may introduce the proposed Money Bill. Currently, this is the Minister of Finance in the South African Cabinet.

As set out in section 77 of the Constitution, a Money Bill put before the National Assembly can only address a circumscribed list of issues, namely:

- the appropriation of money by the National Government from the National Revenue Fund or matters incidental to such an appropriation;
- the imposition, abolition or reduction of taxes, levies, duties and surcharges; or
- an exemption from taxes, levies, duties and surcharges.

While only the Minister of Finance may introduce a Money Bill, as with all bills before Parliament a Money Bill may nevertheless be amended by the legislature before being passed by Parliament into law. In this regard section 77(3) of the Constitution envisaged that Parliament would set out in a discrete Act the procedure for such amendments to be made. Parliament gave effect to this with the enactment of the Money Bills Amendment Procedure and Related Matters (the 'Amendment Procedure Act').[14]

With regard to Money Bills which seek to impose or reduce taxes, referred to as 'revenue Bills', various principles are set out for Parliament to adhere to when varying or amending the

[12] Op cit note 11 para 48.
[13] Act 15 of 2016.
[14] Act 9 of 2009.

proposed statute. Section 11 of the Amendment Procedure Act requires that Parliament afford the Minister of Finance the opportunity to make representations, albeit that such representations are not binding on Parliament. Even in the context of the constrained grounds upon which Parliament can amend a Money Bill, the legislature nevertheless retains the discretion to amend and to pass the 'Money Bill' in terms of section 77 of the Constitution.

As with all other bills before Parliament, once a Money Bill is passed it must be assented to by the President in terms of sections 75(1) (read together with section 79) of the Constitution and published in the *Government Gazette* before coming into effect.[15] In terms of section 81 of the Constitution, a new Act will come into force either on the date of its publication or on a date determined by the Act itself.

In the context of the Income Tax Act,[16] the use of retrospective legislative amendments has been the site of significant debate. Prior to the seminal judgment of *Pienaar Bros Judgment,*[17] some academics and tax advisors had argued that the retrospective application of various bespoke taxing provisions would not likely survive legal challenges given the prevailing rules of statutory interpretation, the principle of legality, and public policy.[18]

The legislative provision assigning the power to the Minister of Finance to alter tax rates was introduced just months before the South African Revenue Service would appear before Fabricius J in the *Pienaar Bros Judgment*. This case stands as a unique precedent for the apparent lawful retrospective application of an amendment to the Income Tax Act.

The *Pienaar Bros Judgment*, handed down on 29 May 2017, considered a challenge to the insertion of a provision into the Income Tax Act with retroactive effect. At issue was the insertion of section 44(9A) by virtue of section 34 of the Taxation Laws Amendment Act (the 2007 Amendment Act).[19] This provision, which at section 34(1)*(c)* deemed the share capital ascribed to an amalgamated company to be profit not of a capital nature, was in terms of section 34(2) of the 2007 Amendment Act set to commence on 21 February 2007 - in other words, *before* the date on which the amendment was promulgated.

[15] Iain Currie and Johan de Waal *The New Constitutional & Administrative Law* Volume 1 (2001) 189.
[16] Act 58 of 1962.
[17] *Pienaar Bros* op cit note 6.
[18] Henrich Louw 'Retrospective application: tax' (2012) *Without Prejudice* 12, 8 *Without Prejudice*; Liesl Kruger 'Retrospective legislation: do taxpayers have any recourse?' (2014) 5 *Business Tax and Company Law Quarterly*.
[19] Taxation Laws Amendment Act 8 of 2007.

The applicant was a corporate taxpayer that had distributed an amount of R29,500,000 on 3 May 2007 to its shareholders. At the time of making the distribution the wording of the Income Tax Act did not trigger the Secondary Tax on Companies (STC). With the promulgation of the 2007 Amendment Act and the insertion of section 34 with retrospective effect, it meant that the distribution suddenly changed in character and was subject to STC. The aggrieved taxpayer launched a challenge to the retrospective application of the amendment on various grounds, including that it breached the principle of legality as understood through the lens of the Constitution. Ultimately Fabricius J held that the retrospective application of the taxing provision, by virtue of section 34(2) of the 2007 Amendment Act, was not unconstitutional or invalid.[20]

Perhaps the most important aspect of the judgment for present purposes lies in the fact that in the course of the court's reasoning, Fabricius J highlighted the public announcement by the Minister of Finance in a press release issued on 21 February 2007 as a key basis for rejecting the assertion that taxpayers were unaware of an impending amendment.[21] This announcement, on its own terms, was intended to indicate that an identified 'loophole' which allowed amalgamated companies to escape STC was going to be 'withdrawn'.

Subsequent to the *Pienaars Bros Judgment*, various academics critiqued the reasoning of Fabricius J. These arguments are considered in greater detail below in the literature review in Chapter 2. Part of the dissertation, in Chapter 6 dealing with retrospective and retroactive legislative amendments, will also be dedicated to engaging with these arguments further, and those that preceded the *Pienaar Bros Judgment*, in so far as they relate to the research question posed.

In this thesis I intend, however, to shift the debate from the current focus on retrospective legislative enactments, to the distinct issue of prospective law-making powers being assigned to the Minister of Finance. I will argue that as a result of the amendment, the Minister now possesses the unique power to prospectively alter the income tax rate by mere announcement in terms of section 5(2) of the Income Tax Act. The Minister been given primary or plenary law-making powers, a power which is unlawful for the Minister to have.

Prior to the publication of the 2016 Amendment Act[22] on 19 January 2017, section 5(2) of the Income Tax Act held that the income tax rate would be fixed annually by Parliament. The

[20] *Pienaar Bros* op cit note 6 para 110.
[21] *Pienaar Bros* op cit note 6 para 2.
[22] Act 15 of 2016.

provision as it was then, envisaged an annual reconsideration of the income tax rate by Parliament. To ensure a default position of continuity the provision confirmed that the rate of tax determined in the previous year 'shall be deemed to continue in force until the next such determination'.[23]

This unique power given to the Minister was first introduced by virtue of section 6 of the 2016 Amendment Act and has subsequently been substituted by section 3 of the Taxation Laws Amendment Act of 2018.[24] Section 5(2) of the Income Tax Act as it reads today, in fact, represents a dramatic departure from the pre-existing statutory regime which recognised the authority of Parliament to determine the income tax rate on an annual basis. The Explanatory Memorandum for the 2016 Amendment Act issued by the South African Revenue Service is very light on detail in respect of the substitution of section 5(2). In this regard clause 6 of the Explanatory Memorandum records the purpose of the amendment in sub-clause (a) as giving effect to the alignment of 'tax charging provisions of all tax Acts'.[25] Further, in respect of sub-clause (b), it indicates that the proposed amendment is 'consequential and deletes now obsolete provisions of sub-section 7 due to the amendment to align the tax charging provisions of all tax Acts'.[26]

The differentiated tax rates reflected in the Income Tax Act, whether income tax, donations tax,[27] or dividends withholding tax,[28] have all been amended to reflect the same power given to the Minister of Finance to announce an alteration to the existing rate of tax, subject to a ratification by Parliament within 12 months. The Minister of Finance is now vested with authority not only to introduce new tax legislation, but to bring into effect new taxing rates for twelve calendar months.

An interesting facet of section 5(2) of the Income Tax Act lies in the use of a ratification mechanism by Parliament, recognising tacitly that Parliament ultimately has the power to determine amendments to tax legislation. The exact wording of sub-section 5(2)*(b)* is that the newly announced tax rate is applicable for a 12-month period 'subject' to Parliament enacted supporting legislation. There is no clarity from the section 5(2) what would occur if Parliament

[23] The prior wording in section 5(2) of the Income Tax Act.
[24] Act 23 of 2018.
[25] Issued by the South African Revenue Service on 15 December 2016. TABLE OF CONTENTS (sars.gov.za)
[26] Ibid.
[27] Section 64 of the Income Tax Act 58 of 1962.
[28] Section 64E of the Income Tax Act 58 of 1962.

failed to enact such legislation, other than the natural implication that the apparent tax announcement would no longer be lawful.

In their joint response to the Final Response Document on the 2017 Rates and Monetary Amounts and Amendment of Revenue Laws Bill,[29] the South African Revenue Service and National Treasury appeared to indicate that the default position would be mere repayment of any excess tax collected. In this regard the response set out the following position:

> [I]f Parliament does not accept the proposal regarding the increase in the rate of [tax] with effect from the date of the Budget, Government (through SARS) will have to refund the difference between the [tax] paid in accordance with this proposal and the [tax] that is payable in terms of the law after the Rates and Monetary Amounts and Amendment of Revenue Laws A Bill has been passed by Parliament.[30]

As will be discussed in Chapter 7, this position will likely not be sustainable given the dearth of powers available to the South African Revenue Service in the Tax Administration Act[31] to address this kind of scenario.

1.3.2. The political context

In light of the perceived connection between taxation and government spending, the application of taxing provisions has typically been construed as inherently in the public interest – even by the judiciary. This can be clearly seen in a wide variety of court judgments.

In the Constitutional Court judgment of *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another*[32] Kriegler J held that:

> There is 'public interest in obtaining full and speedy settlement of tax debts… [and there are] a number of public policy considerations in favour of a general system whereby taxpayers are granted no leeway to defer payment of their taxes'. [33]

In the Supreme Court of Appeal judgment of *New Adventure Shelf 113 (Pty) Ltd v Commissioner of the South African Revenue Services*[34] Leach JA set out the following principle:

---

[29] Final Response Document on the 2017 Rates and Monetary Amounts and Amendment of Revenue Laws Bill issued on 15 December 2017. LAPD-LPrep-Resp-2017-05-Final-Response-Doc-2017-Rates-and-Monetary-Amounts-and-Amendment-of-Revenue-Laws-Bill-15-Dec-2017.pdf (sars.gov.za), accessed on 13 July 2020.
[30] Ibid.
[31] Act 28 of 2011.
[32] 2001 (1) SA 1109 (CC), 60.
[33] *Metcash* op cit note 32 para 60.
[34] *Metcash* op cit note 32 para 28.

> In 'any event, even if in certain instances it may seem 'unfair' for a taxpayer to pay a tax which is payable under a statutory obligation to do so, there is nothing unjust about it… tax laws are not always regarded as 'fair''.[35]

This articulation of the moral justification for potentially unfair taxing provisions, must be acknowledged as a common understanding. Through judicial reasoning, it forms a part of our common law.

The general perception of the overriding public policy objectives arising from taxation was expressly stated by the South African Revenue Service in the *Pienaar Bros Judgment*. In this case, the South African Revenue Service argued that public policy considerations should weigh heavily in the determination of the lawfulness of retrospective legislative amendments 'especially… in the context of tax legislation which is enacted for the benefit of the fiscus and thus the country and the public as a whole'.[36]

The unique approach to taxation legislation brings to the fore the urgent need to consider the implications for the Separation of Powers Doctrine, the rules regarding the delegation of the authority to make laws, and the law-making process itself in the Constitutional era.

1.4. Terminology

The literature that engages with (broadly) retrospective legislation, may at times use the term 'retroactive' interchangeably. In my thesis, I use the terms in the following way:

1.4.1. Retrospective

The approach of the Supreme Court of Appeal in *National Director of Public Prosecutions v Carolus and Others*[37] will be used as the basis for the term retrospective law-making. In this regard Retrospective laws refer to legislation that are prospective but will impose novel legal implications for past events.[38]

1.4.2. Retroactive

Similarly, the Supreme Court of Appeal in *National Director of Public Prosecutions v Carolus and Others*[39] will be used as the basis for the term retroactive law-making. While this term is

[35] *Metcash* op cit note 32 para 28.
[36] *Pienaar Bros* op cit note 6 para 64.
[37] 2000 (1) SA 1127 (SCA).
[38] An example of this in the context of income tax would be a change that affects a transaction which has already occurred but the tax in respect of this event has not been finally assessed as the income tax year remains open.
[39] *Carolus* op cit note 37.

frequently used interchangeably with retrospective law-making it remains a distinct concept. For purposes of this thesis, Retroactive refers to a situation where the new law is 'back-dated' to a date prior to its enactment. The effect of such a provision is to alter the law in respect of both completed and uncompleted transactions. In the area of tax this would be, for example, to close a loophole in tax structuring.[40]

1.4.3. Prospective

This phrase is not very often used in the literature but is of paramount importance to this thesis. I use this term to describe a situation where a change is announced, and purportedly commences from the moment of that announcement, with a future Act 'ratifying' that change. This can be clearly seen in the subject of thesis and the discussion above of section 5(2) of the Tax Act.

1.5. Research method

The research methodology in this paper will utilise a qualitative desktop study relying on primary sources (including, legislation, regulations, international instruments, and case law), as well as secondary sources (including, academic books, journal articles and essays). No field work or interviews with human subjects will take place in the course of researching this thesis. As a result, no ethics approval is required.

1.6. Anticipated structure

Chapter 2 is the literature review. I will trace three primary bodies of literature central to the research question, namely, commentary prior to *Pienaar Bros Judgment*; commentary after *Pienaar Bros Judgment*; and the more recent delegation of the power to the Executive to make tax specific laws.

Chapter 3 will engage with the Doctrine of Separation of Powers, and the constitutional framework for primary legislation law making and secondary law making through delegated authority. Chapter 4 expands on this, by setting out the legal framework for the drafting and amendment of tax laws specifically. Chapter 5 in turn addresses the question as to whether the current framing of section 5(2) of the Income Tax Act is compatible with the Rule of Law. This Chapter will make the argument that the amended section 5(2) purports to create a system of 'prospective' law making, which is unconstitutional.

[40] An example of this in the context of income tax would be re-opening a year of assessment that was already closed and had been assessed.

Chapter 6 engages in-depth with both retrospective and retroactive law-making, while Chapter 7 critiques the amended section 5(2) of the Tax Act and specifically examines the application of the doctrine of lawfulness as it would apply to the South African Revenue Service when implementing section 5(2) of the Income Tax Act.

Finally, Chapter 8 provides a brief conclusion.

Chapter 2: Literature Review

2.1. Introduction

The process of making of laws, and determining when they come into force, is of significant concern to most if not all legal academics, regardless of their specific discipline or area of research. In the context of this thesis, the focus of the literature relates primarily to tax legislation and the process by which amendment to rates of income tax become law. The research question straddles two primary areas of law, namely, constitutional and administrative law related to law-making and tax law. The judgment of *Pienaar Bros Judgment*[1] raises relevant issues related to both of these areas of law, and the literature on the cases ventilates many of the law-making and tax law material that I have engaged with.

The literature review is addressed under three distinct subheadings:

1. commentary regarding retrospective tax legislation, prior to the judgment in *Pienaar Bros Judgment*;
2. commentary regarding retrospective tax legislation subsequent to the *Pienaar Bros Judgment*; and
3. commentary regarding the delegation of prospective law-making powers to a member of the Executive.

2.2. Commentary prior to *Pienaar Bros Judgment* regarding retrospective tax legislation

The topic of retrospective or retroactive legislation, as defined in Chapter 1, has often been considered by academics and legal practitioners in the field of tax law. In part, this is as a result of the frequency of the use of commencement dates for strategic taxing provisions which pre-date the promulgation of the statute in which they are contained. Prior to the *Pienaar Bros Judgment*, many of those academics and tax advisors commenting on retroactive or retrospective taxing provisions had argued they would likely not survive legal challenge.

In his extensive 2008 thesis, Beric Croome sets out in some detail his argument that the imposition of retrospective taxing provisions in a statute could constitute a deprivation of property in terms of section 25 of the Constitution albeit that he recognised there may be

[1] 2017 (6) SA 435 (GP).

difficulty in proving that the deprivation was 'arbitrary'.[2] While conceding that the Constitution does not contain a 'specific prohibition against the introduction of tax amendments with retrospective effect',[3] he argues that there may be circumstances in which such retrospective application might be unlawful.

Croome begins with a discussion of the jurisprudence emanating from Canada relating to the challenges that arise from retrospective taxation statutes.[4] Croome referred to the articulation of Bentley who warned that '[t]ax laws stretch' the principle that those bound by the law should only have to follow laws which are actually in effect, but noted that despite stretching this principle even 'tax legislation is seldom passed so that the law applies from a date earlier than the date that the legislation was first announced'.[5] Croome further re-iterated the subtle but significant distinctions between different forms of tax legislative amendments highlighted by Bentley, namely the difference between administrative and substantive changes as well as the difference between changes to the benefit of the taxpayer or the tax collecting agency in question.

A core concern raised by Croome when referencing comparative international literature is the need for a coherent legal system to provide taxpayers with certainty. In this regard Croome highlights the distinction identified by Daiber in the context of German legal principles in respect of retrospective laws, namely: '[u]nder one form, future legal consequences are established but are based on past facts… Under the other form the legal consequences are based on past facts are retroactive'.[6] When considering retrospective amendments to tax legislation it is important therefore not only to be concerned with when an amendment would come into effect, but also consider what the implications would be for transactions and tax periods that have already occurred before this amendment.

With incredible foresight Croome highlights Bentley's particular aversion to retrospective tax amendments dated to a 'media release… [which he] concludes… is offensive and unfair'.[7] Croome went to great lengths to address the inequity that would arise from retrospective tax legislation, such that he made a submission to the Constitutional Assembly in

[2] Beric Croome *Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts* (unpublished PhD thesis, University of Cape Town, 2008) 96.
[3] Croome op cit note 2 at 56.
[4] Croome op cit note 2 at 56.
[5] Duncan Bentley *Taxpayers Rights: An International Perspective* (1998) 56.
[6] Bentley op cit note 5 at 159.
[7] Croome op cit note 2 at 57.

1995 to propose that our Constitution contain a prohibition on 'fiscal amendments… being introduced with retrospective effect'.[8] His proposal might have led to a prohibition on tax legislation being implemented for periods before its enactment. If that had occurred, it would be consistent with the current prohibition in section 35(3)*(l)* which holds that an accused person has the right to a fair trial which includes the right 'not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted'. To the extent that certain tax provisions may create a new offence for which the accused may be convicted and sentenced, section 35, in so far as it envelops the principle of legality, is relevant. In the end, however, this proposal was not adopted by the Constitutional Assembly and ultimately many of Croome's specific concerns regarding a potential infringement of section 25 of the Constitution were later tacitly rejected in *Pienaar Bros Judgment.*

The position that the retrospective or retro-active implementation of taxing provisions may in fact be unlawful continued to be discussed by various academics and legal practitioners in the field of tax law beyond Croome's 2008 thesis.

In 2012, Henrich Louw,[9] specifically addresses the announcement regarding an anticipated retrospective increase in the dividends tax rate from 10 to 15 per cent in the Income Tax Act of 1962 (Income Tax Act).[10] He discusses the potential legality and applicability of tax provisions which have been announced but remain to be enacted and promulgated with retrospective effect.[11] Writing after the announcement of the change in tax rate by the Minister of Finance but before the enactment of the necessary legislation, Louw openly questions the validity of obeying a non-existent law. [12] In assessing the validity of retrospective legislation, he traverses the conventional topics of the rule of interpretation which creates a presumption against retrospective application of laws, the prohibition on retrospective criminalising provisions as articulated in section 35 of the Constitution,[13] and the necessity of balancing rights as envisaged by the Bill of Rights in the Constitution.[14] Louw acknowledges that there might, in a hypothetical future case, be limited circumstances in which a ban on retrospective tax legislation may be ordered by a court, albeit with some trepidation and clear limitations.

[8] Croome op cit note 2 at 59.
[9] Henrich Louw 'Retrospective application: tax' (2012) 12 *Without Prejudice* 8.
[10] Act 58 of 1962.
[11] Louw op cit note 9 at 8.
[12] Louw op cit note 9 at 8.
[13] Louw op cit note 9 at 8.
[14] Louw op cit note 9 at 9.

He tacitly endorses the principle in the United Kingdom's common law that 'fair balance' may require a court to strike down retrospective legislation where 'there is an unreasonable burden on taxpayers'.[15] Louw therefore envisages circumstances in which retrospective or retroactive amendments to the Income Tax Act may be unlawful and unconstitutional.

In 2014, Liesl Kruger argued that while there was 'no strong precedent for the principle that non-criminal retrospective laws are unconstitutional, there is support for the proposition that some types of retrospective laws offend against the rule of law'.[16] She concludes that there may be scope for the Constitutional Court to determine whether taxing provisions applied with retrospective effect violated the principle of legality and could be struck down. She postulates that it will depend greatly upon the circumstances and facts surrounding that particular challenge.[17] In this regard, Kruger identifies some potentially influential factors, including, whether the retrospective application affects future or past conduct, whether a reasonable person could have anticipated the change, the effect of the law on taxpayers generally, whether the change in the statute is purely technical, and the underlying reason for the retrospective application of the provision.[18]

In 2016, Milton Seligson discussed the possibility that amendments to the Income Tax Act, which are brought into being with retrospective effect, may be found to be unconstitutional or 'unlawful'.[19] The subject of discussion in this paper was an amendment to section 8EA of the Income Tax Act introduced by Taxation Laws Amendment Act 15 of 2016 (the 2016 Amendment Act) with retrospective effect. Of particular interest is Seligson's speculation that retroactive amendments to the Income Tax Act that would alter the law and existing rights in respect of 'antecedent years of assessment' may in fact be prohibited by the Constitution.[20] Seligson after considering relevant case law and provisions of the Constitution concluded that retroactive amendments to dividends tax provisions which had the effect of changing (and disturbing) the already settled tax outcomes for completed transactions where would not be constitutionally compliant and would likely fall foul of the Rule of Law.

