A critical analysis of the legality of retroactive fiscal legislation and the remedies available to taxpayers

By

Christoff De Wet de Villiers

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

By Christoff De Wet de Villiers (DVLCHR005)

in partial fulfilment of the requirements for the degree M.Com (Taxation)

Faculty of Commerce

UNIVERSITY OF CAPE TOWN

Date of submission: March 2021

DECLARATION

I, Christoff De Wet de Villiers, hereby declare that the work on which this research paper is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

Signature: Signed by candidate

Date: March 2021

Abstract

'Uncertain law also penalizes those anxious to obey it and eventually creates contempt for the law. Uncertain law will thus erode the confidence of taxpayers in the system and their willingness to support and comply with the system.'[1]

Retroactive fiscal legislation leaves taxpayers with little to no tax certainty, with only about two months of transactional certainty each tax year not subject to any potential retroactive draft fiscal legislation - from when the amendment act from the prior legislative amendment cycle is promulgated until the Budget Speech which sets in motion the new legislative amendment cycle.

Arguably, economic activity and tax morality could increase should more certainty exist as to what types of retroactive fiscal legislation are permissible, in which circumstances it is permitted and the remedies available to taxpayers in cases where such legislation adversely affects their vested rights. This research aims to consider the legality of retroactive fiscal legislation to provide much-needed tax certainty. This will be done by analysing the rules under the common law, statute law (being the Interpretation Act) and the Constitution.

The conclusion reached under the common law is that regarding fully completed transactions, the presumption against retroactivity will provide an effective remedy to taxpayers should the retroactive legislation not explicitly provide that it will apply to completed transactions. Under statute law, the treatment of statues which are subject to commencement provision are dealt with similarly under the Interpretation Act and the proposed Interpretation of Legislation Bill, in that neither contains an outright prohibition on retroactive legislation.

Under the Constitution, a challenge based on either the rule of law or the doctrine of separation of powers will most likely not be successful. A challenge in terms of section 25 of the Constitution would be the constitutional remedy most likely to succeed. A challenge under section 25 of the Constitution requires a two-stage test: *Firstly*, it needs to be determined if the deprivation of property was arbitrary for purposes of section 25 of the

---

[1] Jinyan Yi, ***Taxpayers' Rights in Canada***, 7 Revenue Law Journal 81, 131 (1997).

Constitution. *Secondly*, it needs to be determined if section 25 of the Constitution's limitation is justifiable under section 36 of the Constitution.

The deprivation of property will be arbitrary if sufficient reasons are not provided. If found to be arbitrary, then the judiciary must declare such legislation unconstitutional without the need to consider section 36 of the Constitution. Should an assessment under section 36 of the Constitution be required, the competing values need to be measured against each other and an assessment made based on proportionality. Section 36(1)(e) of the Constitution suggests that prospective legislation is preferred to retroactive legislation, and that means less restrictive than retroactive fiscal legislation should be relied on if they exist.

Based on the analysis in this paper, it is respectfully submitted that the taxpayers in ***Pienaar Brothers*** should have had an effective remedy in terms of section 25 of the Constitution, read with section 36(1)(e) of the Constitution, as less restrictive means were available to the Commissioner in the form of the general anti-avoidance rules. The retroactive amendments were also not of general application and the taxpayers did not receive adequate warning.

Irrespective of a successful constitutional challenge, the taxpayers in ***Pienaar Brothers*** also had a remedy available to them under the common law presumption against retroactivity (as applied to the completed transaction). The retroactive amendments negatively impacted their vested rights without specifically stating that it would apply to completed transactions. It is unfortunate that the matter was not taken on appeal, as judicial precedent is much needed on the topic of retroactive fiscal legislation and completed transactions.

Table of Contents

1. INTRODUCTION

1.1. Background to the research objective

> *'The principle that the effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognised by the Greeks ... by the Romans ... by English common law ... and by Code Napoleon. It has long been a solid foundation of American law ...'*[2]

The abovementioned quote also rings true in South Africa and more specifically in the field of taxation, as is evident from the four primary canons of taxation: equity, certainty, convenience of payment and economy of collection.[3] In the words of Smith, the canon of certainty entails that:

> *'The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid all ought to be clear and plain to the contributor and to every other person.'*

Any form of 'retroactive legislation' makes it almost impossible for taxpayers to arrange their affairs, comply with the relevant legislation and determine the amount of tax to be paid, should they not have certainty on the consequences to be attached to transactions. This was evident in the judgment of ***Pienaar Brothers (Pty) Ltd v the Commissioner for the South African Revenue Service***[4] and the issues surrounding retroactive fiscal legislation, which became particularly topical following the judgement.