[15] Louw op cit note 9 at 9.
[16] Liesl Kruger 'Retrospective legislation: do taxpayers have any recourse?' (2014) 5 *Business Tax and Company Law Quarterly* 16.
[17] Kruger op cit note 16 at 18.
[18] Kruger op cit note 16 at 18 - 19.
[19] Milton Seligson 'The retrospective operation of statutory amendments to taxation laws: interpreting the amendments to section 8EA of the TLAA' (2016) 18 *Business Tax and Company Law Quarterly* 1 at 25.
[20] Seligson op cit note 19 at 22.

In 2011, Garven and Hare argued that the retrospective amendment to section 23K of the Income Tax Act in the absence of accompanying regulations would create uncertainty for taxpayers.[21] The authors specifically highlight that the retrospective application would likely render decisions made by the South African Revenue Service in terms of this provision of 'doubtful validity in law'.[22]

In 2013, Des Kruger identified the possible retrospective application of understatement penalties in terms of the Tax Administration Act[23] as 'controversial'.[24] Des Kruger argued that despite the ambiguity of the relevant provision, given the pre-existing common law rules of statutory interpretation the legislature could not have intended such a penalty to apply to tax years preceding the commencement of the statute on 1 October 2012.[25]

All of these authors were writing in the period before the seminal *Pienaar Bros Judgment* which has significantly changed the direction of the commentary regarding retrospective or retroactive amendments to taxing provisions. The next section summarises literature after the *Pienaar Bros Judgment*.

2.3. Commentary subsequent to *Pienaar Bros* judgment regarding retrospective tax legislation

The judgment of Fabricius J in *Pienaar Bros Judgment* represented a watershed event in respect of the common law as well as the commentary regarding retrospective or retroactive amendments to taxing statutes in South Africa. In 2017, Dennis Davis, writing in support of the outcome of the judgment records that whatever the merit of one's arguments regarding the rule of law and the right to property in section 25 of the Constitution, said that 'it is difficult to see why retroactive legislation which falls expressly within the scope of a clearly worded press release and a draft Bill cannot be justified under the circumstances'.[26] It would appear that for Davis this precedent-setting judgment in large part is driven by the circumstances in which it occurred. Davis identifies the circumstances as being akin to addressing a 'gaping loophole in

[21] Barry Garven and Robert Hare 'Tax uncertainty the poison pill for foreign investors: tax' (2011) 11 *Without Prejudice* 8.
[22] Garven and Hare op cit note 21 at 24.
[23] This refers to Chapter 9 of the Tax Administration Act 28 of 2011 in respect of which there was some doubt as to whether the relevant provisions would apply retrospectively to affect events prior to the commencement of the Act on 1 October 2012.
[24] Des Kruger 'Tax Administration Act: what every corporate tax administrator should know (part 2)' (2013) 4 *Business Tax and Company Law Quarterly* 3 at 22.
[25] Kruger op cit note 24 at 23.
[26] Dennis Davis 'Retroactive Legislation and Completed Transactions – Another View' (2017) *The Taxpayer* 102.

our tax legislation'.[27] The existence of such a loophole arguably justified a retroactive amendment, which in Davis' words resulted in a balance being struck 'in a fair fashion'.[28]

In 2017, in reviewing the judgment, Croome remarked that in his opinion the judgment was both comprehensive and an accurate assessment of the law in South Africa regarding retrospective tax legislation.[29] Going beyond the qualified endorsement of Davis, Croome appeared to shift the focus and to adopt the view that properly construed, a media announcement followed by an interim draft Bill provided sufficient notice to taxpayers for a later retroactive amendment. This, it would appear, is consistent with Croome's view expressed in his 2008 thesis that it was 'important that amendments enacted should not extend beyond the ambit of the State's prior announcements'.[30] This position does however stand in direct contradiction in respect of the quoted position of Bentley as reflected in Croome's 2008 thesis wherein Croome highlights Bentley's particular aversion to retrospective tax amendments dated to a 'media release… [which h]e concludes… is offensive and unfair'.[31]

Further, Croome held that the test for a valid retrospective amendment lay essentially in a test for rationality (as well as to determine whether it was reasonable and proportional in the circumstances).[32] This position was indeed foreshadowed by Croome in his 2008 thesis wherein he concludes that taxpayers - wishing to challenge not the existence of retrospective or retroactive taxing provision but the implementation thereof - may have to resort to section 33 of the Constitution, which refers to the right to fair administrative action and includes the right to be subject only to rational administrative decisions.[33]

Not all commentators were persuaded by Fabricius J's reasoning, and many questioned the basis for the *Pienaar Bros Judgment*. In particular, Tredoux and Van Zyl writing in 2018 critiqued the narrow framing of the test for a lawful retroactive application of a taxing provision, which was reduced to a mere test of rationality.[34] In this regard, the authors highlighted the court's failure to acknowledge the potential illegality of retroactive

---

[27] Davis op cit note 26 at 102.
[28] Davis op cit note 26 at 102.
[29] Beric Croome 'The lawfulness of retrospective tax amendments' (2017) *The South African Tax Guide* available at https://www.mondaq.com/southafrica/Tax/612164/The-Lawfulness-Of-Retrospective-Amendments-In-Tax-Law, accessed on 30 June 2020.
[30] Croome op cit note 2 at 59.
[31] Croome op cit note 2 at 57.
[32] Croome op cit note 29 at 32.
[33] Croome op cit note 2 at 67.
[34] Liezel Tredoux and Stephanus P van Zyl 'Some drastic measures to close a loophole: the case of Pienaar Brothers and the targeted retroactive amendment of section 44 of the Income Tax Act' (2018) 21 *Potchefstroom Electronic Law Journal* 1.

amendments which in principle should not be entitled to interfere with existing rights.[35] Contrary to Davis' articulation of a 'gaping loophole' the authors reiterate that a 'deferred capital gains tax liability' would continue to exist and further pointed out that other measures existed in the Income Tax Act that could be utilised to prevent the abuse of the statute.

Writing in 2019, Afton Titus argues that Fabricius J erred in respect of his understanding of the South African common law and in particular, in the court's failure to apply the necessary principle of certainty under the auspices of the rule of law.[36] Titus specifically draws attention to the following three propositions relied on by Fabricius J in the *Pienaar Bros Judgment* which she argues are bad in law, namely the allegation that:

- retrospective legislative amendments are common in the South African legal context;
- revenue Acts do not require a rigid application of the certainty principle in the context of a rule of law challenge to a retrospective amendment; and
- the appropriate test to apply in the context of a rule of law challenge is that of a rationality test.[37]

Titus concludes that the retroactive application of the taxing provision in *Pienaar Bros Judgment* violated the principle of legality rooted in the rule of law.[38] She heralds the judgment as being a watershed that will come to define a new period of tax law.[39]

Moosa writing in 2018 interestingly reasserts that the 'imposition of a tax and liability for its payment, must originate from the clear wording of a taxing statute'.[40] In 2019,[41] Moosa in reiterating the axiomatic statement that all taxation statutes need to meet minimum constitutionality requirements reiterated the standards by which they would be assessed. He argues by implication the applicable criteria would include the following democratic principles namely 'legality, equality, fair play, annuality, certainty and non-retroactivity'.[42]

[35] Tredoux and van Zyl op cit note 34 at 26.
[36] Afton Titus '*Pienaar Bros (Pty) Ltd v CSARS*: retroactive fiscal legislation and the rule of law: has South Africa just taken a step back in its constitutional democracy?' (2019) 136 *South African Law Journal* 3 at 404.
[37] Titus op cit note 36 at 407 - 408.
[38] Titus op cit note 36 at 419.
[39] Titus op cit note 36 at 420.
[40] Fareed Moosa 'Value-conscious interpretation of taxing provisions using ubuntu: an appropriate decolonised interpretive approach?' (2018) 300 *SA Mercantile Law Journal* at 73.
[41] Fareed Moosa 'Democratic principles underpinning tax administration in SA' (2019) 10 *Business Tax and Company Law Quarterly* 4.
[42] Moosa op cit note 41 at 15.

Given the 2016 Amendment Act and the assignment to the Minister of Finance of the power to amend the income tax rate by announcement, the terrain has shifted in the post-*Pienaar Bros Judgment* landscape. The question that now requires scholarly attention is whether a mere announcement of a change in tax rates by the Minister of Finance could itself ever constitute a source of new law (rather than a notification of future, retrospective legislative amendments) as the current wording of section 5(2) of the Income Tax Act envisages.

2.4. Commentary regarding the delegation of prospective law-making powers to a member of the Executive

In the very year that the Constitution was enacted, Swart wrote a prescient article titled 'Constitutional limitations on the delegation of powers of taxation'.[43] The central issue discussed was that of the new theoretical limitations blocking the delegation of the legislative power to impose national taxes, to a member of the Executive, in the context of the newly minted Constitution. Importantly Swart correctly asserted:

> [T]he final Constitution does not contemplate the delegation of plenary legislative powers of taxation so as to allow an actor other than parliament or a provincial legislature to impose taxes or appropriate money without complying with the manner and form [provisions of the Constitution].[44]

Swart set out in essence the principle that the core legislative powers accorded to the Legislature cannot be assigned or delegated to the Executive. What is more, he made this specific assertion in the context of the empowering provisions for the imposition or reduction of national taxes.

This early scholarship on the 'plenary' legislative power of imposing taxes was written long in advance of the recent amendment to section 5 of the Income Tax Act contained in the 2016 Amendment Act. Swart did not therefore have the target of this thesis, being the power assigned to the Minister of Finance to temporarily impose or reduce the income tax rate. The example used in Swart's analysis was a provision in the Income Tax Act which permitted the Minister of Finance to 'authorise the settling of disputes regarding certain tax avoidance schemes by means of agreements departing from the relevant principles of the Income Tax Act'.[45]

Swart concluded that 'the final Constitution empower[s] the National Assembly to assign any of its legislative powers, except the power to amend the Constitution, to any other

[43] GJ Swart 'Constitutional limitations on the delegation of powers of taxation' (1996) 11 *SA Public Law* 2.
[44] Swart op cit note 43 at 19.
[45] Swart op cit note 43 at 22.

legislative body in another sphere of government'.[46] Swart was at pains, however, to emphasise that the 'formulation of these provisions does not authorise the delegation of legislative powers to the executive'.[47] While Swart was emphatic in his view, his scholarship opened a larger academic discussion which this thesis hopes to expand upon.

Scholarship regarding the Separation of Powers Doctrine and specifically the delegation of law-making powers by Parliament is a well-trodden terrain in South Africa with decades of common law and commentaries to draw upon. In the seminal judgment of *Executive Council of the Western Cape Legislature and Others v President of the Republic of South African and Others*,[48] (the 'Executive Council judgment') the then newly minted Constitutional Court, in applying the interim Constitution of 1993, was to consider the following question: 'whether under our Constitution, Parliament can delegate or assign its law-making powers to the executive or other functionaries, and if so under what circumstances, or whether such powers must always be exercised by Parliament itself in accordance with the provisions of…' the Constitution.[49]

Of particular importance to the present question is the distinction the court made between the delegation of the authority to make 'subordinate legislation' and the assignment of 'plenary legislative powers'.[50] The court held that 'the nature and extent of [Parliament's] power to delegate legislative powers to the executive depends ultimately on the language of the Constitution, construed in the light of the country's own history'.[51] Referring to the interim Constitution that preceded the current text, the court held that:

> [I]t is a necessary implication of the Constitution that Parliament should have the power to delegate subordinate legislative powers to the executive… But to delegate to the executive the power to amend or repeal Acts of Parliament is quite different. To hold that such power exists… could be subversive to the manner and form' provisions of the previous Constitution.[52]

Ultimately the court held that the purported delegation to the President of the power to amendment legislation was invalid and unconstitutional.

Hofmeyr writing in 2007 referred to the continued application of this precedent in the subsequent judgments of *Executive Council, Western Cape v Minister of Provincial Affairs and*

[46] Swart op cit note 43 at 24.
[47] Swart op cit note 43 at 24.
[48] 1995 (4) SA 877.
[49] *Executive Council* op cit note 48 para 47.
[50] *Executive Council* op cit note 48 para 51.
[51] *Executive Council* op cit note 48 para 61.
[52] *Executive Council* op cit note 48 para 62.

Constitutional Development & another[53] and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another*[54] which were both decided upon under the auspices of the final Constitution.[55]

Hugh Corder further records that the precedent in the *Executive Council Judgment* ensured the consolidation of the doctrine of the Separation of Powers which flowed at first from Principle IV in the interim 1993 Constitution and then confirmed in the Constitutional Court judgment of *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*[56] which certified the final Constitution.[57]

Interestingly, Labuschagne argues that despite the architecture of the Constitution envisaging overlapping spheres of government, the 'courts in general and the Constitutional Court in particular have adopted a rigid approach to the separation of powers that is more inflexible than it was during the pre-1993 era'.[58] In this regard, Labuschagne uses the *Executive Council Judgment* as a basis to argue that 'plenary powers' are not to be used or delegated to the Executive. Labuschagne then convincingly invokes the other related judgments referred to above as well as *Government of the Republic of South Africa and Others v Grootboom and Others*[59] and *Minister of Health and Others v Treatment Action Campaign and Others*[60] for the assertion that the 'the Constitutional Court values the separation of power principle… and is prepared to enforce this in its judgments'.[61]

The law regarding the exercise of primary or plenary law-making power is so well established that even in the *Pienaar Bros Judgment* Fabricius J in an obiter dictum statement held that the 'executive does not make laws'.[62] Relevant scholarship dedicated to this issue in the context of taxations statutes is, however, fairly minimal since the seminal article written by Swart in 1996. The various aspect of the Separation of Powers Doctrine, the overlap of

[53] 2000 (1) SA 661 (CC), paras 122 – 124.
[54] 2007 (1) SA 343 (CC).
[55] Kate Hofmeyr 'Constitutional Law' (2007) 1 *Annual Survey of South African Law* at 212.
[56] 1996 4 SA 744 (CC).
[57] Hugh Corder 'Principled calm amidst a shameless storm: Testing the limits of the Judicial Regulation of Legislative and Executive Power' (2009) *Constitutional Law Review* at 239.
[58] Pieter Labuschagne 'The doctrine of separation of powers and its application in South Africa' (2004) 23 *Politeia* 3 at 91.
[59] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).
[60] *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002).
[61] Labuschagne op cit note 58 at 91.
[62] *Pienaar Bros* op cit note 1 at 110.

functions and personnel between the Executive and the Legislature all need to be more thoroughly considered in the context of the power to impose national taxes.

A core concern of the research in this thesis will be on the specific rules relating to the delegation of the legislative function between the Legislative and Executive spheres. In light of the 2016 Amendment Act, which introduced the delegation to the Minister of Finance of the power to amend the income tax rate by mere announcement, the question nevertheless rears its head as we need to consider whether Parliament is in fact able to assign an inherently legislative power to a member of the executive - namely to make law. While legal scholars have discussed at length the scope for delegation or assignment of the power to create law, this conversation has yet to extend to the Income Tax Act. Currie and de Waal usefully articulate that the limitations on the delegation of legislative powers to members of the Executive were not exhaustively addressed in the judgment of *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & another*[63] and these authors propose a more thorough discussion of the potential limitations to be applied to the transfer of law-making powers to members of the Executive.[64]

Flowing from this literature is the subsequent consideration of the application of the Rule of Law. For present purposes the focus of this discussion lies particularly in understanding the underlying purpose behind the need for an advanced warning and the opportunity to comment on proposed new laws. In this regard, in the course of unpacking the merits of the Constitutional Court judgment in *Doctors for Life International v Speaker of the National Assembly*[65] (the 'Doctors for Life Judgment') Kate Hofmeyer discussed in some detail Ncobo J's articulation of the Legislature's 'duty to facilitate public involvement in the legislative process'.[66] Hofmeyer identifies the careful balance adopted by the court between deference to the Legislature in respect of their own processes and at the same time the right of the public to 'a reasonable opportunity to participate effectively in the law making process'.[67]

Hofmeyer then identified that this dictum was further expanded upon by Ngcobo J in the subsequent judgment *Matatiele Municipality & Others v President of the Republic of South Africa & Others*[68] (the 'Matatiele Judgment'). In the *Matatiele Judgment* it first had to be

[63] *Executive Council* (2000) op cit note 53 paras 122 – 124.
[64] Ian Currie and Johan de Waal *The New Constitutional and Administrative Law Vol. One* 1 ed (2007) 105.
[65] 2006 (6) SA 416 (CC).
[66] Kate Hofmeyer *Annual Survey of SA Law* (2006) 22.
[67] Hofmeyer op cit note 66 at 23.
[68] 2007 (6) SA 477 (CC).

established whether section 74(8) of the Constitution which set the requirement of Provincial legislature approval where a Bill concerned such Province or Provinces. Once triggered the court then had to consider section 118(1)*(a)* of the Constitution requiring of a 'provincial legislature' that it 'facilitate public involvement in the legislative and other processes of the legislature'. Hofmeyer in this context addressed the advancement of the ratio in the *Doctors for Life Judgment*. Hofmeyer noted that Ngcobo J added to 'the factors identified… which ought to inform the reasonableness inquiry'.[69] In Hofmeyer's estimation the key expansion to this approach was:

> [T]he fact that the more discreet and identifiable the potentially affected section of the population… the more intense the possible effect on their interests… the more reasonable it would be to ensure [this group]… is given a proper opportunity to have a say. [70]

The need for participation is therefore to be assessed contextually and will always be driven by the underlying purpose of including the people who will actually be affected by the law in the process of making it.

Returning to the *Doctors for Life Judgment* Chukus Okpaluba went into some detail addressing the Constitutional Court's approach to the need for participation and potential court invention in the legislative process at various stages. Okpaluba noted that the approach in the *Doctors for Life Judgment* had been that the court would only have purchase on the matter once a bill had 'gone through all the processes of enactment and could in law be termed an Act of parliament'.[71] Okpaluba then considered the development of this principle in the context of the Constitutional Court judgment of *Glenister v President of the Republic of South African and Others*[72] (the 'Glenister Judgment'). In the *Glenister Judgment* the court was confronted with a challenge to the power of a minister to introduce a bill into Parliament. While in the *Glenister Judgment* the Constitutional Court did not ultimately interfere with this pre-legislative step, the court - in the words of Okpaluba - recognised 'in exceptional circumstances… [it would] grant relief… where immediate intervention was required to prevent the violation of the Constitution and the rule of law'. [73]

---

[69] Hofmeyer op cit note 66 at 27.
[70] Hofmeyer op cit note 66 at 27.
[71] Chukus Okpaluba 'Can a court review the internal affairs and processes of the legislature? Contemporary developments in South Africa' (2015) 48 *Comparative and International Law Journal of Sothern Africa* 2 at 204.
[72] 2009 (1) SA 287 (CC).
[73] Okpaluba op cit note 71 at 205.

In discussing the nature of the Separation of Powers Doctrine in South Africa, Swart and Coggin argue that the 'negotiators of the Final Constitution insisted on the clear *existence* of separation of power'.[74] Swart and Coggin note that in the judgment of *S v Dodo*[75] the Constitutional Court had invoked the approach of Laurence Tribe,[76] wherein the nature of the 'separation of powers' is framed not as 'any abstract theory… but the actual separation of powers "operationally defined by the Constitution"'.[77]

Taking this thought further, Swart and Coggin then discuss the literature of Seedorf and Sibanda.[78] In this regard Seedorf and Sibanda correctly recognise that strict independence is not likely achievable, and the existing degree of interrelations is reflected in the 'overlap of personnel'.[79] Seedorf and Sibanda also acknowledge the practical reality that in post-Apartheid South Africa given the dominance of one political party in the Legislature and Executive there has been little practical effect to the Separation of Powers Doctrine.[80]

A particular contention of Seedorf and Sibanda was then considered and discussed by Hodgson, who examined the implication of the contention that 'litigants have relied upon [the principle of separation of powers], either expressly or implicitly, to formulate their complaints'.[81] In this regard Hodgson identifies a distinct South African strand of the Separation of Powers Doctrine which was framed by Moseneke DCJ in the judgment of *National Treasury and Others v Opposition to Urban Tolling Alliance*.[82] This new prism through which the doctrine is to be reviewed was referred to by Moseneke DCJ as 'separation of powers harm'. [83] In an intriguing comparison Hodgson likens the novation of formulating the separation of powers from the perspective of the general populace who are affected by failures of government to the Constitutional Court's formulation of 'meaningful engagement'

[74] Mia Swart and Thomas Coggin 'The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and Etolling in National Treasury v Opposition to Urban Tolling' (2013) Constitutional Court Review 5 at 352.
[75] 2001 (3) SA 382 (CC).
[76] Laurence Tribe *American Constitutional Law* 3rd ed (2000).
[77] *Dodo* op cit note 75 para 47.
[78] S Seedorf and S Sibanda 'Separation of Powers' in S Woolman and M Bishop (eds) *Constitutional Law of Soith Africa* 2nd ed (2005), chapter 12 at 12 - 17.
[79] Swart and Coggin op cit note 74 at 353.
[80] Seedorf and Sibanda op cit note 78.
[81] Timothy Hodgson 'The mysteriously appearing and disappearing doctrine of separation of powers: towards a distinctly South African doctrine for a more radically transformative Constitution' (2018) 34 *South African Journal on Human Rights* 1 at 78.
[82] 2012 (6) SA 223 (CC).
[83] *Urban Tolling Alliance* op cit note 82 para 47.

as the standard by which the Legislature is required to facilitate in the law-making process in terms of section 57 of the Constitution. [84]

2.5. Conclusion

In concluding his seminal 1996 article, Swart clarified that he merely 'endeavoured to illustrate the potential impact of the limitations'[85] placed on the delegation of plenary powers to impose taxes set out in the Constitution. Swart articulated a desire then that his article would 'stimulate some debate on this important issue'.[86] Critically, in light of the 2016 Amendment Act the issue has been brought to the fore and urgently requires new scholarship. The commentary regarding the assignment of law-making powers has yet to consider the unique formulation in section 5(2) of the Income Tax Act which envisages a temporary 12-month window subject to Parliamentary ratification. This novel formulation of the assignment of law-making powers warrants further consideration and research, a gap in literature that I hope to contribute to closing.

[84] Hodgson op cit note 81.
[85] Swart op cit note 43 at 24.
[86] Swart op cit note 43 at 24.

Chapter 3: Separation of Powers Doctrine in South Africa

3.1. Introduction

The Separation of Powers Doctrine is a fundamental principle of our Constitutional democracy which was expressly stated in the 1993 Constitution and ultimately enthused into the architecture of the final text of the Constitution. This principle, the popular formulation of which originated in Montesquieu's 1748 masterpiece *L'Esprit des Lois* or in English 'The Spirit of the Law', envisages a separation in function and personnel between the three spheres of government, namely the Legislature, Executive and Judiciary. The conception of the separation of these different roles in the state persists to this date through the lens of 'functions and personnel'.[1]

Currie and de Waal articulate the underlying purpose of this design as being to 'prevent the excessive concentration of power in a single person or body'.[2] The purpose of this separation is of course to facilitate practical checks and balances on the use of state power in both directions. In the South African context, at least in the democratic era, this separation has never been absolute and often entails a nuanced assessment of the degree to which the Constitution will permit an overlap of potentially both function and personnel.

In the judgment of *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries*,[3] Zondo J writing for the Constitutional Court set out the following four general principles in respect of the formulation of the Separation of Powers Doctrine in South African law. First, it was to be noted that there is 'no universal model of separation of powers' which in simple terms meant that with a plethora of options available for oversight and accountability, the notion of separation was never going to be 'absolute'.[4] Second it is important to have an understanding of the context within which this doctrine is to be applied and this should provide gentle caution in respect of appeals to foreign legal jurisdictions with distinct institutions. Third, the express recognition that 'the separation of powers doctrine is not a fixed or rigid constitutional doctrine' but is actually a nuanced expression of the objective of ensuring effective 'checks and balances of many kinds'.[5] Fourth, our Constitution

[1] Ian Currie and Johan de Waal *The New Constitutional and Administrative Law* (2007) 1 at 95.
[2] Ibid.
[3] 2013 (5) SA 571 (CC) at para 13.
[4] Ibid.
[5] Ibid.

does not 'provide for total separation' of the different spheres of the state including the Legislature and the Executive.[6]

Moseneke DCJ in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[7] introduced a somewhat augmented formulation of the doctrine of the separation of powers where he held that when delivering a judgment which may 'intrude upon the terrain of another branch of Government' the exercise must weigh alongside 'other relevant harm… a careful consideration of separation of powers harm'.[8] In this context the former Deputy Chief Justice was alluding to the inherent limits placed on the courts when interfering with the operation of other spheres of government.

This chapter will consider the Separation of Powers Doctrine as it is reflected in South African law and more specifically its application in the context of delegated law-making powers. This inquiry requires a consideration of the Separation of Powers Doctrine as it is reflected in the current Constitution, the common law and its origins in the 1993 Constitution.

3.2. The Separation of Powers Doctrine as reflected in the architecture of the Constitution

Of particular interest to this dissertation is the relationship between the Legislature and the Executive, and in the context of this interrelationship the focus is even more specifically on the power to make law. The Constitution is expressly clear in section 43(a) that 'the legislative authority… of the national sphere of government is vested in Parliament'. The power to make the country's written laws therefore firmly sits with Parliament.

Parliament is itself composed of two houses: the National Assembly, comprised of representatives elected from across the country on a proportional basis, and the National Council of Provinces (the NCOP), comprised of 10 representatives elected from each province. The National Assembly, as the primary national chamber, has the power to amend the Constitution (with the participation of the NCOP), per section 44(1)*(a)*(i), to amend any national law (with the participation of the NCOP in the event of legislation affecting Provinces), per section 44(1)*(a)*(ii), and to assign the legislative function in respect of any relevant matter to any other *legislative body*, per section 44(1)*(a)*(iii).

[6] Ibid.
[7] 2012 (6) SA 223 (CC).
[8] *Urban Tolling Alliance* op cit note 7 para 47.

It is important to note at this point that Parliament alone is vested with these specific law-making powers, and furthermore even where such power is assigned (that is, where the primary role and the power is transferred to another body), the power to legislate cannot be assignment to the Executive. This means that only legislative bodies will be able to exercise the original power to make law by way of legislation.

The position regarding the allocation of the legislative *function*, therefore, would appear to be fairly clear cut in the Constitution. There are two aspects that are perhaps less clear, namely, the separation of personnel, and the potential delegated role of creating derivative law through an existing statute. With regard to the appointment of the Executive, this group of decision makers are by and large dual members of both Parliament and the Cabinet. The President, who is elected from Parliament but ceases to be a member of the Legislature, is granted the sole discretion to appoint the Deputy President and Ministers in terms of section 91(2) of the Constitution. This group of people can *only* be selected from the members of the National Assembly, with the exception of two Ministers who may be appointed from outside the National Assembly in terms of section 91(3)*(c)* of the Constitution. Despite being appointed to the Executive and unlike the President, all but two Ministers remain members of the National Assembly.

The dual role played by members of the Executive is made further complicated by the fact that as Ministers they may introduce legislation to the National Assembly. While this is a power all members of Parliament possess, the difference in institutional capacity is quite stark. A Minister will typically have access to the full capacity of a governmental Department to draw up not only the Bill but any supplementary material needed. An ordinary member of the National Assembly will usually have access only to a limited number of short-term contract researchers. In part this accounts for the disproportionate volume of legislation that originates from the Executive. The focus of this thesis is of course on the passage of money Bills specifically, which relate to imposing or reducing national taxes. The procedure to be followed in the case of money Bills will be discussed in greater detail in Chapter 4.

The role of the President is the most unambiguous distinction between the Legislature and the Executive. The President, on election from and by Parliament, ceases to be a member of the Legislature and in terms of section 85 of the Constitution ‘executive authority of the Republic is vested in the President’. In this regard the President to a certain degree fulfils the objective of a distinct Executive both in personnel and in function.

The key source of friction, which is at the epicentre of this thesis, lies in the statutory delegation of law-making powers to members of the Executive by the Legislature. Within months of the Constitutional Court having been established in 1995 this very issue was put before the apex court and tested under the light of the 1993 Constitution.

3.3. Separation of Powers Doctrine as applied to delegated law-making powers under the 1993 Constitution

In 1993 when the Interim Constitution was enacted, to facilitate the transition to democracy in South Africa, one of the core principles hardcoded into our revised legal system was the Separation of Powers Doctrine. The 1993 Constitution specifically recorded in Principle VI that:

> There shall be a separation of powers between the legislature, the executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness.[9]

Even before final Constitution was enacted, the newly minted Constitutional Court was asked to consider the application of the Separation of Powers Doctrine as it applied to the potential overlap between the Executive and the Legislature in the creation of law. In the judgment of *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*[10] ('Executive Council Judgment') the apex court was asked to consider a potential breach of the Separation of Powers Doctrine triggered by a statute which assigned to a member of the Executive the power to potentially make new law.

At issue in the *Executive Council Judgment* was the application of section 16A of the Local Government Transition Act which set out the following:

> (1) The President may amend this Act and any Schedule thereto by proclamation in the Gazette.
> (2) No proclamation under subsection (1) shall be made unless it is approved by the select committees of [both houses of Parliament]…
> (3) A proclamation under subsection (1) shall commence on a date determined in such proclamation, which may be a date prior to the date of publication of such proclamation.
> (4) (a)The Minister shall submit a copy of a proclamation under subsection (1) within 14 days after the publication thereof to Parliament.
>
> (b) If Parliament by resolution disapproves of any such proclamation or any provision thereof, such proclamation or provision shall cease to be of force and effect, but without prejudice to the validity of anything done in terms of such proclamation or such provision before it so ceased to be of force and effect, or to any right or liability acquired or incurred in terms of such proclamation or such

[9] 1995 (4) SA 877 (CC) paragraphs 18-22
[10] *Executive Council* op cit note 9.

> provision before it so ceased to be of force and effect, or to any right or liability acquired or incurred in term so such proclamation or such provision before it so ceased to be of force and effect.

The background to the *Executive Council Judgment* was the looming local government elections in South Africa due to be held later that year in 1995. The impugned law was an amendment to the Local Government Transition Act,[11] which was given effect to by 'the President by proclamation…[who was] purporting to act in terms of powers vested in him under the' Act itself.[12] The effect of the empowering provision in the Act was that the President could amend the Act, not via a proposed amendment being presented and passed by Parliament, but rather by mere proclamation. Understandably this raised the possibility of a conflict between the two spheres of government over the function of law making.

The outcome of the *Executive Council Judgment* was unanimous in that the provision purporting to allow the President to amend an Act of Parliament was declared unconstitutional. The truly fascinating aspect of this judgment, however, lay in the nebulous reasoning behind the outcome. In this regard the *Executive Council Judgment* was far from unanimous as four distinct judgments emerged from the Constitutional Court.

I shall refer to the argument in the first judgment, written by Chaskalson P, as the 'Primary Procedural Argument'. To begin with, Chaskalson P acknowledges that the substantive law-making powers granted to Parliament in section 37 of the 1993 Constitution are framed broadly and must implicitly allow for a degree of delegated law making.[13] In this context, however, Chaskalson P draws the distinction between delegating or assigning the power to make 'subordinate legislation within the framework of a statute' and those of 'assigning plenary legislative power to another body… the power to amend the Act under which the assignment is made'.[14]

The core basis for Chaskalson P in determining that the provision was unconstitutional lay in the 'manner and form' provisions of the then 1993 Constitution namely sections 59 to 61, rather than the substantive functional power to create law in section 37.[15] The crux of the Primary Procedural Argument is the emphasis placed on the set procedural steps to be followed by Parliament in passing ordinary laws (section 59), money bills (section 60) or laws affecting Provinces (section 61), which meant that the act of creating primary legislation *must* traverse

[11] Act 209 of 1993.
[12] *Executive Council* op cit note 9 para 2.
[13] *Executive Council* op cit note 9 para 51.
[14] *Executive Council* op cit note 9 para 51.
[15] *Executive Council* op cit note 9 para 62.

these expected procedural milestones through Parliament. In the words of Chaskalson they were 'not merely directory… [t]hey prescribe how laws are to be made'.[16] For Chaskalson the deviation from these 'manner and form' provisions is then determinative, subject to certain identified exceptions.

Chaskalson P goes on to identify circumstances in which 'short of war or a state of emergency' where the sheer urgency in a particular context may permit a deviation from the normal 'manner and form' provisions.[17] Chaskalson was quick to dismiss, however, the potential argument for urgency driven by the forthcoming Local Government elections.

The second judgment set out by Mahomed DP shall be referred to as the 'Spectrum of Separation Argument'. When assessing the constitutional validity of a purported delegation of law making powers in a statute, Mahomed argues that instead of a simple application of the 'manner and form' provisions the court should instead consider contextual factors including: a consideration of the 'constitutional instrument in question, the powers of the legislature in terms of that instrument, the nature and ambit of the purported delegation, the subject-matter to which it relates, the degree of delegation, the control and supervision retained… the circumstances prevailing at the time… the identity of the delegate and practical necessities generally'.[18]

Mahomed DP determined that the provision in question simply 'goes too far and effectively constitutes an abdication of Parliament's legislative function'.[19] The judge did not rule out the possibility that Parliament could assign the power to amend the statute on subtly different terms, but held that this would depend greatly upon 'whether the power conferred is limited to what is reasonably necessary and expedient' for conducting the election envisaged.[20] To a degree it could be argued that Mahomed DP conceived of the parameters for such a delegation as being akin to those of subordinate legislation, namely their content and character would need to be largely circumscribed by the empowering statute.

The third judgment, penned by Ackermann J and O'Regan J, I shall refer to as the 'Plenary Power Argument'. The focus in this portion of the judgment was on the distinction between primary and secondary law making. In particular, the judges sought to examine what legislative power was being delegated and not simply how a law was to be passed. In this regard

[16] *Executive Council* op cit note 9 para 62.
[17] *Executive Council* op cit note 9 para 62.
[18] *Executive Council* op cit note 9 para 136.
[19] *Executive Council* op cit note 9 para 141.
[20] *Executive Council* op cit note 9 para 141.

the Plenary Power Argument begins with the substantive empowering provision of the 1993 Constitution namely section 37.

Ackermann J and O'Regan J held that the impugned provision envisaged the making of laws that neither conformed with the requirement that such an act was 'in accordance with the Constitution' nor with the requirement that such act was 'subject to this Constitution'.[21] Further, the Plenary Power Argument refrains from addressing the speculative exceptions articulated by Chaskalson P. Instead, Ackermann J and O'Regan J preferred not to provide any opinion as to potential exceptions in favour of the default position that the 'plenary' power to make primary legislation could not be delegated.

The fourth and final judgment written by Langa J, and building upon the 'Primary Procedural Argument' of Chaskalson, adds critical principle that Parliament cannot delegate or assign a power which 'exceeds the competence of Parliament itself'.[22] For this reason I shall refer to this as the Secondary Procedural Argument, namely if Parliament is bound by set 'manner and form' requirements when passing a law it cannot delegate or assign a power in a statute that exceeds these limitations.

3.4. Separation of Powers Doctrine as applied to delegated law-making powers under the final Constitution

Unlike the 1993 Constitution, the final Constitution does not explicitly refer to the Separation of Powers Doctrine. It does not in fact refer to that particular phrase at all. Despite the omission of the phrase, there can be no question that the underlying Separation of Powers Doctrine inspired and influenced the formulation of many provisions in the Constitution.

When the Constitutional Court was considering the certification of the final Constitution in *Certification of the Constitution of the Republic of South Africa*[23] (the Certification Judgment), one of the objections raised before it and considered by the apex court was whether the final Constitution failed 'to effect a full separation of powers' given that 'members of the executive government also … [are to be] members of the legislatures at all three levels of government'.[24] While the Constitutional Court appeared preoccupied with the degree to which the Executive could be held accountable by an overlapping Legislature, its reasoning in determining that the model adopted remained compliant within the umbrella of

[21] *Executive Council* op cit note 9 para 151.
[22] *Executive Council* op cit note 9 para 192.
[23] 1996 (4) SA 744 (CC).
[24] *Certification* op cit note 23 para 106.

the Separation of Powers Doctrine remains somewhat relevant to an assessment of the possible dilution of law making powers in the other direction.

In demining that the model remained within the broad scope of what could be termed a separation of the personnel and functions of the Executive and Legislature the court held:

> As the separation of powers doctrine is not a fixed or rigid constitutional doctrine, it is given expression in many different forms and made subject to checks and balances of many kinds… Indeed, the overlap [in personnel between the Executive and Legislature] contributes different forms of checks and balances on the exercise of executive power.[25]

The Constitutional Court can be understood to have sanctioned the 'overlapping' nature of the personnel in these two spheres of the state.

There remained a somewhat silent omission in respect of the possible diffusion of functions. This is perhaps the case as the Constitutional Court was not being asked the question from the perspective of the distinct functions, but it may also be simply because the court believed the allocation of functions to be rather clear. In the *Certification Judgment* the court merely regurgitated the refrain that 'legislative authority of government in the national sphere [vests] in Parliament'.[26]

The Constitutional Court did not have to wait long before the issue of delegated law-making powers in a national statute reared its head again in the judgment of *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development* (the 'Second Executive Council Judgment').[27] Unlike the *First Executive Council Judgment* the court now considered this matter in terms of the final Constitution.

At the heart of the *Second Executive Council Judgment* was a dispute as to the constitutionality of a provision in the Local Government: Municipal Structures Act of 1999 (the Structures Act) relating to the establishment and classification of municipalities.[28] While a number of challenges were mounted against the provisions of the Structures Act the issue of relevance to this thesis is the challenge to section 24(1) of the statute.

Section 24(1) of the Structures Act at the time of the *Second Executive Council Judgment* set out as follows:

---

[25] *Certification* op cit note 23 para 111.
[26] *Certification* op cit note 23 para 110.
[27] 2000 (1) SA 661 (CC).
[28] Act 117 of 1999.

> The term of municipal councils is no more than five years as determined by the Minister by notice in the *Government Gazette*, calculated from the day following the date or dates set for the previous election of all municipal councils in terms of subsection (2).

The point of obvious friction in respect of the Constitution arose from the wording of section 159(1) which in turn held that '[t]he term of a Municipal Council may be no more than five years, as determined by national legislation'.

Ncobo J in writing the majority judgment in the *Second Executive Council Judgment* held that this power to 'determine' the term of a Municipal Council simply 'is not a matter which the Constitution permits to be delegated'.[29] Currie and de Waal make the point that the set of factors laid out by Mahomed DP does appear to be partially considered by Ncobo J who alludes to the aspect of the 'Spectrum of Separation Argument'. Ncobo J for instance considers the relevant importance of this provision and the powers that flow from it. It should be noted, however, that the simple wording of the provision which uses the phrase 'as determined by legislation' appears to be determinative.[30] The ratio would therefore appear to be that Parliament simply cannot delegate its plenary power to make primary legislation. As a result, where the Constitution requires that legislation be the determining variable in respect of a particular use of state power – it is not possible for Parliament to delegate this power.

Due to the application of the essence of O'Regan J's 'Plenary Power Argument' from the *First Executive Council Judgment,* in the majority judgment of the *Second Executive Council Judgment*, O'Regan J (while dissenting in respect of the bulk of the challenges to the Structures Act) nevertheless agreed with the basis on the provision in the Municipal Structures Act[31] which purported to delegate a power that could not be delegated under the auspices of the Constitution. The Constitutional Court in the *Second Executive Council Judgment* therefore set down a far more deliberate ratio with all of the constituent judges adopting the straightforward view that Parliament simply cannot delegate its plenary function to make primary legislation.

It should be noted, whoever, that in applying the Separation of Powers Doctrine between the Judiciary and the Legislature the Constitutional Court in *Kubyana v Standard Bank of South Africa Ltd*[32] (the 'Kubyana Judgment') approached the review of legislation with a view to constraining its own powers and indicated the need in some cases to defer to the

[29] *Second Certification* op cite note 27 para 126.
[30] *Second Certification* op cite note 27 para 126.
[31] Act 117 of 1998.
[32] 2014 (4) BCLR 400.

Legislature in the performance of their original power to make law. In this regard the Constitutional Court held:

> It is well established that statutes must be interpreted with due regard to their purpose and within their context.... Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However that does not mean that ordinary meaning and clear language may be discarded for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.[33]

When considering the application of the Separation of Powers Doctrine one has to always bear in mind that it governs the interrelationship between three different spheres of government. Arising from this it is possible that the Judiciary are strict in their view of a potential trespass committed by the Executive in respect of the Legislature, but at the same time cautious and introspect on the Judiciary's own role in intruding upon the extent of the Legislature's discretion to make law.

The question to answered in respect of section 5(2) of the Income Tax Act, however, is not the degree to which the Judiciary can interfere in the law-making process but the capacity of the Legislature to delegate or assign its own plenary powers to original law-making. In this regard, I submit the position remains that which was down by the Constitutional Court in the *Second Executive Council Judgment*, namely that Parliament simply cannot delegate its plenary function to make primary legislation.

A related but important aspect to consider alongside the delegation of purported primary or plenary legislative powers, is the delegation of secondary or derivative law-making powers.

3.5. The delegation of secondary law-making powers in a statute

In the Constitutional Court judgment of *Ynuico Ltd v Minister of Trade and Industry*[34] the court was asked to consider the extent of Parliament's authority to delegate not primary law-making powers, but secondary law-making powers under the auspices of the 1993 Constitution. At issue was the application of section 2(1)*(b)* of the Import and Export Act 45 of 1963 which held that:

> The Minister may, whenever he deems it necessary or expedient in the public interest, by notice in the Gazette prescribe that no goods of a specified class or kind… shall be imported into the

[33] Ibid.
[34] 1996 (3) SA 989 (CC).

> Republic, except under the authority of and in accordance with the conditions stated in a permit issued by him or by a person authorised by him.

The source of Parliament's legislative authority to delegate such a power was considered by the court. The key provision in the then 1993 Constitution was section 37 which read that 'the legislative authority of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution'.

Counsel for the applicant relied upon this provision to argue that Import and Export Act 45 of 1963 exceeded the mandate of this provision in the 1993 Constitution. Despite persuasive arguments by counsel that the impugned provision in question clearly breached the bounds of legislative authority granted by the Constitution (and circumscribed by the Constitution), the Constitutional Court held that since the act in question predated the 1993 Constitution it fell outside the scope of section 37. The court therefore refused to retroactively apply the post-1994 conception of a legislative authority bound by constitutional principles.

The modern version of section 37 in the 1993 Constitution is section 44(3) in the final Constitution. As alluded to earlier, in a departure from the pre-1994 ethos of Parliamentary sovereignty, the Constitution holds in section 44(3) that '[w]hen exercising legislative authority Parliament is bound *only* by the Constitution, and must act in accordance with, and within the limits, of the Constitution'. The source of Parliament's authority is therefore the Constitution which both empowers but also limits its authority to delegate. The power to delegate secondary law-making powers has continued to be discussed in the context of the final Constitution.

A key judgment in this regard is that of *Dawood v Minister of Home Affairs*[35] (the 'Dawood Judgment') which considered the potential breadth of discretion to be afforded to a member of the Executive by the Legislature when granting the power to make delegated, secondary laws or regulations. The issue at hand was the power granted to the Minister of Home Affairs to issue temporary living permits to the foreign partners of South African citizens. Ultimately O'Regan J held that:

> [I]t [was] for the legislature… to determine what [circumstances would justify the infringement of the right to dignity in the context of cohabiting spouses of different nationalities] will be and to provide guidance to administrative officials to exercise their discretion accordingly'.[36]

[35] 2000 (3) SA 936 CC.
[36] *Dawood* op cit note 35 para 57.

In essence by leaving the wording of the statutory power to issue secondary law or regulations too broad, the provision had gone too far exposing it to a successful challenge. This general principle was then reaffirmed in the judgment of *Janse van Rensburg v Minister of Trade and Industry NO*[37] albeit not in the context of secondary legislation or law making.

In applying this dictum in the Kubyana Judgment the High Court North Gauteng Division (Pretoria) in the judgment of *Helen Suzman Foundation v Speaker of the National Assembly and Others*[38] (the 'Helen Suzman Judgment') which was heard during the height of the Covid-19 lockdown elected to show significant deference to the Legislature in interpreting the delegated law-making powers assigned in terms of the Disaster Management Act.[39] The court in that matter did not accept the argument of the applicant which envisaged the Disaster Management Act[40] operating within a fixed period of time.

I would submit, however, that the *Helen Suzman Judgment* was in some ways a missed opportunity as the 'directions' issued by some Ministers bordered on the purported use of primary and not secondary law-making powers in that they interfered with legislation that is currently in force. In this regard it is perhaps noteworthy that the court specifically held that the applicant in this matter:

> [D]oes not take issue with the provisions of the DMA; it does not challenge the extensive regulation making power of the Minister; it does not challenge the delegation of power by Parliament to the Minister and it does not challenge the content of any of the regulations made under the DMA. Indeed, the applicant accepts that the use of the DMA by government as a response to the COVID-19 pandemic was lawful and appropriate and that its use to date has been constitutionally compliant.[41]

In many respects it is a pity that counsel for the applicant in the *Helen Suzman Judgment* did not challenge the delegated law-making powers under the Disaster Management Act[42].

There are in fact a number of other more directly relevant, and supportive, recent cases of delegated law-making powers being challenged. The matter of *Afriforum NPC v Minister of Tourism and Others*,[43] raised the issue of delegated authority to make regulations. In this regard the Minister of Tourism was found to have acted outside of the parameters of this delegated authority. Specifically, Plasket JA found that the use of the power to issue directions in terms

[37] 2000 (1) SA 29 (CC).
[38] (32858/2020) [2020] ZAGPPHC 574 (5 October 2020).
[39] Act 57 of 2002.
[40] Act 57 of 2002.
[41] *Helen Suzman* op cit note 38 para 13.
[42] Act 57 of 2002.
[43] (499/2020; 498/2020) [2021] ZASCA 121 (22 September 2021).

of the regulations that were issued under the auspices of the Disaster Management Act[44] were 'invalid'.[45]

In the related matter of *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others*,[46] Plasket JA determined that a Minister had overshot their powers when issuing overly broad regulations. In the even more recent judgment of *Skole-Onsersteuningsentrum NPC and Others v Minister of Social Development and Others*,[47] Fabricius J held that the directions issued in respect of early childhood centres was 'not done lawfully and not within the Minister's powers'.[48]

I would therefore submit that even if one were to argue that the application of section 5(2) constituted a form of secondary law-making powers akin to the issuance of regulations - a position I submit is invalid given the requirement that Parliament ratify the Minister of Finance's announcement - it would still fall to be declared invalid as it would constitute the use of overly broad secondary law-making powers.

3.6. Conclusion

This chapter has discussed in some detail the Separation of Powers Doctrine as it is reflected in South African law and more specifically its application in the context of delegated law-making powers. The existing position as articulated by the Constitutional Court in the *Second Executive Council Judgment* would appear to be that Parliament simply cannot delegate its plenary function to make primary legislation. There is scope for the delegation of secondary law-making powers to members of the Executive, but in this regard the Legislature must nevertheless jealously guard its exclusive legislative competence and can only justifiably delegate such secondary law-making powers within the context of clear legislative guidelines. The outright assignment of the power to announce new tax rates in section 5(2) of the Income Tax Act is therefore incompatible with the application of the Separation of Powers Doctrine envisaged by the Constitutional Court.

The next chapter will discuss in some detail the process by which amendments to tax statutes are to be processed by the Legislature and to set out in appropriate terms the true role of the Executive in this process of law-making.

---

[44] Act 57 of 2002.
[45] *Afriforum* op cit note 43 para 54.
[46] 2021 (3) SA 593 (SCA).
[47] [2020] 4 SA All SA 285 (GP).
[48] *Skole-Onsersteuningsentrum* op cit note 47 para 48.

Chapter 4: The Legal Framework for Drafting and Amending Tax Laws

4.1. Introduction

The previous Chapter involved a discussion of the Separation of Powers Doctrine specifically in the context of the delegation of law-making powers by the Legislature to the Executive. Following from that, the particular focus of this Chapter is the application of the Separation of Powers Doctrine and more specifically its application in the context of delegated law-making powers in respect of national taxes. The context of this inquiry lies in the power set out in section 5(2) of the Income Tax Act granted to the Minister of Finance to 'alter… the rates of tax chargeable' or in other words to, in effect amend a statute by mere 'announcement'. This statutorily granted power will then be juxtaposed against the empowering provisions in the Constitution namely section 44 read together with section 77.

As detailed in Chapter 3, the plenary power to issue and make law in the form of a statute is an exclusive legislative competence. As regards the imposition or reduction of a national tax the Constitution expressly holds in section 77 that such a law will constitute a 'money Bill' which in terms of section 44(3) must follow the Parliamentary procedure for a law passed by the National Assembly in terms of section 75 of the Constitution. The central question, therefore, is whether the Separation of Powers Doctrine and more particularly the framework within which law-making powers may be delegated under our Constitutional dispensation permits the application or use of section 5(2) of the Income Tax Act in its current form.

4.2. The executive power to introduce a money Bill to Parliament

The Constitution provides roles for both the executive and the legislature in respect of the legislative process. Generally, members of the National Assembly can initiate legislation in the course and scope of 'exercising its legislative power' in terms of section 55(1)*(b)* of the Constitution. This does not apply to situations where the draft statute in question is a 'money Bill'. The same restriction applies to the National Council of Provinces in terms of section 68(b) of the Constitution.

Only the 'Cabinet minister responsible for national financial matters' may introduce a 'money Bill' into the houses of Parliament, as set out in section 73(2)*(a)* of the Constitution. A 'money Bill', as articulated above, includes a statute that either 'imposes' or 'reduces' national 'taxes, levies, duties or surcharges' per section 77(1)*(b)* and *(c)* of the Constitution. The Constitution therefore clearly reserves the function of introducing a statute which will increase

or decrease national taxes for a specific member of the executive and places it in the hands of the National Finance Minister.

The appointment of the National Finance Minister is itself an executive function and this decision rests in the hands of the President. In terms of section 91(2) of the Constitution the President both 'appoints' Ministers and 'assigns their powers and functions'. It should also be noted that when appointing the Cabinet, the President is not bound to only appointment Ministers from the pool of existing members of Parliament and may in terms of section 91(3)*(c)* appoint two persons from outside of Parliament. This means that it is possible that the executive authority to introduce a taxing statute could rest in the hands of an unelected individual merely appointed by the head of state. At the time of writing this thesis the current Minister of Finance is a member of the National Assembly and has been since the advent of the Constitution.

Once a money Bill has been introduced, by the Minister of Finance, they will then participate in the vote on this statute in the house. By convention there are three forms of 'money Bill' introduced at the time of the budget speech which is typically timed to occur just over a month before the National government's financial year begins on 1 April and often just before the beginning of the tax year for natural persons and trusts on 1 March. These three bills include: first, laws to amend provisions in taxing statutes (like the Income Tax Act). Secondly, laws to set out the appropriation of new money by the National government as well as to arrange for the distribution of funds to Provincial and local governments. Finally, an often-overlooked bespoke statute that sets out the revised tax rates applicable for the incoming tax year.

These draft Bills, typically drafted by state law advisors in National Treasury at the behest of the Minister of Finance, enter the legislative process once presented to Parliament. The stereotypical process for money Bills is as follows:

- the relevant members of Parliament will receive briefings from:
    - the Parliamentary Budget Office (the 'PBO') which is intended to be an independent and technically proficient advisory body to Parliament in respect of all 'money Bills'; and
    - the Financial and Fiscal Commission (the 'FFC') which is a Chapter 9 institution established principally to ensure fair and equitable distributions of funding through all spheres of government.

- a short 'public' hearing is convened by the Standing Committee on Finance (often for not more than 3 or 4 days),[1] which is the subject of some recent criticism given the truncated period and lack of general public access, but this is a topic discussed in greater detail in Chapter 5.
- National Treasury will then comment before the Standing Committee on Finance on any of the issues raised either by the technical bodies (the PBO or the FFC) as well as public comments.
- Finally, the Standing Committee on Finance will then issue a report to the general body of the National Assembly.

The introduction of the three typical forms of 'money Bill' by the Minister of Finance to Parliament do not represent the final form of the statute necessarily, as it may be subject to amendment by Parliament before being passed into law. This in many ways represents the most serious risk to the current formulation of section 5(2) of the Income Tax Act. This is because section 5(2)*(a)* envisages the 'announced' rate of income tax taking effect 'from a date or dates mentioned' in the announcement of the Minister.

4.3. The process of amending a money Bill

The Constitution, in terms of section 77(3), mandated Parliament to 'provide for a procedure to amend money Bills before Parliament'. This Constitutional injunction found expression in the Money Bills Amendment Procedure and Related Matter Act 9 of 2009 (the 'Amendment Act') which sets out in some detail the procedures for amending money Bills.

In terms of the Amendment Act, the Minister continues to play a role where any amendment to a money Bill is envisaged. This is the case even after the Minister has exhausted their power to introduce a 'money Bill' per the Constitution.

Looking specifically at a money Bill seeking to impose or reduce national taxes, which is referred to as a 'revenue Bill' in the Amendment Act, the Minister 'must be given at least 14 days to respond to any proposed amendment', in terms of section 11(5) of the Amendment Act. In this scenario it is members of Parliament that notify the Minister of amendments envisaged by the Legislature.

[1] Parliament and the Budget process press release 8 July 2019, available at https://www.parliament.gov.za/index.php/press-releases/parliament-and-budget-process accessed on 22 November 2021.

Before considering ‘revenue Bills’ the Amendment Act envisages the National Assembly adopting an overarching set of guidelines referred to as the ‘fiscal framework’. This ‘fiscal framework’ is defined in section 1 of the Amendment Act as constituting:

- estimates of revenue to be collected in the forthcoming financial year and the budget requirements of the state;
- estimates of expenditure for the forthcoming financial year;
- estimates of government borrowing;
- the likely interest and related costs of such borrowing; and
- estimates of the contingency fund available to government.

This ‘fiscal framework’ does not itself constitute an act of Parliament and cannot be seen as an enacted ‘money Bill’ in terms of section 77 of the Constitution. Rather it might be appropriate to understand its operation as a form of public notice regarding the technical mechanics behind National Treasury’s proposals in both the formulation of the draft taxing provisions and the appropriations which are set out in the draft ‘money Bills’ presented to Parliament.

The Amendment Act sets out various principles to be considered by Parliament and the Standing Committee on Finance when considering an amendment to a revenue Bill. First the Committee must ensure the bills remain consistent with the ‘fiscal framework’, in terms of section 11(3)*(a)*. Second, they need to take into consideration the principles of ‘equity, efficiency, certainty and ease of collection’, in terms of section 11(3)*(b)*. Third, this Committee must take into account the impact on the ‘composition of tax revenue with reference to the balance between direct and indirect taxes’, in terms of section 11(3)*(c)*. Fourth, there must be a consideration of general regional tax trends, in terms of section 11(3)*(d)*. Fifth and finally, the Committee must weigh the impact of the proposed changes on ‘development, investment, employment and economic growth’, in terms of section 11(3)*(e)*.

These considerations, set out by Parliament in the Amendment Act, must themselves be understood in the context of the empowering provision in the Constitution which enjoined Parliament to enact this administrative law. Section 77(3) of the Constitution mandated Parliament to ‘provide for a procedure to amend money Bills before Parliament’. These considerations are therefore required as part of the procedure for amending a ‘revenue Bill’ but could not be rightfully read as a further limitation on the discretion of Parliament to amend the substance of any ‘money Bill’ in the ordinary course of its activities.

The Amendment Act at section 11(6)*(a)* provides for the report issued by the Standing Committee on Finance to 'motivate' for amendments to the 'revenue Bill'. The Amendment Act gives the Minister of Finance a second bite at the apple by allowing for 'comments' in respect of both the bill and any envisaged changes to accompany the Committee's report, in terms of section 11(6)*(b)* of the Amendment Act. The Minister's comments are, however, not binding on Parliament. As a result, any amendments to a money Bill, to which the Minister voices opposition in his or her comments, may nevertheless be passed into law.

As the preamble to the Amendment Act re-iterates, these provisions merely set out 'the procedure to amend money Bills'. This second opportunity to 'comment' on the bill and any proposed changes granted to the Minister of Finance, does not alter the ultimate legislative prerogative to amend and pass a money Bill into law – which remains with Parliament.

Finally, the Minister is given a third potential opportunity to influence the wording of the final bill and may propose an additional amendment to a 'money Bill' that he or she had previously introduced to Parliament by virtue of section 14 of the Amendment Act. In this regard it is perhaps noteworthy that the Amendment Act specifically restricts this right to making 'technical corrections to the Bill' rather than substantive changes. Yet again the empowering provisions makes it clear that the executive power to introduce a money Bill is distinct from the legislative power to amend and pass a money Bill – a power that emanates from section 44 of the Constitution read together with section 77.

4.4. When do money Bills become law?

The overlap between the Legislature and the Executive reappears at the point of legislation coming into force as law. Once a money Bill has been passed by the National Assembly in terms of section 75 of the Constitution, together with the potential approval of the National Council of Province, the Bill *must* then be assented to by the President in terms of section 79 of the Constitution.

A Bill that is assented to will come into force as an Act when published in the *Government Gazette*. The date on which the statute, or portions of the statute, come into effect will be detailed in the gazetted instrument itself. In other words, the statute may set a date either before or after its publication as the date on which its legally binding provisions come into effect. This very issue was the central concern of the *Pienaar Bros Judgment*,[2] wherein a

[2] 2017 (6) SA 435 (GP).

'money Bill' was enacted with a specific provision coming into effect retrospectively on the date this proposed amendment was 'announced' by the Minister of Finance.

The power of the President to assent (or to refuse an assent) should be understood not as a power to substantively change the provisions of the envisaged statute, but rather as an executive power of an administrative character that provides the President, in terms of section 79(1) of the Constitution, with a binary option: either assent to the Bill or refer the Bill back to the National Assembly.

The President does not have the equivalent of a veto in respect of the enactment of legislation. The power to refer a Bill back to Parliament is subject to the condition that in the opinion of the President there are 'reservations about the constitutionality of the Bill'. The Constitution does also provide a mechanism to resolve any potential disputes that may arise. The Constitutional Court may be approached to pronounce on a question of a Bill's constitutionality, which will then be final and in terms of section 79(5) of the Constitution will be binding on the President who must then assent to the Bill.

4.5. Section 5(2) of the Income Tax Act

In an amendment to the section 5(2)(*a*) and (*b*) of the Income Tax Act,[3] the Legislature introduced in the Taxation Laws Amendment Act 23 of 2018 an entirely new procedure for imposing (increasing) and reducing the national income tax. The provision in section 5(2) of the Income Tax Act now holds as follows:

> 5(2)(*a*) The Minister may announce in the national annual budget contemplated in section 27(1) of the Public Finance Management Act 1999, (Act No. 1 of 1999), that, with effect from a date or dates mentioned in that announcement, the rates of tax chargeable in respect of taxable income will be altered to the extent mentioned in the announcement.
>
> (*b*) If the Minister makes an announcement of an alteration contemplated in paragraph (*a*), that alteration comes into effect on the date or dates determined by the Minister in that announcement and continues to apply for a period of 12 months from that date or those dates subject to Parliament passing legislation giving effect to that announcement within that period of 12 months.

In many respects this provision is not so much desiring 'its cake and eating it', as it is trying to 'eat its cake' before it has even been baked.

The Minister of Finance, in terms of sections 5(2)*(a)* and *(b)* of the Income Tax Act is now empowered to 'alter' the income tax rate by virtue of an 'announcement' in the annual

[3] Act 58 of 1962.

national budget, with effect from the 'date or dates determined by the Minister in that announcement'.

In light of sections 77(2)(*b*) and (*c*) of the Constitution, the power to 'impose' or 'reduce' a national tax requires a special form of statute (a 'money Bill'). It would appear, therefore, that section 5(2) of the Income Tax Act is quintessentially an example of a purported delegation of primary or plenary law-making powers by Parliament via an existing statute.

Pursuant to the discussion above regarding the roles of the Minister of Finance in introducing 'money Bills' to the National Assembly and the President in giving assent to a passed statute, there is no question that members of the Executive perform important roles at the entry and exit points for the legislative process. What is, however, clear from the current formulation of section 5(2) of the Income Tax Act is that the Minister of Finance is envisaged to play the central role in altering the tax rate - in effect amending an existing statute.

Any amendment to an act of Parliament, which would fall under section 77 of the Constitution and constitutes an enacted 'money Bill', would, in terms of the principles laid down in the *First Executive Council Judgment*[4] and *Second Executive Council Judgment*[5] (as discussed in detail in Chapter 3), need to be enacted by Parliament itself. Section 5(2)(*b*) in some ways patently acknowledges the need for Parliament to pass legislation for the purpose of 'giving effect to the [Minister's] announcement'.

This very issue was rather presciently predicted by Swart when in 1996 he considered the 'Constitutional limitations on the delegation of powers of taxation'.[6] Even before the Constitutional Court had considered the application of the Separation of Powers Doctrine in terms of the final Constitution or the principles to be applied in determine the scope for the delegation of law-making powers to members of the Executive, Swart held:

> [T]he final Constitution does not contemplate the delegation of plenary legislative powers of taxation so as to allow an actor other than parliament or a provincial legislature to impose taxes or appropriate money without complying with the manner and form [provisions of the Constitution].[7]

This view of our Constitutional law accords with the subsequent judgments of the Constitutional Court, albeit not specifically in the context of a provision to be found in a 'money Bill'.

---

[4] 1995 (4) SA 877 (CC).
[5] 2000 (1) SA 661 (CC).
[6] GJ Swart 'Constitutional limitations on the delegation of powers of taxation' (1996) 11 *SA Public Law* 2.
[7] Swart op cit note 6 at 19.

4.6. The meaning of a 'tax'

An ancillary question to bed down, which on the face of it may appear innocuous but remains an area of legal contestation, is the definition of an actual 'tax'. On this score, it should be noted that despite references in section 77 of the Constitution to the public power to impose a 'tax, levy, duty or surcharge' none of these terms have been defined by the Constitution. The conceptual framework for a 'tax', however, has been discussed in various court judgments. In the Heads of Argument of the South African Reserve Bank, authored by Gilbert Marcus SC, in the matter of the *South African Reserve Bank and Another v Shuttleworth and Another*[8] ('Shuttleworth Judgment') the classical features of a 'tax' were described as follows:

> It is a compulsory contribution, imposed by the legislature or other competent public authority upon the public as a whole or a substantial sector thereof, the revenue from which is to be utilised for the public benefit and to provide a service in the public interest. A tax is not charged in exchange for some quid pro quo or service rendered and is primarily utilised to defray government expenditure.[9]

Revenue is emphasized as the core ingredient of a tax.

A succinct comparative example of a commonly understood meaning of a 'tax' can be found in Blackshield and Williams *Australian Constitutional Law: Foundations and Theory* which holds that a tax 'is a compulsory extraction of money by a public authority for public purposes and is not a payment for services rendered'. [10]

The classic exclusion to the common formulation of a 'tax' exists predominantly in the context of municipal law as municipalities unlike National and Provincial governments are often direct service providers to households (that is, of water, electricity and refuse collection). In this context there exists an interesting discussion in our common law wherein the Supreme Court of Appeal considered whether the imposition of compulsory charges by municipalities in terms of the Land Use Planning Ordinance of 1985 constituted a 'tax'.

Heher J in the Supreme Court of Appeal in the judgment of *Municipality of Stellenbosch v Shelf-Line 104 (Pty) Ltd*[11] (the 'Stellenbosch Judgment') held as follows:

> Counsel for the municipality submitted that the resolution of 29 May 2007 imposed a tax on developers. I do not agree. It did no more than define the obligation of a developer for the purposes of a conditional approval of an application for rezoning and subdivision under [the relevant land use planning law]. The obligation required payment to the municipality of defined parts of the latter's infrastructural costs, in

[8] 2015 (5) SA 146 (CC).
[9] Ibid.
[10] Suri Ratnapala and Jonathan Crowe *Australian Constitutional Law: Foundations and Theory* (2012) 3rd ed.
[11] 2012 (1) SA 599 (SCA).

return for which the developer could expect to receive a properly serviced development and higher prices for the properties sold by it. The payment would meet what was in effect an endowment obligation. [12]

Heher J then invoked the older judgment of Ramsbottom J in *Permanent Estate & Finance Co*[13] which held as follows:

> When the Provincial Council enacted that the conditions upon which an owner of land could be offered permission to establish a township might include a condition which, if accepted, would oblige him to contribute towards the cost of the financial burden which would be imposed on the local authority, it clearly did not impose a tax upon him. I do not propose to attempt to give a definition of the word tax. Though difficult to define, I think that a tax can be recognised with reasonable ease. To require any person who carries on a business or who owns a dog or a motor-car to pay a prescribed fee is, I think, to impose a tax. The money paid is taken into general revenue and is used for general purposes; the person who pays receives no specific service in return for his payment. [14]

In the above case the court emphasized the reciprocal service that was being delivered by the municipality, even if only in aggregate and diffuse bulk services, as a key basis for negating the inference that the charge constituted a 'tax'.

In later judgments this clear distinction became more ambiguous. In this regard, in order to understand the current judicial approach to determining whether a compulsory payment constitutes a 'tax' it is necessary to return to the *Shuttleworth Judgment.* In this regard, while the Supreme Court of Appeal held that a '*levy*' that had been imposed on the externalization of money in terms of the exchange control regulations had constituted a tax, the Constitutional Court, however, ultimately found that it did not.

The main judgment, written by Moseneke DCJ, in the *Shuttleworth Judgment* set out the following, namely:

> Not every duty, levy, charge or surcharge that raises national revenue is a national tax. Not every law that permits the raising of national revenue is a money Bill. That is plain from the Constitution. It sets money Bills apart from other laws and imposes a distinct procedure for their passage. This is because there are indeed many other laws that themselves impose, or authorise the Executive to impose, a myriad of charges outside the strictures of money Bill requirements. In each case, as our and other courts have often held, the primal question is: what is the dominant purpose of the revenue-raising law concerned? To raise revenue in order to fund the operations of the State, or to regulate behaviour or defray costs or advance another legitimate purpose? I have earlier sought to show that here the charge or levy was expected to slow down the extent and the frequency of capital externalisation. Revenue-

[12] *Shelf-Line* op cit note 11 para 28.
[13] 1952 (4) SA 249 (W).
[14] *Permanent Estate* op cit note 13 at 258A-F.

> raising was a mere by-product of the exit charge's true purpose: regulation of the export of capital. The exit charge was therefore not one which attracts the definition of 'money Bill' (own emphasis). [15]

In the *Shuttleworth Judgment*, the Constitutional Court essentially held that when determining whether a compulsory payment constituted a 'tax' the question to be posed is *subjectively* whether a regulatory charge is designed/intended to collect revenue for the relevant organ of state or whether the collection of revenue is 'incidental' to the underlying regulatory purpose.

It is perhaps important to note at this point that this ratio is not without some criticism given the apparent artificial and somewhat subjective distinction the court requires the reader to adopt in determining the difference between the primary motives of different regulatory charges. In this regard, Cora Hoexter notes in *Constitutional Court Review*[16] that 'the majority fell back on 'technical readings of legislation' strangely divorced from the reality as well as from the Court's own previous approaches'.

In the context of the default definition of a 'tax', the imposition and amendment of income tax rates in terms of section 5(2) of the Income Tax Act would appear to quintessentially fall within the definition of a 'tax'. As a result, the decision in section 5(2) of the Income Tax Act should be considered within the context of the power to impose 'taxes' as envisaged in section 77 of the Constitution.

4.7. Conclusion

The Taxation Laws Amendment Act of 2018,[17] brought into being an entirely new procedure for imposing (increasing) and reducing the national income tax in terms of section 5(2)(*a*) and (*b*) of the Income Tax Act. This formulation of section 5(2) of the Income Tax Act envisages the Minister of Finance playing the central role in essentially 'altering' or amending an existing statute. In terms of the principles laid down in the *First Executive Council Judgment*[18] and *Second Executive Council Judgment*[19] (as discussed in detail in Chapter 3) section 5(2) is likely in breach of the Separation of Powers Doctrine and would appear to operate outside the bounds of a Constitutionally compliant delegation of a quintessentially law-making power (that should be performed by Parliament itself).

---

[15] *Shuttleworth* op cit note 8 para 26.
[16] Cora Hoexter 'South African Reserve Bank v Shuttleworth A Constitutional Lawyers Nightmare' (2016) *Constitutional Court Review* 340.
[17] Act 23 of 2018.
[18] 1995 (4) SA 877 (CC).
[19] 2000 (1) SA 661 (CC).

The next chapter, Chapter 5, will engage with the legal questions that would likely arise from the application or use of section 5(2) of the Income Tax Act. Of particular importance is the discussion surrounding the uncertainty that would arise in the event that for instance the income tax rate was increased by the Minister of Finance with effect from the date of his budget speech, in terms of section 5(2)(*a*) of the Income Tax Act, but was to fall away and become inoperative after 12 months given the hypothetical failure of Parliament to enact legislation 'giving effect' to this 'alteration' or amendment of a statute, in terms of section 5(2)(*a*). Among the myriad of questions to be address are the following:

- would officials at the South African Revenue Service be acting within the law if they were to collect the 'additional' tax in terms of the increased rate of tax (temporarily increased by virtue of the announcement by the Minister of Finance)?
- how would the rule of law and the principle of legality be considered and applied in this context?
- what would the legal nature of the 'additional' taxes collected be – would it be a form of expropriation outside the bounds of section 25 of the Constitution or an alternative form of extra-legal appropriation?

Chapter 5: The Rule of Law

5.1. Introduction

Underpinning the complex process of creating and amending laws detailed in Chapters 4, is the concept of the Rule of Law. In this Chapter the focus is on the application of the Rule of Law to the process of law-making in the context of section 5(2) of the Income Tax Act, whereas Chapter 7 will in turn consider the application of the derivative principle of legality in respect of the administration or implementation of the section 5(2) of the Income Tax Act. The question to be addressed in this Chapter is whether the fiat law-making power or power to make law by mere announcement as recorded in section 5(2) of the Income Tax Act is compatible with the Constitutionally enshrined Rule of Law.

The transition occasioned by the 1993 Constitution represented a fundamental sea change in respect of not just the substance of our laws but how they are made and manner in which they acquire the force of what we understand to be the law. Prior to the enactment of the 1993 Constitution the legislature was sovereign, and its decisions were the apex source of all law in South Africa. In the constitutional era the country transitioned to a model of law-making that in every respect was subject to the provisions of the Constitution. The Constitution itself then codified the rule of law as a basic foundation of our constitutional democracy as reflected in section 1I which holds:

> The Republic of South Africa is one, sovereign, democratic state founded on the following value (c) Supremacy of the constitution and the rule of law.

In order to unpack the essence of this concept of the Rule of Law I now turn to the seminal work of Lon Fuller, this as Fuller sets out a rather appropriate analogous case of a decision maker who sets out to make law by mere announcement and falls into eight quintessential traps that today are reflected in Constitutional Court judgments as the principles of the rule of law.

5.2. The nature of the Rule of Law

In his pivotal work *The Morality of Law* Fuller famously used the analogy of a king new to his throne who was moved to reform his kingdom's laws. Not content to use the lethargic system of his predecessors which was described as 'cumbersome', this new king named Rex, embarked on dramatic reform which began by doing away with entire set of laws.[1]

[1] Lon Fuller 'The Morality of Law' (1965) 40 *Indiana Law Journal* 2.

Fuller illustrates a number of the common sense pitfalls in embarking upon a maverick legal system driven by the fiat or personal declarations a king or similar apex decision-maker. Fuller then sets out in his own words the 'eight distinct routes to disaster' for such an approach to law making. [2] I will set out the eight principles first and then discuss their relevance in relation to the application of section 5(2) of the Income Tax Act.

The first pitfall is to fail to establish universal rules rendering all subsequent decisions to be 'decided on an ad hoc basis'. [3] In the context of our Constitution the power to make laws is assigned to the Legislature and in the context of the National Assembly the process legislative process is clearly laid out, as discussed in Chapter 4, and where rule-making powers are delegated to persons outside of the Legislature this is a carefully constrained power, as detailed in Chapter 3. In short, the process by which our laws are made and the process by which we determine when they become laws precludes ad hoc or arbitrary decision making by individual decision-makers.

The second risk of fiat law making is the failure to appropriately inform the affected party of the new rule with a view to ensuring that they can tailor their conduct appropriately. Our Constitution actually contains express obligations to both facilitate public participation in law making, which is discussed in greater detail below, and the need to publish a law in the Government Gazette. In terms of section 81 of the Constitution when a 'Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act'. The Constitution envisages a complex system of both informing and consulting, by also involving those affected by laws in the process of making them.

The third danger arises from the 'abuse of retroactive legislation' which Fuller points out 'not only cannot itself guide action, but undercuts the integrity of rules' even those made prospectively as they might be changed retrospectively.[4] I have at length discussed the approach to retrospective and retroactive legislation in Chapter 6.

The fourth pitfall lays in a system of law creation that 'failed to make rules understandable'. [5] Similar to the two previous risks referred to above this principle has the

[2] Fuller op cit note 1.
[3] Fuller op cit note 1.
[4] Fuller op cit note 1.
[5] Fuller op cit note 1.

rather common sense implication that people affected by a law need to be able to understand it in order to follow it.

The fifth risk was the existence of contradictions in the ultimate laws produced – the incidence of which would inevitably increase the more ad hoc the law-making process. Given the existence of several legislative centres for example between national and provincial governments the Constitution has carefully thought through the process of managing conflicts in laws. In section 146(2) of the Constitution for instance, a process has been set out to resolve conflicts between these two legislative decision-making centres.

The sixth danger to arise from fiat law-making is that it may set 'rules that require conduct beyond the powers of the affected party'.[6] The onerous imposition of a law that is materially impossible to comply with would appear to be a common sense block to legitimate law making.

The seventh pitfall refers to the 'introduction… [of rules with such frequency] that the subject cannot orient his action by them'.[7] Given that the legislative process is typically described as long and laborious this is conventionally not a serious risk to constitutionally compliant law-making given that bills have to be introduced to the Legislature which will then have to include public participation in the process and convene hearings to discuss the bill before determining whether to pass or amend it.

The eighth and final risk to emerge from fiat law-making relates to the implementation of the law namely where there is an incongruence between 'the rule as announced and [its] actual administration'. [8] This goes to the heart of arbitrary and capricious systems that lack the basic legitimacy of a stable and predictable legal system where those affected are able to adjust their conduct in compliance with the law as it is implemented.

These potential pitfalls merely describe in high level terms the general scope for the rule of law. What is more specifically relevant from a South African perspective is how the concept has been applied by the Constitutional Court.

5.3. The approach of the Constitutional Court

In looking at the possible challenge to the lawfulness of section 5(2) of the Income Tax Act it is instructive to consider how the Constitutional Court has approached challenges to the use of

[6] Fuller op cit note 1.
[7] Fuller op cit note 1.
[8] Fuller op cit note 1.

law-making powers. In this regard, in the judgment of *Minister of Health v New Clicks South Africa (Pty) Ltd*,[9] Sachs J held that '[l]egality… draws its lifeblood from multiple texts of the Constitution and lies at the structural heart of constitutional democracy'. [10]

In the judgment of *Premier, Gauteng and Others v Democratic Alliance and Others*,[11] Mathopo AJ for the court held that '[i]t is trite that the principle of legality is but one aspect of the rule of law, which is a value enshrined in section 1(c) of the Constitution'.[12] The judgment in *Premier, Gauteng and Others v Democratic Alliance and Others*,[13] issued in 2021, simply re-asserts a basic principle of our constitutional democracy which was first boldly confirmed by the Constitutional Court in the 1995 judgment of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[14] ('Fedsure Judgment').

The Constitutional Court in the *Fedsure Judgment* case held very simply that it is a 'fundamental principle of the rule of law… recognised widely.. [that] the exercise of public power is only legitimate when lawful'.[15] Put slightly differently the court held that the 'rule of law – to the extent at least that it expresses this principle of legality – is generally understood as a fundamental principle of constitutional law'.[16]

The Constitutional Court has further held that the principle of legality, tied with the supremacy of the Constitution, equally applies. In the judgment of *President of the Republic of South Africa v South African Rugby Football Union*[17] the court held:

> It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally connected to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with the requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.[18]

The courts have naturally been cautious to approach the lawfulness and validity of law-making acts – with careful consideration of the Separation of Powers Doctrine. Cora Hoexter captures the delicate role of the judiciary in reviewing the work of the Legislature succinctly

[9] 2006 (2) SA 311 (CC).
[10] *New Clicks* op cit note 9 para 613.
[11] [2021] ZACC 34.
[12] *Premier v DA* op cit note 11 para 65.
[13] *Premier v DA* op cit note 11.
[14] 1999 (1) SA 374 (CC).
[15] *Fedsure* op cit note 14 para 56.
[16] *Fedsure* op cit note 14 para 56.
[17] 2000 (2) SA 674 (CC).
[18] *SARFU* op cit note 17 para 85.

when she set out the following description of the powers of the courts namely to 'defer to the government at the margins without relinquishing its supervisory role completely'.[19]

The Constitutional Court has nevertheless on numerous occasions overturned legislation at various stages in the law-making process deeming the purported law to be unlawful. In the 2001 judgment of *Pharmaceutical Manufacturers Association of South African and Another: In re Ex Parte President of the Republic of South Africa and Others*[20] (the 'Pharmaceutical Judgment')

In the *Pharmaceutical Judgment* the Constitutional Court held:

> The exercise of public power was regulated by the courts through the judicial review of legislative and executive action. This was done by applying constitutional principles of the common law, including the supremacy of Parliament and the rule of law. The latter had a substantive as well as a procedural content that gave rise to what courts referred to as fundamental rights, but because of the countervailing constitutional principle of the supremacy of Parliament, the fundamental rights could be, and frequently were, eroded or excluded by legislation.[21]

At issue in the Pharmaceutical Judgment was the decision of the President to announcement the commencement of a statute for which the regulatory framework was not yet in place. In this regard the absence of a schedule rendered the statute 'unworkable'. [22] The court as a result determined that:

> The President's decision to bring the Act into operation in such circumstances cannot be found to be objectively rational on any basis whatsoever. The fact that the President mistakenly believed that it was appropriate to bring the Act into force, and acted in good faith in doing so, does not put the matter beyond the reach of the Court's powers of review. What the Constitution requires is that public power vested in the executive and other functionaries be exercised in an objectively rational manner. This the President manifestly, though through no fault of his own, failed to do. [23]

In its discussion of the rule of law the Constitutional Court in the *Pharmaceutical Judgment* quoted with approval from de Smith, Woolf and Jowell[24] who held that:

> The rule of law is another such principle of the greatest importance. It acts as a constraint upon the exercise of all power. The scope of the rule of law is broad. It has managed to justify —albeit not always explicitly— a great deal of the specific content of judicial review, such as the requirements that laws as

[19] Cora Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484 at 507.
[20] 2000 (2) SA 674 (CC).
[21] *Pharmaceutical Manufacturers* op cit note 20 para 37.
[22] *Pharmaceutical Manufacturers* op cit note 20 para 88.
[23] *Pharmaceutical Manufacturers* op cit note 20 para 89.
[24] SA De Smith, H Woolf and JL Jowell *Principles of Judicial Review* (1999).

> enacted by Parliament be faithfully executed by officials; that orders of court should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised. In addition, the rule of law embraces some internal qualities of all public law: that it should be certain, that is, ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation.[25]

The concept of the rule of law in South African common law has to a degree bled into the notion of constitutionality itself. The frame of section 1(c) of the Constitution invokes the notion of their being two distinct concepts but the rule of law and the principles invoked by Lon Fuller have largely seeped into the framing of the Constitution itself. The notion that law-making is quintessentially a function of the Legislature was firmly asserted in the *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others.*[26] Although this ruling that a piece of legislation could not assign the original power of law making to a member of the executive was not itself described as a breach of the rule of law it was framed as constituting the exercise of a public power in contravention of the then constitution. I submit this is in effect an expression of what is now a patent constitutional requirement that the law-making process complies with the principles of the rule of law as espoused by Fuller.

5.4. The Rule of Law in the Context of section 5(2) of the Income Tax Act

Using the eight pitfalls of Lon Fuller's *The Morality of Law* as the basis for examining the rule of law implications for the current formulation of section 5(2) of the Income Tax Act is a useful way of engaging with the delegated power to the Minister of Finance. In this regard the first category of pitfalls is the ad hoc announcements of laws. Here fiat law making would appear to be quintessentially ad hoc in nature as the Minister of Finance without any prior warning and without any preceding process can announce a change in the law with immediate effect.

There is one identifiable limitation placed on the Minister of Finance as to the forum for the Income Tax rate changes as section 5(2)*(a)* indicates that the power to make these announcements as law is restricted to the 'national annual budget' which is set out in section 27(1) of the Public Finance Management Act of 1999.[27] The decision remains entirely at the Minister discretion and therefore despite falling into a pattern of discernible conduct remains arbitrary. The seventh risk, namely that the changes in the law are frequent, is unlikely to be a

[25] De Smith et al op cit note 24 at 14 – 15.
[26] 1995 (4) SA 877 (CC).
[27] Act 1 of 1999.

serious risk given the power envisaged in section 5(2) of the Income Tax Act is to be used annually.

The second pitfall related to the potential failure to publicise the new law. The power granted to the Minister of Finance in section 5(2)*(a)* is precisely fixated on this element of law making, namely a public announcement. The 'annual budget' speech is also a particularly public announcement as it is broadcast on public television and on radio stations across the country. The content of the speech often does not include a breakdown of the revised income tax rates referred to in section 5(2)*(a)*. Rather this detail is included in the document pack that accompanies the speech – which includes the draft money Bills presented to Parliament.

Further, the central purpose of publicising a proposed law is to ensure that affected parties can tailor their conduct in order to comply, according to Fuller. The third pitfall, however, rears its head as the announcement of the law by the Minister of Finance can also determine the retrospective or retroactive application of the announcement. This would negate the purpose of guiding the conduct of those affected and would prejudice all those affected.

The announcement of the respective income tax rates is conventionally in the form of a table which is fairly self-explanatory, and as a result the Minister of Finance's announced changes are unlikely to fall victim to the fourth pitfall, namely being formulated in manner that is not understandable. In addition, provided that the template format of wall-to-wall income tax brackets is maintained then the fifth pitfall – contradictions in the announced law emerge – would similarly be unlikely.

The sixth risk is that the change in law requires something of an affected party that they are not able to perform. In this regard I would submit that the risk is no greater than if the conventional law-making process was followed. There is, however, one important caveat and that relates to the key distinction between a law which commences upon its announcement and a law which after being announced remains open to meaningful public participation before ultimately commencing. I would submit this is the single biggest challenge faced by section 5(2) of the Income Tax Act and is why it would likely not survive a challenge brought under the auspices of the rule of law. In this regard I discuss the need for public participation in the law-making process below.

The eighth risk is addressed in Chapter 7, namely the potential incongruence between the law as it is described by the Minister of Finance and ultimately administered by the South African Revenue Service. This is a fundamental challenge presented by the formulation of

section 5(2) of the Income Tax Act and for that reason I have set out the most obvious challenge to this provision on the basis that it is incompatible with the rule of law as reflected in the Constitution.

5.5. The importance of public participation in upholding the Rule of Law

Fuller's second risk is to fail to inform the affected party of the law change. On a common-sense understanding, an 'announcement' in a public speech (such as that given by the Minister of Finance in the 'Budget Speech') would serve to inform the public about the new law. However, there is a distinction between an informational announcement, and the publishing of the promulgated statute in the Government Gazette. The former is important for public understanding, while the second is an essential step in the law-making process and should only be taken after there has been wide public engagement on a draft version of the law.

The Minister of Finance's budget speech should serve to inform the public of the *proposed* tax rate changes that the Minister will be presenting to Parliament, rather than an announcement to already determined rate changes. This would then be the start of the public participation process, where tax residents are informed of the proposals and can be on the lookout for Parliament's draft Bill should they wish to comment on it. The Minister could publicly announce the proposals in any other way, such as, in a newspaper, on the government website, or even on social media. The announcement during the budget speech is not a legal requirement, although it is a convenient and far-reaching mode of communication, as it is widely watched on television and reported on in a detailed manner by the media.

An odd quirk of the current wording of section 5(2) of the Income Tax Act is that it clearly conflates the publicising of a proposed law for the purpose of public engagement with the (later) step of publicly announcing a law once it is finalised. Section 5(2) simply jumps to the second stage and does not lend itself at all to public consultation. While it is possible that through Parliament enacting the changes to the tax rates in a statute, such a process may involve a period of public participation, what makes a mockery of this is the notion that Parliament is 'ratifying' what the Minister has already announced. When Parliament backdates the commencement date to the Minister's Budget Speech, the bypassing of the legislative process is cemented, given the need in the Constitution for public engagement in the law-making process before the law is final.

It may, however, transpire that the subsequent act of Parliament passing legislation to 'ratify' the Minister's announcement may contradict the original announcement. This may give

rise to Fuller's eighth risk, discussed further in chapter 7. If Parliament does amend the content of the Minister's 'announcement', especially where changes are as a result of public participation, that would somewhat mitigate the unlawful delegation of law-making power to the Minister, as it would demonstrate that Parliament is the true law-making body and that it is applying its mind. However, given the literal wording of section 5(2) of the Income Tax Act, a period of uncertainty in the law would result between the time of the announcement and the promulgation of Parliament's enactment of the tax rates – further posing a challenge to the Rule of Law.

The Constitution expressly requires of the National Assembly, in terms of section 59(1)*(a)*, that it 'facilitate public involvement in the legislative and other processes of the Assembly and its committees'. In considering the meaning of this phrase the Supreme Court of Appeal in the judgment of *King and Others v Attorneys Fidelity Fund Board of Control and Another*[28] wherein Cameron and Nugent JJA held that:

> 'Public involvement' is necessarily an inexact concept, with many possible facets, and the duty to 'facilitate' it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its context.[29]

The Constitution Court in the judgment of *Doctors for Life International v Speaker of the National Assembly and Others*[30] again considered the meaning of 'public involvement' and in this regard held that:

> The basic elements of public involvement include the dissemination of information concerning legislation under consideration, invitation to participate in the process and consultation on the legislation. These three elements are crucial to the exercise of the right to participate in the law-making process. Without the knowledge of the facts that there is a bill under consideration, what its objective is and when submissions may be made, interested persons who wish to contribute to the law-making process may not be able to participate and make such contributions.[31]

Of particular significance for the present review of section 5(2) of the Income Tax Act, it is noteworthy that the Constitutional Court ruled in the *Doctors for Life International v Speaker of the National Assembly and Others*[32] that:

---

[28] 2006 (4) BCLR 462 (SCA).
[29] King op cit note 28 para 22.
[30] 2006 (6) SA 416 (CC).
[31] *Doctors for Life* op cit note 30 para 221.
[32] *Doctors for Life* op cit note 30.

- the court was competent to declare invalid the 'the proceedings of Parliament after a bill has been enacted into law but before it has been brought into force';[33] and
- as a result of Parliament's failure to comply with its constitutional obligation to facilitate 'public involved' specific statutes identified in this case were declared invalid.[34]

In determining what kind of public participation in the legislative process is required, Ngcobo J held that '[w]hat is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process'.[35] In formulating this in-principle test Ngcobo J went on hold that there were 'two aspects to this duty'.[36] The first was the duty to 'provide meaningful opportunities for public participation in the law-making process' and the second was the duty to 'take measures to ensure that people have the ability to take advantage of those opportunities'.[37]

Albeit in a separate judgment, concurring with the order of the majority, Sachs J set out a substantive assessment of the constitutionally envisaged right to 'public participation'.[38] In this regard he set out what the Constitution envisaged in the following terms:

> The people have more than the right to vote in periodical elections, fundamental though that is. And more is guaranteed to them than the opportunity to object to legislation before and after it is passed, and to criticise it from the side-lines while it is being adopted. They are accorded the right on an ongoing basis and in a very direct manner, to be (and to feel themselves to be) involved in the actual processes of law-making.[39]

In particular Sachs J emphasised the importance of 'qualitative and not just quantitative' measures to ensure participation with an ultimate view to underwriting a vibrant democracy.[40]

Sachs J further makes the important contribution that 'public participation' is not purely an empty act for the sake of legitimacy but should actually reach into the law-making process itself. In this particular case Sachs J underlined the role that affected parties can play in the

[33] *Doctors for Life* op cit note 30 para 65.
[34] *Doctors for Life* op cit note 30 para 225.
[35] *Doctors for Life* op cit note 30 para 129.
[36] *Doctors for Life* op cit note 30 para 129.
[37] *Doctors for Life* op cit note 30 para 129.
[38] *Doctors for Life* op cit note 30 para 230.
[39] *Doctors for Life* op cit note 30 para 230.
[40] *Doctors for Life* op cit note 30 para 234.

law-making process by providing sometimes invaluable perspective and ultimately contributing to better law.[41]

The Constitutional injunction placed on the Legislature to ensure both 'meaningful participation' in the law-making process and the obligation to facilitate this participation raises an unsolvable problem for the current formulation of section 5(2) of the Income Tax Act. The Legislature's obligation has simply been ignored and is entirely frustrated by the first stage of section 5(2) of the Income Tax Act wherein the Minister of Finance is able to simply announce new law. The second stage of section 5(2) conversely follows the conventional route of the legislative law-making process which one would assume would be accompanied by meaningful public participation before being passed into law. The problem arises from the purpose of meaningful participation which would envisage the potential for amendments to the announced law. Herein lies the structural flaw which makes section 5(2) of the Income Tax Act incompatible with the rule of law.

The implications of this inherent flaw for the administration of section 5(2) of the Income Tax Act and the role of the South African Revenue Service is continued in Chapter 7.

5.6. Conclusion

In terms of the constitutional framework within which the Legislature operates, and particularly section 1(c) of the Constitution, it is a requirement that all law-making adhere to the principles of the Rule of Law. In this regard, of the various potential Rule of Law pitfalls likely to challenge the operation of the section 5(2) of the Income Tax Act, the most serious is the risk that the law announced by the Minister of Finance is not the same as the law promulgated once Parliament passes the ultimate statute.

During the law-making process the Legislature is required in terms of section 59(1)*(a)* of the Constitution to include public participation in the finalisation of a statute or law. In light of the ratio of Ngcobo J in the *Doctors of Life Judgment* this duty will require the Legislature to both 'provide meaningful opportunities for public participation' and to 'take measures to ensure that people… [can] take advantage of those opportunities'.[42] Ultimately this will require the Legislature to consider and possibly amend the announced law. As a result, section 5(2) of the Income Tax Act inherently conflicts with a basic premise of the Rule of Law.

[41] *Doctors for Life* op cit note 30 para 237.
[42] *Doctors for Life* op cit note 30 para 129.

The next chapter engages with the potential for retrospective and retroactive law-making as a result of the process in section 5(2)*(b)* of the Income Tax Act.

Chapter 6: Retrospective and Retroactive Law-Making

6.1. Introduction

The conventional approach to the commencement of laws enacted by Parliament is for the applicable legal provision to apply from either the date on which such law is promulgated, or such other date as is stipulated in the published act. The *prospective* application of laws may be the default, but the purpose of this Chapter is to discuss the parameters within which tax specific legislation is to operate when the newly issued law is set to commence before it was published or perhaps even before it had been announced. In this regard, the Minister of Finance has been assigned the power to not only alter tax rates by mere announcement, but also to determine when this change will come into operation by virtue of section 5(2)*(b)* of the Income Tax Act. This power could conceivably be used to either retroactively or retrospectively impose an income tax rate change.

The particular concern to be addressed in this Chapter lies in unpacking the mechanics and motivations for the amendment of section 5(2) of the Income Tax Act.[1] The provision was passed into law in the same year as the seminal judgment in *Pienaar Bros Judgment*.[2] I surmise that the National Treasury and South African Revenue Service, in advising the Minister of Finance, would likely have been pursuing a measure that had the force of law and provided an empowering basis to change the income tax rate with immediate effect. The framing of section 5(2), like many other taxing provisions amended in a similar fashion, appears to have been geared to ensuring that amendments announced by the Minister of Finance in the 'Budget Speech' acquire the force of law.

Prior to this amendment, the use of retrospective amendments in the context of taxation statutes was a common occurrence – particularly where it was perceived that taxpayers would exploit potential temporal loopholes. This was in fact the central focus of the South African Revenue Service in the seminal judgment in *Pienaar Bros Judgment.*[3] Before discussing this judgment, it is first important to address the lingering confusion surrounding the terms *retrospective* and *retroactive*.

[1] Act 58 of 1962.
[2] 2017 (6) SA 435 (GP).
[3] *Pienaar Bros* op cit note 2.

6.2. The difference between retro-active and retrospective law-making

The two terms *retrospective* and *retroactive* have often been used, perhaps confusingly, as interchangeable descriptions for laws that commence before they are promulgated or published. The distinction between these two terms has, however, been discussed in some depth by the judiciary. One particularly fertile area arose in the context of statutory interpretation where a pre-existing presumption against retrospective application of statutes continues to be discussed in our common law to this day.

In his seminal book *Re-Interpretation of Statues* Lourens du Plessis proposes a number of nuanced motivations underlying this principle of interpreting statutes.[4] Du Plessis points out that one of the core motivations underlying this principle of interpretation is the avoiding interference with pre-existing rights or completed transactions, as far as practically possible. Du Plessis then goes on to point out that there is another principle of interpretation which similarly arises from the desire to avoid unnecessary interference with existing rights and that is the presumption against unjust, inequitable, and unreasonable legislation. [5]

In examining the overlap between these two principles of interpretation Du Plessis makes the point that a key distinction arises as a result of the presumption against retrospectivity even in instances where a transaction has not yet been completed. Rather Du Plessis places the emphasis in the case of retrospectivity on the 'element of legal certainty'.[6] The principal of interpretation which sees the interpreter guard against the retrospective application of a new legal provision in order to ensure the affected person or entity is judged against a standard by which they could have adjusted their corresponding conduct. As one delves into the use of this principle of interpretation, the distinction between the terms *retrospective* and *retroactive* becomes clearer.

In the 1955 Appellate Division judgment of *Shewan Tomes & Co v Commissioner of Inland Revenue*,[7] Schreiner ACJ identified the distinction between a change in the law that operated *retrospectively* and one which interfered with pre-existing settled rights, in respect of which he intimated the term *retroactive* may be more appropriate.[8]

---

[4] Lourens Du Plessis *Re-Interpretation of Statutes* (2002) 182.
[5] Ibid.
[6] Ibid.
[7] 1955 (4) SA 305 (AD).
[8] *Shewan Tomes* op cit note 7 at 11.

The South African common law default position is fairly clear in that there is an active presumption when interpreting any legislation that it does not apply *retroactively*. This principle is neatly articulated by Mahomed J in the judgment of *S v Mhlungu and Others*[9] who wrote that 'there is a strong presumption that new legislation is not intended to be retroactive'.[10] The Constitutional Court in this matter then went on to clarify what it meant by *retroactive* legislation namely 'legislation which invalidates what was previously valid, or *vice versa*, that is, which affects transactions completed before the new statute came into operation'.[11]

The Constitutional Court in *S v Mhlungu and Others*[12] invoked the reasoning in *Van Lear v Van Lear*[13] but also the principle as it was articulated by Schreiner ACJ in *Shewan Thomes & Co v Commissioner of Inland Revenue.*[14] In particular Mahomed J appeared to rely upon the formulation of *retroactive* legislation set out in *Van Lear v Van Lear*[15] wherein the court referred to 'legislation which enacts that "as a past date the law shall be taken to have been that which it was not"'.[16]

The Constitutional Court similarly addressed the potential meaning of *retrospective* legislation which Mahomed J described as a statute which despite taking 'effect only from its date of commencement… impairs existing rights and obligations, e.g. by invalidating current contracts or impairing existing property rights'.[17] Similar to the presumption in respect of *retroactive* legislation the Constitutional Court re-affirmed the presumption against 'reading legislation as being retrospective'.[18]

In the subsequent judgment of *National Director of Public Prosecutions v Carolus and Others,*[19] the Supreme Court of Appeal made a further attempt to define and distinguish the terms *retroactive* and *retrospective*. Farlam AJA quoting from an article in the Canadian Bar Review[20] indicated that a 'retroactive statute is one that operates as of a time prior to its enactment'. On the other hand, Farlam AJA quoted with approval the view that a 'retrospective statute is one that operates for the future only… [i]t is prospective, but it imposes a new result

[9] 1995 (3) SA 867 (CC).
[10] *Mhlungu* op cit note 9 para 65.
[11] *Mhlungu* op cit note 9 para 65.
[12] *Mhlungu* op cit note 9.
[13] 1979 (3) SA 1162 (W).
[14] 1955 (4) SA 305 (AD).
[15] *Van Lear* op cit note 13.
[16] *Mhlungu* op cit note 9 para 65.
[17] *Mhlungu* op cit note 9 para 65.
[18] *Mhlungu* op cit note 9 para 65.
[19] 2000 (1) SA 1127 (SCA).
[20] EA Driedger 'In Statutes: Retroactive Retrospective Reflections' (1978) 56 *Canadian Bar Review* 264.

in respect of a past event'.[21] This distinction is then neatly summarised as follows: a 'retroactive statute changes the law from what is was; a retrospective changes the law from what it otherwise would be with respect to a prior event'.[22] In the context of South African common law, Farlam AJA that the 'expression "retroactivity" is used for retrospectivity in the "strong" sense while the expression "retrospectivity" is reserved for what is described as retrospectivity in the "weaker" sense'. [23]

Quoting Driedger, Farlam AJA referred to the below summary with approval, namely:

> [R]etroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but *it imposes new results in respect of a past event*. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backward in that *it attaches new consequences for the future to an event that took place before the statute was enacted*. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [24]

Following these judgments in the Constitutional Court and the Supreme Court of Appeal subsequent courts have attempted to implement these decisions and distil workable a 'test' to apply.

A useful example of the common judicial application of this principle of interpretation that leans in favour of the non-*retrospective* application of legislation can be found in the judgment of *Bareki NO and Another v Gencor Limited and Others.*[25] In this judgment De Villiers J instead of referring to retroactive and retrospective application sets out the distinction on the basis of 'weak' or 'strong' retrospectivity. In this regard De Villiers J set out the following components for 'strong' retrospective application, namely:

- there is a change in legal status for an already completed action i.e. something which has already occurred either becomes or ceases to be unlawful after the fact;
- this *retrospective* change will apply to 'transactions [that were already] completed' before the 'enactment' of the amended law i.e. a sale agreement has already been given effect to and transfer taken place before the change in law;[26] and

[21] *Carolus* op cit note 19 para 34.
[22] *Carolus* op cit note 19 para 34.
[23] *Carolus* op cit note 19 para 35.
[24] *Carolus* op cit note 19 para 34.
[25] 2006 (1) SA 432 (T).
[26] *Bareki* op cit note 25 at 442 para A - J.

- the amended law now reads as if it were in effect at the time the transaction took place i.e. the effective date for the amendment is *retrospectively* written into the statute to reflect a date before the amendment was published as a law. [27]

By comparison the components of a 'weak' *retrospective* amendment to a statute would be prospective in its application but would simply vary the future consequences for a prior event. The relevance of this discussion will become apparent in the following discussion which relates to the determination of the constitutionality and legality of a retroactive amendment to a taxing provision which was considered in the *Pienaar Bros Judgment.*

6.3. The approach to retrospective and retroactive tax law in the *Pienaar Bros Judgment*

Prior to the *Pienaar Bros Judgment* there had been substantial discussions taking place between academics and tax advisors regarding the legality of *retrospective* and *retroactive* legislation. This widespread debate arose from the common use of the device of stipulating a commencement date for tax statutory amendments preceding their promulgation.

Perhaps the most notable was Beric Croome who in his 2008 thesis presented a potential argument against the use of retrospective tax legislation. This argument was premised on the notion that the imposition of retrospective taxing provisions in a statute could constitute a deprivation of property in terms of section 25 of the Constitution, although he did concede that there was no specific prohibition contained in the Constitution. Croome's focus on the probability of success for this argument hinged in his words on the basis for arguing that the deprivation was 'arbitrary'.[28]

Croome was by no means the only academic or tax practitioner to question the legality of retrospective tax amendments, but it was ultimately Croome's argument as spelled out in his thesis, premised on section 25 in the Constitution, that was put to the test in the judgment of *Pienaar Bros Judgment.* The high court judgment issued by Fabricius J considered whether the commencement of section 34(2) of the Taxation Laws Amendment Act[29] on a date five months prior to its publication as an Act of Parliament was inconsistent with the Constitution, and in particular, whether it violated the right to property.

---

[27] *Bareki* op cit note 25 at 442 para A - J.
[28] Beric Croome *Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts* (unpublished PhD thesis, University of Cape Town, 2008) 96.
[29] Act 8 of 2007.

In this particular case the taxpayer, a private company, had entered into a so-called amalgamation transaction with the listed applicant, namely Pienaar Brother (Pty) Ltd. This form of corporate action is envisaged when combining two companies into a single entity while largely ensuring a tax neutral outcome in terms of section 44 of the Income Tax Act.[30] As part of this transaction the taxpayer would issue a number of its own shares as a form of 'equity consideration' for the acquisition of shares in Pienaar Brother (Pty) Ltd.

The central tax question arose from the application of the taxpayer's share premium. At the time of the transaction the definition of the term 'dividend' in the Income Tax Act[31] 'excluded from its ambit any amount distributed out of the share premium account'.[32] As a result the taxpayer applied the law as it was then, namely it did not report nor collect secondary tax on companies (the precursor to the dividends tax) in respect of this 'equity consideration'.[33]

Fabricius J begins his analysis by acknowledging that at the time the 'distribution was effected and finalised' the transaction did not give rise to a 'dividend' as it was then defined in section 1 of the Income Tax Act. [34] It was only with the subsequent amendment to section 44 of the Income Tax Act,[35] by virtue of section 34(1)*(c)* of the Taxation Laws Amendment Act[36] which now deemed 'the resultant company's equity… including any share premium… to be a profit… available for distribution to its shareholders for the purposes of… the definition of a dividend', that this transaction would give rise to a distribution that constituted a 'dividend'.[37] The applicant in this matter did not challenge the substantive provision in section 34(1)*(c)* which would render the distribution a taxable dividend, but rather challenged section 34(2) of the Taxation Laws Amendment Act[38] which 'deemed [this provision] to have come into operation' almost five months before the gazetting of the amendment and importantly on a date preceding the amalgamation transaction.

At this point it is important to return to the distinction between *retrospective* and *retroactive* amendments. The founding affidavit of the applicant in the *Pienaar Bros Judgment* specifically sought a declaration that the statutory amendment in question was

[30] Act 58 of 1962.
[31] Act 58 of 1962.
[32] *Pienaar Bros* op cit note 2 para 6.
[33] *Pienaar Bros* op cit note 2 para 6.
[34] *Pienaar Bros* op cit note 2 para 10.
[35] Act 58 of 1962.
[36] Act 8 of 2007.
[37] *Pienaar Bros* op cit note 2 para 10.
[38] Act 8 of 2007.

'unconstitutional and invalid [as a] retrospective amendment' (emphasis added). [39] The court, in the words of Fabricius J, expressly recognises that the amendment in question constituted a 'retroactive amendment', albeit that the judge uses the terms *retrospective* and *retroactive* interchangeably at times in the judgment. For the purpose of this analysis, I proceed on the basis of the definition of a *retroactive* amendment as articulated by Farlam AJA in the matter of *National Director of Public Prosecutions v Carolus and Others*[40] and the test distilled therefrom by De Villiers J in *Bareki NO and Another v GENCOR.*[41]

On the facts of this case, it is certainly the reality that the amendment to the Income Tax Act had the effect of altering the legal consequences of an existing transaction. What is more this transaction was 'completed' before this enactment. Finally, the effect of the change in the law was that it now read as if it were in effect *prior* to the transaction being entered into by the taxpayer and the applicant. For these reasons it would appear that the amendment in question constituted a so-called *retroactive* amendment which had the effect of interfering with the settled legal outcome of an already completed transaction.

Returning to the *Pienaar Bros Judgment,* given the express retroactive application of section 34(1)*(c),* as recorded in section 34(2) of the Taxation Laws Amendment Act,[42] the presumption of interpretation against the retrospective or retroactive application of the envisaged amendment was not the site of the parties' dispute. Rather the focus of the challenge in the *Pienaar Bros Judgment* was on the validity of the *retroactive* commencement of the provision in the context of the Constitution and more specifically in light of section 25(1) of the Constitution which holds that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.

Right at the outset Fabricius J identified that neither party had 'suggested that our constitutional dispensation would never allow the legislature to expressly introduce retrospective legislative amendments'.[43] The court then focused its attention on the following dictum, namely the 'touch-stone would… always be whether the retrospectivity amounts, in the particular circumstances of their case, to a contravention of the Rule of Law'.[44]

[39] *Pienaar Bros* op cit note 2 para 5.
[40] *Carolus* op cit note 19.
[41] 2006 (1) SA 432 (T).
[42] Act 8 of 2007.
[43] *Pienaar Bros* op cit note 2 para 47.
[44] *Pienaar Bros* op cit note 2 para 47.

As a consequence of this dictum the court turned naturally to the basic question of what would constitute 'adequate warning' of a 'retroactive amendment' that would meet the requirements of the Rule of Law – being essential to the basic norm that an affected party should be put in the position that they are able to 'regulate their conduct in accordance with those amendments'.[45] Intriguingly, Fabricius J outright rejected the contention that the 'warning [to be issued of a proposed retrospective or retroactive amendment] must self-evidently pertain to the actual amendment that is implemented'.[46] Instead the judge preferred to adopt a highly flexible approach that recognised '[e]conomic circumstances generally will demand a degree of fluidity'.[47]

When examining that actual 'warning' issued, Fabricius noted that a brief media statement had been made by the South African Revenue Service and subsequently a draft bill was presented to the Parliamentary Portfolio Committee in which it was noted 'was not cast in stone and it did not emanate from the legislature, but the Executive which does not make laws'.[48] Subsequent to this step detailed submissions were received with 'substantial resistance to the proposed amendment' with the effect that 'revised Draft Legislation' was then drafted.[49]

After considerable consultation a revised draft Bill was then formally introduced 'into parliament on 7 June 2007… [which] occurred more than a month after the Applicant's distribution took place'. [50] In light of this clear evidence that the 'warning' issued to the taxpayer in question *before* entering into the transaction was not directly connected to the ultimate amendment, Fabricius J somewhat inexplicably ruled that the 'economic demands' of a 'tax statute' meant that if the 'tax statute is rationally connected to a legitimate purpose, no precise warning is required, if one at all'. [51] The rather problematic natural consequence of this statement is that the basic norm of the Rule of Law, namely that one should be informed of the law in order to regulate one's conduct, does not apply when 'tax statutes' are designed retroactively provided that they are drafted in such a manner that they are 'rationally connected to a legitimate purpose'.[52] In *casu,* Fabricius J held that the 'legitimate purpose' was the alleged

[45] *Pienaar Bros* op cit note 2 para 49.
[46] *Pienaar Bros* op cit note 2 para 50.
[47] *Pienaar Bros* op cit note 2 para 50.
[48] *Pienaar Bros* op cit note 2 para 53.
[49] *Pienaar Bros* op cit note 2 para 54.
[50] *Pienaar Bros* op cit note 2 para 57.
[51] *Pienaar Bros* op cit note 2 para 63.
[52] *Pienaar Bros* op cit note 2 para 63.

'loop-hole' that allowed an amalgamated company to ignore the secondary-tax on companies when distributing share premium post-transaction.[53]

I turn now to the challenge based on the right to property as contained in section 25(1) of the Constitution. Taking the framework for a test from the judgment of Ackermann J in *First National Bank of South Africa v Minister of Finance*,[54] and that of the judgment in *Mkontwana v Nelson Mandela Metropolitan Municipality*,[55] Fabricius J proceeded to address the question of a potential 'arbitrary' deprivation by considering whether the amendment failed to 'provide sufficient reason for the particular deprivation' or was 'procedurally unfair'.[56] The reasoning applied in respect of both of these tests is not directly relevant to consider, but it is useful to note that Fabricius J again located his decision in the following three determinations, namely:

- there was no 'over-riding duty to give notice irrespective of the facts';
- in the case at hand 'there was sufficient notice of general impact' (emphasis added); and
- there is 'no over-riding duty to give notice that states precisely what the intended legislation will entail'.[57]

Ultimately, Fabricius J held that the challenge in terms of section 25 of the Constitution would fail as it was neither procedurally unfair nor arbitrary. Further for good measure he additionally ruled that even if the retroactive amendment were to fall foul of section 25(1) that it would nevertheless be 'reasonable and justifiable' in terms of section 36(1) of the Constitution.[58]

6.4. The application of the Rule of Law post-*Pienaar Bros Judgment*

For present purposes I will endeavour to problematise the *Pienaar Bros Judgment* assuming that the reasoning applied in this case may be used in assessing the legality of the current wording of section 5(2) of the Income Tax Act.

Of particular significance in this regard is Fabricius J's determination in the *Pienaar Bros Judgment* that a fluid 'warning' of a forthcoming *retroactive* amendment by a member of the Executive was sufficient to overcome the challenge demanded of the Rule of Law, namely that

[53] *Pienaar Bros* op cit note 2 para 63.
[54] 2002 (4) SA 768 (CC).
[55] 2005 (1) SA 530 (CC) at paragraph 34.
[56] *Pienaar Bros* op cit note 2 para 106.
[57] *Pienaar Bros* op cit note 2 para 107.
[58] *Pienaar Bros* op cit note 2 para 110.

laws should be sufficiently certain so as to allow an affected person to regulate their conduct accordingly. In this regard, there are two aspects of the *Pienaar Bros Judgment* that deserve greater consideration, namely:

- the court was expressly clear that members of the Executive, including the Minister of Finance, could only propose statutory amendments but could never 'make laws';[59] and
- that the Legislature was vested with the actual authority to amend legislation, including in some circumstances retrospectively.

The ratio in the *Pienaar Bros Judgment* not only relates to a different basis for determining the commencement of a law, that is, a retroactive amendment rather than a prospective announcement, but also Fabricius J in his obiter statements has definitively rejected the current formulation of section 5(2), that is, where the Minister is purportedly vested with the authority to 'make laws' merely by virtue of an announcement.

In the context of the Legislature's continued use of *retrospective* and *retroactive* amendments to tax statutes the *Pienaar Bros Judgment*, absent any subsequent ruling by a higher court, will continue to provide comfort to the notion that such amendments are permissible.

6.5. Conclusion

In the absence of an appeal or subsequent ruling by a higher court, the *Pienaar Bros Judgment* stands as a binding precedent in Gauteng and a persuasive authority in the rest of South Africa for the proposition that *retrospective* and *retroactive* amendments to tax statutes are permissible. This judgment only sanctions such amendments where they are validly passed by the Legislature.

Given the current wording of section 5(2) of the Income Tax Act which purports to assign or delegate to the Minister of Finance the interim power to 'make laws' by changing the tax rate, it would appear that on a careful reading of the *Pienaar Bros Judgment*, not only does this ruling not provide a basis for this provision but obiter statements refute the very essence of the provision. As Fabricius J held, the 'executive does not make laws'.[60] The judgment does, however, provide some measure of cover for the narrow assertion that the Minister of Finance may impose a retroactive or retrospective amendment. In this regard the persisting and default

[59] *Pienaar Bros* op cit note 2 para 110.
[60] *Pienaar Bros* op cit note 2 para 110.

rule of interpretation would apply, namely the presumption against retroactive or retrospective application of an amendment.

In Chapter 7, I will discuss the implications for the South African Revenue Service of the formulation of section 5(2) of the Income Tax Act. This is important, as the Revenue Service is tasked with administering the decisions taken by the Minister of Finance and Parliament.

Chapter 7: The administration of invalid laws

7.1. Introduction

In the preceding chapters we discussed the implications for Parliament and the Minister of Finance of the current drafting of section 5(2) of the Income Tax Act. In particular, Chapter 3 considered the application of the Separation of Powers Doctrine as it would apply to the delegation of plenary law-making powers. Chapter 4 in turn examined the mechanics of amendments to taxing statutes and the legislative process to be followed. Chapter 5 considered the application of the rule of law to the law-making process. The next step is to consider the principle of legality in the context of the South African Revenue Service which is left with the task of implementing whatever decision is made by the Minister of Finance in terms of section 5(2)*(a)* of the Income Tax Act.

Section 5(2)*(b)* of the Income Tax Act expressly holds that the use of the delegated law-making powers granted to the Minister of Finance will only 'apply for a period of 12 months from that date or those dates subject to Parliament passing legislation giving effect to *that* announcement within that period of 12 months' (emphasis).[1] In considering the potential ramifications of this provision, the rather elementary concern for the civil servants tasked with implementing the Income Tax Act at the South African Revenue Service is, of course, what if this condition is not met?

What happens if Parliament doesn't make the 12-month deadline for *ratifying* the Minister' announcement? Or perhaps more awkwardly, what happens if Parliament passes into law a statute that differs from the announcement?

It is important to distinguish at this point between administrative actions and the exercise of legislative power. Of relevance is the *Fedsure Judgment*[2] where the Constitutional Court in examining the imposition of taxes held that:

> [T]he resolutions to adopt the budget were not administrative actions… The resolution … taken for the purpose of raising the levy and paying the subsidies formed an integral part of the adoption of the budget and, as such, constituted the exercise of taxing and spending powers. Such powers are constitutionally vested in the legislature and their exercise is accordingly not administrative action.[3]

[1] Section 5(2)*(b)* of the Income Tax Act.
[2] 1999 (1) SA 374 (CC).
[3] *Fedsure* op cit note 2 para 46.

Similarly, the distinction should be applied to the power to impose income tax rates and then the practical collection of such taxes by the South African Revenue Service. Of course, the framing of section 5(2) confuses the difference between the Legislature and the Executive, but these should be no doubt that the power the Minister purports to exercise to amend the income tax rate is a legislative power under the Constitution, as discussed in Chapter 4. The focus of this chapter is instead on the administrative function of implementing the tax rate changes and in the form of the collection of taxes by the South African Revenue Service.

7.2. The need for authority to act as an administrator

In every aspect of the performance of their roles at the South African Revenue Service the employees of the tax collector must be able to locate an empowering law. A central feature of our system of administrative law is captured by the dictum in the *Fedsure Judgment* namely the requirement that:

> [I]t is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law.[4]

Similarly, in the recent Constitutional Court judgment of *Premier, Gauteng and Others v Democratic Alliance and Others*[5] it was held that:

> The principle of legality has developed significantly in our jurisprudence since *Fedsure* and the grounds for a legality review have expanded along with it. They now include lack of authority, abuse of power, and jurisdictional facts, which are all subcategories of lawfulness. The rationality of the action in question may also be challenged as a further and separate ground of review.[6]

Any of these grounds may be the basis for a legality review.

Of particular significance for present purposes is the jurisprudence surrounding the potential attack of 'lack of authority' which is eloquently set out in the Constitutional Court judgment of *Minister of Education v Harris.*[7] The case has some clearly analogous background facts to the present subject, as it related to the implementation of a Ministerial notice that was published in terms of the National Education Policy Act. In *Harris*, the notice was ultimately found to be *ultra vires* the actual powers of the Minister.

[4] *Fedsure* op cit note 2 para 56.
[5] [2021] ZACC 34 (4 October 2021).
[6] *Premier v DA* op cite note 5 para 67.
[7] 2001 (4) SA 1197 (CC).

The key foundation to the law of administrative action is that an administrator can only act with an appropriate empowering provision. The next question is to determine the ambit of the powers the administrator is empowered to act within.

7.3. The responsibility to implement the law in the face of known errors

Unlike the clear-cut position of the Constitutional Court in respect of the need for authority in order to act as an official, the common law principles applicable to the fallout arising from an illegitimate empowering provision or decision are far more complex. The Constitutional Court, in the judgment of *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*,[8] (the Kirland Judgment) was asked to consider the application of the so-called 'Oudekraal principle' which emanated from the Supreme Court of Appeal Judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[9] (the 'Oudekraal Judgment').

In the Oudekraal Judgment the Supreme Court of Appeal was put in the invidious position of having to consider whether an 'unlawful administrative act might simply be ignored'.[10] In this particular case an aggrieved property owner had sought time extensions for meeting certain requirements for the development of its property. The City of Cape Town had granted these requested extensions but had importantly done so after the prescribed period for their performance had elapsed.

In considering the relevant legal principles the court invoked the maxim articulated by Lawrence Baxter which held that:

> There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled.[11]

The essence of this Roman-Dutch legal principle is the presumption that authorities have acted according to their prescripts. The objective is fairly straightforward, namely, to ensure that the administrator will proceed with a measure of certainty.

The Oudekraal principle does not, however, stop at the act of a single decision maker because in this case the extensions that had been granted, outside of the permitted window, then led to a subsequent decision to award the status of a township to the property development.

[8] 2014 (3) SA 481 (CC).
[9] 2004 (6) SA 222 (SCA).
[10] *Oudekraal* op cit note 9 para 1.
[11] *Oudekraal* op cit note 9 para 27.

It was this later decision that was then at risk of the earlier unauthorised decisions. In examining the framework within which a second official was to act the Supreme Court of Appeal held that:

> [T]he proper enquiry in each case – at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequential acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.[12]

In the Kirland Judgment the Constitutional Court was similarly concerned with whether the decisions of an administrator were 'effective… until set aside' by a court.[13] In this regard Cameron J re-iterated a form of the 'Oudekraal principle' namely:

> It is true that the word "decision" in its ordinary meaning may signify a proper decision, namely one taken lawfully after a full application of the mind. Yet in administrative law an approval granted under unlawful dictation is still a decision. Like any other, it has effect until it is reviewed and set aside. That it was granted under dictation makes it vulnerable to judicial review. It does not mean that it is a non-decision.[14]

In a subsequent judgment the Supreme Court of Appeal in *Seale v Van Rooyen NO and Others*[15] Cloete JA expressed the 'Oudekraal Principle' in the following terms:

> [A] court asked to review the first act and set it aside has, and must have, a discretion whether or not to [set aside the subsequent act]. Some of the factors relevant to the exercise of that discretion were discussed in *Oudekraal*; they include the lapse of time, the need for finality, the consequences for the public at large and the extent to which persons may have acted in reliance on the decision which it is sought to set aside.[16]

In this judgment of *Seale v Van Rooyen NO and Others*,[17] the court confirmed that subsequent administrative action would be invalid as it was dependent upon the existence of an earlier decision which had been set aside by the court.

In the context of section 5(2) of the Income Tax Act, I submit that officials at the South African Revenue Service would be both empowered and bound by a decision of the Minister of Finance to alter the applicable income tax rates. This would be the position until a court reviewed and set aside the decision of the Minister of Finance or alternatively declared invalid the provision in section 5(2) of the Income Tax Act. The next question to be answered is what

[12] *Oudekraal* op cit note 9 para 31.
[13] *Kirkland* op cit note 8 para 87.
[14] *Oudekraal* op cit note 9 para 92.
[15] 2008 (4) SA 43 (SCA).
[16] *Seale* op cit note 15 para 13.
[17] *Seale* op cit note 15.

the South African Revenue Service could do if and when the subsequent issuance of a tax statute by Parliament failed to ratify the decision of the Minister of Finance.

7.4. Income tax treatment of invalidly collected taxes

In answer to a query regarding the application of tax rate amendments, which are not in the end passed into law by Parliament, a joint response was issued by National Treasury and the South African Revenue Service in the Final Response Document on the 2017 Rates and Monetary Amounts and Amendment of Revenue Laws Bill[18] to the effect that:

> [I]f Parliament does not accept the proposal regarding the increase in the rate of [tax] with effect from the date of the Budget, Government (through SARS) will have to refund the difference between the [tax] paid in accordance with this proposal and the [tax] that is payable in terms of the law after the Rates and Monetary Amounts and Amendment of Revenue Laws A Bill has been passed by Parliament. [19]

It would appear that both National Treasury and the South African Revenue Service assume that the failure to pass the necessary statute will simply trigger a refund procedure. The critical question to ask, however, is whether the South African Revenue Service is in fact empowered to give effect to this refund?

As detailed above, an administrator can only act and perform their role when authorised by law. A derivative issue that arises from this basic principle of administrative law is that when a decision is made by an administrator in the absence of a power to rescind and remake the decision, they run the risk of being *functus officio* in respect of the decision in question.

In the context of imposing income tax, it is relevant to consider the form of tax in question, namely it is an annual tax that is calculated in respect of the gross income received by the relevant taxpayer in question over the entire tax period rather than calculated in respect of a specific event or transaction. At the close of the tax period the definitive calculation of the income tax liability for the taxpayer will be recorded in an 'assessment'.

After the issuance of a final 'assessment' by the South African Revenue Service it does retain the power to 'withdraw' an assessment in terms of section 98 of the Tax Administration Act[20]. This power is however only available in one of three circumstances, namely: it was

---

[18] Final Response Document on the 2017 Rates and Monetary Amounts and Amendment of Revenue Laws Bill issued on 15 December 2017. LAPD-LPrep-Resp-2017-05-Final-Response-Doc-2017-Rates-and-Monetary-Amounts-and-Amendment-of-Revenue-Laws-Bill-15-Dec-2017.pdf (sars.gov.za), accessed 29 September 2021.
[19] Final Response Document on the 2017 Rates and Monetary Amounts and Amendment of Revenue Laws Bill issued on 15 December 2017. LAPD-LPrep-Resp-2017-05-Final-Response-Doc-2017-Rates-and-Monetary-Amounts-and-Amendment-of-Revenue-Laws-Bill-15-Dec-2017.pdf (sars.gov.za) accessed 29 September 2021.
[20] Act 28 of 2011.

issued to an incorrect taxpayer, in respect of the incorrect tax period or with an incorrect payment allocation.[21] None of these categories would be met in the case where the Minister of Finance announced a change in the tax rate, but Parliament failed to subsequently pass the ratifying statute.

In addition to being able to 'withdraw' an assessment there is also the power to issue an 'additional assessment' where in terms of section 92 of the Tax Administration Act[22] the South African Revenue Service is 'satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the *fiscus*, SARS must make an additional assessment to correct the prejudice'. Again, this provision would not be applicable for instance where the Revenue Service was envisaged to make refunds to taxpayers based on levying a tax rate that was higher than the statutory rate.

Of course, an individual taxpayer could lodge an objection to an assessment, within the prescribed time, but in the absence of this *ad hoc* approach, the South African Revenue Authority would be locked into the incorrect assessments issued prior to the Minister's announcement falling away. This is confirmed by the framing of the finality of an 'assessment' as set out in section 100 of the Tax Administration Act.[23] Alternatively, where an assessment had not been finalised the final determination of income tax liabilities could be correctly reflected by the South African Revenue Service.

7.5. Conclusion

Pursuant to the application of section 5(2) of the Income Tax Act, I submit that officials at the South African Revenue Service would on the one hand be empowered and on the other bound by a decision of the Minister of Finance to alter the applicable income tax rates.

The position would change if either the decision of the Minister or the power itself were overturned by a court. In this case, I would submit that the subsequent decisions of the South African Revenue Service in administering or implementing the revised income tax rates would be invalid.

Unfortunately for the officials at the South African Revenue Service in the event that Parliament failed to ratify the decision of the Minister and relevant income tax returns had been

[21] Section 98 of the Tax Administration Act holds 'SARS may, despite the fact that no objection has been lodged or appeal noted, withdraw the assessment which – (a) was issued to the incorrect taxpayer; (b) was issued in respect of the incorrect tax period; or (c) was issued as a result of an incorrect payment allocation'.
[22] Act 28 of 2011.
[23] Act 28 of 2011.

assessed – such officials would likely be placed in the invidious position of being *functus officio* or lacking a power to reverse their decisions. In such cases, the South African Revenue Service would need to either take its own decisions on review or challenge the exercise of the Minister's power with a view to a concomitant order of a court declaring all subsequent assessment's invalid (and set aside).

Chapter 8: The Conclusion

8.1. Introduction

The long-term use of retrospective and retroactive amendments in respect of tax rates as reflected in statutes was replaced by a proposed prospective delegation of law-making powers granted to the Minister of Finance in the Amendment Act of 2016. The effect of the amendment to section 5(2) was to put the Minister of Finance in the position to announce both a new income tax rate and to determine by mere announcement when this new tax rate would come into effect as a law.

It may be co-incidental, but this new provision was introduced to Parliament at roughly the same time that the South African Revenue Service was arguing the *Pienaar Bros Judgment* in court. The Amendment Act of 2016 was finally promulgated on 19 January 2017, but the first version was published on 26 October 2016. The South African Revenue Service then argued the *Pienaar Bros Judgment* matter between 15 and 16 March 2017 with the final court judgment issued on 29 May 2017.[1]

In the absence of any clear details in the Explanatory Memorandum to the Amendment Act of 2016 it is not possible, however, to determine with certainty as to what the true motive for this new provision is – but it would be rational to assume that National Treasury and the South African Revenue Service were keen to put in place a backstop in the form of this novel Ministerial power to prospectively make law in the event that the retroactive or retrospective law-making was curtailed.

In the end, Fabricius J ruled in favour of the South African Revenue Service and found that not just retrospective but also retroactive amendments could be made to tax statutes. The amendment to section 5(2) was nevertheless retained and has subsequently been amended slightly. At the time of writing this thesis the provision has now stood on our statute books for over four years. Indeed, the provision has been used by the Minister of Finance to amend, by mere announcement, the statutorily defined income tax rates per the terms of section 5(2)*(a)* of the Income Tax Act. Further, Parliament has on several occasions passed 'ratifying' statutes in order to meet the envisaged procedure set out in section 5(2)*(b)* of the Income Tax Act.

[1] 2017 (6) SA 435 (GP).

8.2. The core critiques

There are four central concerns raised in this thesis regarding the application of section 5(2) of the Income Tax in its current form all of which step from the application of the Separation of Powers Doctrine and the Rule of Law, namely:

- the delegation of this plenary law-making power is a breach of the Separation of Powers Doctrine;
- the absence of any public participation process violates the Rule of Law principle when the Minister of Finance merely announces a law;
- the potential for the Minister to retrospectively or retroactively apply a tax rate by mere announcement is not a scenario covered by the *Pienaar Bros Judgment* and also likely breaches the Rule of Law; and
- the legislature has not adequately addressed the circumstances in which a subsequent ratification of the announcement fails to take place in terms of section 5(2)(b) of the Income Tax Act.

I summarise the conclusion in respect of each in turn for these concerns below.

8.2.1. Delegation of Plenary Law-making powers breaches Separation of Powers

The authority to impose and reduce taxes, levies, duties and surcharges is quintessentially a legislative power that is set out in section 77(1) of the Constitution. While there is a degree of overlap between the Executive and Legislature in the process of drawing up and passing money Bills, the distinction between the two roles remains clear in the Constitution.

The Minister of Finance has the task of presenting Money Bills to Parliament and will continue to play a role in addressing any potential amendments in terms of the Money Bills Amendment Act. This role remains procedural beyond the point of the bill being submitted to Parliament and could not be construed as a substantive role in either being able to veto amendments or to prescribe the terms by which such amendments could be made.

As detailed in Chapter 4, there is no ambiguity in the division of responsibilities and it is in this context that the Separation of Powers Doctrine should be considered. The formulation of this doctrine has been the subject of considerable judicial ink. For the purposes of this thesis

the focus of the inquiry was, however, on the application of this doctrine in respect of the distinction between the Legislature and the Executive. The question to be addressed was in fact even narrower in that the power to impose and reduce taxes is defined as a legislative power in section 77(1) of the Constitution. For that reason, the formulation in section 5(2) of the Income Tax Act requires a consideration of the sub-category of the Separation of Powers Doctrine, namely whether and to what extent the Legislature can delegate a patently law-making power to a member of the Executive.

When determining the scope for the delegation of this original power, namely, to make laws, the Constitutional Court in the *Executive Council Judgment* produced four overlapping judgments. While the ratio of the *Executive Council Judgment* was to effect a prohibition on the delegation of what is in effect a 'plenary' legislative power (that is, to make original laws or statutes) but to permit the delegation of secondary law-making powers (that is, derivative laws or regulations).

In this regard it is noteworthy to re-iterate the breakdown of the various aspects of the seminal judgment *Executive Council Judgment* detailed in Chapter 3. In the first of the four judgments Chaskalson P set out the procedural argument which maintained that the 'manner and form' or procedural provisions of the 1993 Constitution delineated the split between original and secondary law-making. The second judgment penned by Mahomed DP pivoted to a contextual reading of the relevant instrument rather than an appeal to the 'manner and form' provisions of the Constitution. Here the emphasis was still upon the degree of delegation and the proximity to original legislative power being utilised. The third judgment Ackermann J and O'Reagan J invoked the idea of 'plenary powers' and was emphatic that original law-making power should never be delegated. Finally in the fourth judgment penned by Langa J the procedural considerations were re-iterated in a return to the thinking espoused by Chaskalson P. The clincher in this final judgment was the clear and unambiguous statement, which was to be upheld in subsequent judgments under the Constitution, is the notion that Parliament cannot delegate or assign a power which 'exceeds the competence of Parliament itself'.[2]

When Parliament purported to delegate the power to determine and amend the income tax rate applicable for taxpayers in terms of section 5(2) of the Income Tax Act, I would submit that it was attempting to assign a power which 'exceeds the competence of Parliament itself'.[3]

[2] 1995 (4) SA 877 (CC) paragraph 192.
[3] *Executive Council* op cit note 2 para 192.

The law-making process cannot be given effect to by mere fiat declarations and in its original or plenary form it certainty cannot be delegated away by Parliament.

8.2.2. Absence of public participation prior to the enforcement of a law violates the Rule of Law

The Rule of Law is a concept underpinning our legal system that has been enthused into the fabric of the Constitution itself. A key aspect of this principle is the notion that law makers publicise the law-making process and involve the public at large in the process of arriving at the final formulation of laws that will bind their actions. This aspect of legality is often described as the notion of public participation.

This principle of public participation has been concretely recorded in the Constitution as can be seen in section 59(1)*(a)* of the Constitution which expressly holds that Parliament is obliged to 'facilitate public involvement in the legislative and other processes of the Assembly'. To meet this requirement the Constitutional Court in the *Doctors of Life Judgment* set out a two-stage threshold against which this requirement is to be tested.

The first question to be posed is whether law makers have provided 'meaningful opportunities for public participation'.[4] The second question relates to the active measures taken to 'ensure… [people can] take advantage of those opportunities'.[5] Critically these questions are to be asked of law-makers and not the Executive. In other words, an announcement of submitting a bill to Parliament is outside of this process altogether.

This process of substantive public participation only begins once the lawmakers attend to the task of considering a draft bill and any process of consultation undertaken by the Executive simply fall outside of what is envisaged in section 59(1)*(a)* of the Constitution which expressly addresses the 'legislative' process. The opportunities that must be created to comment and influence the final wording of the statute are to be made available therefore by Parliament itself. This is simply axiomatically not possible where laws are amended by mere announcement by a member of the Executive as is envisaged in section 5(2) of the Income Tax Act.

[4] 2006 (6) SA 416 (CC) at paragraph 129.
[5] *Doctors for Life* op cit note 4 para 129.

This further emphasises the trite legal position that original or plenary legislative powers cannot be delegated by Parliament, even in a statute passed by Parliament itself. The law-making process is a jealously guarded procedure. As evidenced by section 59(1)*(a)* of the Constitution the creation of laws will only be cloaked in the legitimacy and universally binding authority where those affected by such laws have meaningful opportunities not only to hear about the envisaged provisions but also an opportunity to comment and convince the minds of their elected representatives.

This issue remains live to this day as members of the National Assembly itself have begun to openly question the briefing they are receiving from the National Assembly and the South African Revenue Service. In this regard on 14 July 2020 a member of the National Assembly, Floyd Shivambu, is recorded in the minutes of the Finance Standing Committee[6] to have said the following:

> Mr Shivambu proposed that the [Finance Standing] Committee seek independent legal guidance on the permissibility of the executive announcing laws, which are then passed immediately without a public consultation process in Parliament. Parliament becomes a 'rubber stamp', which is not how a constitutional democracy is designed to function. Parliament is only involved later to endorse the laws, with very little space to have a different perspective.[7]

I submit that where the Minister of Finance seeks to utilise section 5(2) of the Income Tax Act in order to unilaterally amend a standing law, he would be indirectly pulling the entire law-making process into the troubled waters of conflicting directly with section 59 of the Constitution.

8.2.3. Retrospective and retroactive announcements are not addressed in the *Pienaar Bros Judgment*

Section 5(2)*(b)* extends the already broad power granted to the Minister of Finance to make laws by announcement and enables the Minister to also holds that the envisaged amendment 'comes into effect on the date or dates determined by the Minister in that announcement'. This introduces the possibility of such 'amendments' being announced with retrospective or even retroactive effect. In other words, the Minister of Finance could potentially alter the income

[6] Minutes of the Standing Committee on Finance on 14 July 2020 regarding Disaster Management Bills: briefing; Committee Report: Treasury Adjustments Budget Disaster Management Bills: briefing; Committee Report: Treasury Adjustments Budget | PMG (Accessed 15 October 2021)
[7] Ibid.

tax rate in respect of not only transactions that remain incomplete, but also in respect of transactions and income tax years that have already come to a legal end.

The judgment of Fabricius J in the *Pienaar Bros Judgment* the standing judgment addressing retrospective and retroactive tax amendments therefore continues to be of relevance despite the fact that section 5(2) would conventionally be understood to envisage a prospective law-making power. In this regard, Fabricius in considering the retroactive application of a provision inserted into an existing statute, was purely considering the capacity of the Legislature to retroactively make laws and was certainly not concerned with purported Executive law-making powers.

It is in fact noteworthy that in the reasoning of Fabricius J, the learned judge expressly invoked the need to preserve parliamentary processes for public participation and held as follows:

> [T]he democratic parliamentary and public participation process would be seriously undermined [if the notice process for informing affected parties reflected the exact wording to be implemented in the final legislation]. The executive does not make laws.[8]

In other words, this judgment only provides precedent for tax statutes to amended with retroactive effect by the Legislature and its ratio in fact depends upon the notion that the Executive are not engaged in law making.

Fabricius appears to rely upon the participation envisaged in the legislative process as a basis for legitimising the position that the final law will not likely reflect the formulation first announced by the Minister when presented to Parliament as a draft. This crucial distinction regarding the Minister of Finance's purported law-making power via an announcement and the Legislature's discretion to amendment legislation retroactively remains a point of contention for National Treasury. In a meeting with the Standing Finance Committee on 14 July 2020 the minutes reflect Ms Yanga Mputa the Chief Director: Legal Tax Design equating the finding in the *Pienaar Brothers Judgment* with section 5(2) of the Income Tax Act.

In this regard Ms Mputa inferred that the *Pienaar Bros Judgment* recognised the 'international practice for countries to accept that retrospective amendments may be appropriate where a retrospective provision corrects an unintended consequence or addresses

[8] *Pienaar Bros* op cit note 1 para 110.

tax avoidance or might otherwise lead to a significant behavioural change that will create undesirable consequences' and that such a principle was relevant to a consideration of the law making powers to the 'Minister to make an announcement in the budget speech'.[9]

8.2.4. The status of unratified announcements remains a clear practical vulnerability to section 5(2) of the Income Tax Act

The final concern regarding the application of section 5(2) of the Income Tax Act in part relates to the second necessary step, namely the *ratification* of the Minister of Finance's announcement of an income tax rate change by a subsequent statute passed by Parliament. A simple but obvious risk will hang over every announcement by the Minister of Finance. What happens if Parliament does not make the 12-month deadline for *ratifying* the Minister' announcement? Or perhaps more awkwardly, what happens if Parliament passes into law a statute that differs from the announcement?

Section 5(2)*(b)* is expressly clear in its description of the purported delegation of law-making powers to the Minister of Finance – the announcement will only 'apply for a period of 12 months from that date or those dates subject to Parliament passing legislation giving effect to *that* announcement within that period of 12 months'.[10] The simplest interpretation to apply to this provision is that the Minister's announcement will simply become a nullity if Parliament either fails to meet the deadline or indeed changes the subsequent formulation of the income tax rates.

For the officials at the South African Revenue Service, who are after all civil servants acting within the confines of the empowering provisions of the Tax Administration Act[11] and related statutes, the starting position is always to locate an empowering provision in order to act. The assumption that has been made by the South African Revenue Service and National Treasury is that they would simply give effect to a refund where taxes had been collected on the basis of an invalid Ministerial announcement. Unfortunately, I argue in Chapter 7 that the South African Revenue Service would likely be *functus officio* in that it would not be able to 'withdraw' the relevant assessment in terms of section 98 of the Tax Administration Act[12] or

[9] Committee on Finance op cit note 6.
[10] Section 5(2)(b) of the Income Tax Act.
[11] Act 28 of 2011.
[12] Act 28 of 2011.

indeed to issue an 'additional assessment' where in terms of section 92 of the Tax Administration Act.[13]

As a result, unless an individual taxpayer's lodge objections to individual assessments, the only viable course of action would be for to challenge the constitutional validity of section 5(2) of the Income Tax Act. Where a final assessment had not yet been issued, however, the South African Revenue Service would likely be in a position to correct the final tax computation.

8.3. Conclusion

In the light of the above considerations, I submit that section 5(2) of the Income Tax Act infringes upon the Separation of Powers Doctrine and constitutes an unlawful delegation of the power to impose or reduce taxes in terms of the Constitution.

[13] Act 28 of 2011.

LIST OF REFERENCES

Primary sources

Legislation

Constitution of South Africa, 1996

Disaster Management Act 57 of 2002

Income Tax Act 58 of 1962

Import and Export Act 45 of 1963

Local Government: Municipal Structures Act 117 of 1999

Local Government Transition Act 209 of 1993

Money Bills Amendment Procedure and Related Matters Act 9 of 2009

Public Finance Management Act 1 of 1999

Tax Administration Act 28 of 2011

Taxation Laws Amendment Act 8 of 2007

Taxation Laws Amendment Act 15 of 2016

Taxation Laws Amendment Act 23 of 2018

Case Law

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another 2007 (1) SA 343 (CC)

Afriforum NPC v Minister of Tourism and Others (499/2020; 498/2020) [2021] ZASCA 121 (22 September 2021).

Bareki NO and Another v Gencor Limited and Others 2006 (1) SA 432 (T)

Dawood v Minister of Home Affairs 2000 (3) SA 936 CC

Doctors for Life International v Speaker of the National Assembly 2006 (6) SA 416 (CC)

Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others 2021 (3) SA 593 (SCA).

Executive Council of the Western Cape Legislature and Others v President of the Republic of South African and Others 1995 (4) SA 877

Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development & another 2000 (1) SA 661 (CC)

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa (1996) 4 SA 744 (CC)

Glenister v President of the Republic of South African and Others 2009 (1) SA 287 (CC)

Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

Helen Suzman Foundation v Speaker of the National Assembly and Others (32858/2020) [2020] ZAGPPHC 574 (5 October 2020)

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC)

First National Bank of South Africa v Minister of Finance 2002 (4) SA 768 (CC)

Janse van Rensburg v Minister of Trade and Industry NO 2000 (1) SA 29 (CC)

King and Others v Attorneys Fidelity Fund Board of Control and Another 2006 (4) BCLR 462 (SCA)

Kubyana v Standard Bank of South Africa Ltd 2014 (4) BCLR 400

Matatiele Municipality & Others v President of the Republic of South Africa & Others 2007 (6) SA 477 (CC)

MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC)

Metcash Trading Limited v Commissioner for the South African Revenue Service and Another 2001 (1) SA 1109 (CC), 60.

Minister of Education v Harris 2001 (4) SA 1197 (CC)

Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC)

Minister of Health and Others v Treatment Action Campaign and Others (No 1) (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002)

Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC) at paragraph 34

Municipality of Stellenbosch v Shelf-Line 104 (Pty) Ltd 2012 (1) SA 599 (SCA)

National Director of Public Prosecutions v Carolus and Others 2000 (1) SA 1127 (SCA)

National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries 2013 (5) SA 571 (CC)

National Treasury and Others v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC)

New Adventure Shelf 113 (Pty) Ltd v Commissioner of the South African Revenue Services 2017 (5) SA 94 (SCA)

Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

Permanent Estate & Finance Co 1952 (4) SA 249 (W)

Pharmaceutical Manufacturers Association of South African and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)

Pienaar Brothers (Pty) Ltd v CSARS 2017 (6) SA 435 (GP)

Premier, Gauteng and Others v Democratic Alliance and Others [2021] ZACC 34 (4 October 2021)

President of the Republic of South Africa v South African Rugby Football Union 2000 (2) SA 674 (CC)

Shewan Tomes & Co v Commissioner of Inland Revenue 1955 (4) SA 305 (AD)

Skole-Onsersteuningsentrum NPC and Others v Minister of Social Development and Others [2020] 4 SA All SA 285 (GP)

S v Dodo 2001 (3) SA 382 (CC)

S v Mhlungu and Others 1995 (3) SA 867 (CC)

South African Reserve Bank and Another v Shuttleworth and Another 2015 (5) SA 146 (CC)

Van Lear v Van Lear 1979 (3) SA 1162 (W)

Ynuico Ltd v Minister of Trade and Industry 1996 (3) SA 989 (CC)

Secondary sources

Books

Bentley, Duncan *Taxpayers Rights: An International Perspective* (1998) Bond University.

Currie, Iain and de Waal, Johan *The New Constitutional & Administrative Law* Volume 1 (2001) Cape Town: Juta.

De Smith, SA, Woolf, H, and Jowell, JL *Principles of Judicial Review* (1999) London: Sweet and Maxwell.

Du Plessis, Lourens *Re-Interpretation of Statutes* (2002) Butterworths.

Ratnapala, Suri and Crowe, Jonathan *Australian Constitutional Law: Foundations and Theory* 3rd Edition (2012) Oxford University Press.

Tribe, Laurence *American Constitutional Law* 3rd Edition (2000) West Academic.

Woolman, Stu and Bishop, Michael (eds) *Constitutional Law of South Africa* 2nd Edition (2005) Cape Town: Juta.

Journal articles

Corder, Hugh 'Principled calm amidst a shameless storm: Testing the limits of the Judicial Regulation of Legislative and Executive Power' (2009) 2 *Constitutional Law Review.*

Driedger, EA 'In Statutes: Retroactive Retrospective Reflections' (1978) 56 *Canadian Bar Review.*

Fuller, Lon 'The Morality of Law' (1965) 40 *Indiana Law Journal* 2.

Hodgson, Timothy Fish 'The mysteriously appearing and disappearing doctrine of separation of powers: towards a distinctly South African doctrine for a more radically transformative Constitution' (2018) 34 *South African Journal on Human Rights* 1.

Hoexter, Cora 'South African Reserve Bank v Shuttleworth A Constitutional Lawyers Nightmare' Constitutional Court Review 8 (2016) 1.

Hoexter, Cora ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 *SALJ* 484.

Hofmeyer, Kate *Annual Survey of SA Law.* (2006) Juta

Hofmeyr, Kate ‘Constitutional Law’ (2007) 1 *Annual Survey of South African Law*.

Kruger, Des ‘Tax Administration Act: what every corporate tax administrator should know (part 2)’ (2013) 4 *Business Tax and Company Law Quarterly* 3.

Kruger, Liesl ‘Retrospective legislation: do taxpayers have any recourse?’ (2014) 5 *Business Tax and Company Law Quarterly*.

Labuschagne, Pieter ‘The doctrine of separation of powers and its application in South Africa’ (2004) 23 *Politeia* 3.

Moosa, Fareed ‘Democratic principles underpinning tax administration in SA’ (2019) 10 *Business Tax and Company Law Quarterly* 4.

Moosa, Fareed ‘Value-conscious interpretation of taxing provisions using ubuntu: an appropriate decolonised interpretive approach?’ (2018) 300 *SA Mercantile Law Journal.*

Okpaluba, Chukus ‘Can a court review the internal affairs and processes of the legislature? Contemporary developments in South Africa’ (2015) 48 *Comparative and International Law Journal of Sothern Africa* 2.

Seligson, Milton ‘The retrospective operation of statutory amendments to taxation laws: interpreting the amendments to section 8EA of the TLAA’ (2016) 18 *Business Tax and Company Law Quarterly* 1.

Swart, GJ ‘Constitutional limitations on the delegation of powers of taxation’ (1996) 11 *SA Public Law* 2.

Swart, Mia and Coggin, Thomas ‘The Road Not Taken: Separation of Powers, Interim Interdicts, Rationality Review and Etolling in National Treasury v Opposition to Urban Tolling’ (2013) 5 *Constitutional Court Review*.

Titus, Afton ‘*Pienaar Bros (Pty) Ltd v CSARS*: retroactive fiscal legislation and the rule of law: has South Africa just taken a step back in its constitutional democracy?’ (2019) 136 *South African Law Journal* 3.

Tredoux, Liezel and van Zyl, Stephanus P 'Some drastic measures to close a loophole: the case of Pienaar Brothers and the targeted retroactive amendment of section 44 of the Income Tax Act' (2018) 21 *Potchefstroom Electronic Law Journal* 1.

Other sources

Croome, Beric 'The lawfulness of retrospective tax amendments' (2017) *The South African Tax Guide* available at https://www.mondaq.com/southafrica/Tax/612164/The-Lawfulness-Of-Retrospective-Amendments-In-Tax-Law.

Croome, Beric *Taxpayers' Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts* (unpublished PhD thesis, University of Cape Town, 2008).

Davis, Dennis 'Retroactive Legislation and Completed Transactions – Another View' (2017) *The Taxpayer*.

Final Response Document on the 2017 Rates and Monetary Amounts and Amendment of Revenue Laws Bill issued on 15 December 2017. LAPD-LPrep-Resp-2017-05-Final-Response-Doc-2017-Rates-and-Monetary-Amounts-and-Amendment-of-Revenue-Laws-Bill-15-Dec-2017.pdf (sars.gov.za).

Garven, Barry and Hare, Robert 'Tax uncertainty the poison pill for foreign investors: tax' (2011) 11 *Without Prejudice* 8.

Louw, Henrich 'Retrospective application: tax' (2012) 12 *Without Prejudice* 8.