In order to contextualise the problem statement this paper wishes to address, it is appropriate to, firstly, understand the legislative process in South Africa as it pertains to

---

[2] ***Kaiser Aluminium and Chemical Corporation et al v Bonjorno et al***., 494 US 827, 855 (1990).
[3] Smith, A. ***An enquiry into the nature and causes of the wealth of nations*** 1776, fifth edition, Book V, Chapter II, Part II.
[4] ***Pienaar Brothers (Pty) Ltd v the Commissioner for the South African Revenue Service*** (2017) 80 SATC 1.

fiscal legislation and, secondly, the distinction between 'retroactive legislation' and 'retrospective legislation'.

1.1.1. Legislative process

In South Africa, the legislative process involves draft legislation to be tabled and debated by Parliament and its various committees: the National Assembly, the National Council of Provinces and the President.[5] The legislative authority of the national sphere of government is vested in Parliament and confers on the National Assembly the power to pass money bills (i.e. fiscal legislation).[6] National Assembly can assign its power to pass money bills to any legislative body in another sphere of government.[7] The National Assembly, however, does not have the power to initiate or prepare money bills.[8]

Money bills must be introduced in the National Assembly by the cabinet member responsible for national financial matters (i.e. the Finance Minister).[9] After a money bill has been introduced in the National Assembly, it must be referred to the National Assembly's standing committee on finance for consideration and 'report back' to the National Assembly.[10] A Bill passed by the National Assembly must be referred to the National Council of Provinces and their standing committee on finance.[11]

Once the draft legislation has been finalised (that is to say, tabled and approved by a majority in the absence of constitutional amendments) by the two houses of the Parliament, the draft legislation (now an Act of Parliament) is put to the President of the Republic for assent. Only once the President has assented to the Act by signing the relevant legislation will the Act become law in South Africa. This only when the Act is soon thereafter promulgated by publication in the Government Gazette.

---

[5] Freedman, D. W. ***Law of South Africa Volume 20(1) – Second Edition – Parliament*** at 44.
[6] Section 43(a) and 44 of the Constitution of the Republic of South Africa, 1996 (referred to further as 'the Constitution'). The Constitution was promulgated as Act No. 108 of 1996 but in terms of the Citation of Constitutional Laws Act No. 5 of 2005, the Constitution of the Republic of South Africa, 1996 is the correct and legal manner in which to refer to this act.
[7] Section 44 of the Constitution.
[8] Section 55(1)(b) of the Constitution.
[9] Section 73(2)(a) of the Constitution.
[10] Section 11(1) of the Money Bills Amendment Procedure and Related Matters Act No. 9 of 2009.
[11] Section 73(5) of the Constitution and section 11(2) of the Money Bills Amendment Procedure and Related Matters Act No. 9 of 2009.

In South Africa, statutes come into effect in four instances:[12]

- on the date it is published or gazetted;
- on a future date determined by the statute itself;
- on a date to be determined and proclaimed by the President or the Premier; and
- retroactively, where the legislation is deemed to have commenced on a particular prior day but is only published or gazetted later.

The following timeline is typically adhered to when a money bill (e.g. fiscal legislation) is enacted:

- The Finance Minister holds the Budget Speech during February of every year, wherein the framework of certain amendments are provided as part of Annexure C of the Budget Speech.
- The Draft Taxation Laws Amendment Bill is made available for public comment during June or July of every year.
- The Final Taxation Laws Amendment Bill is made available for public comment during September or October of every year.
- The Taxation Laws Amendment Act is promulgated during December of the same year or January of the following year, often with amendments that take effect from either the date of the Budget Speech or the Draft Taxation Laws Amendment Bill.

Retroactive fiscal legislation is problematic for taxpayers who, after the release of the Budget Speech[13] or the Draft Taxation Laws Amendment Bill, wish to implement a transaction in line with the then wording proposed, and the implementation was completed before the 'next step in the legislative process'. Where the taxpayer acted on the Budget Speech, the next step would be the Draft Taxation Laws Amendment Bill. Where the

---

[12] South African Law Reform Commission ***Discussion Paper 112 Statutory Revision: Review of the Interpretation Act 33 of 1957 (Project 25)*** September 2006 at 3.4.

[13] When legislation is implemented retroactively to the date of the Budget Speech, this can be termed 'legislation by press release'. See Campbell, D. L. ***A Critical Analysis of the Retrospective Introduction of Tax Legislation*** (2018) Masters in Advanced Taxation University of Kwazulu-Natal at 2.3.

taxpayer acted on the Draft Taxation Laws Amendment Bill, the next step would be the Final Taxation Laws Amendment Bill.

The question then arises, if the transaction is already fully implemented and completed before the next step in the legislative process, does the taxpayer have any remedies available to shield itself from the 'retroactive' workings of the Taxation Laws Amendment Act.

1.1.2. Definition of 'retroactive legislation' and 'retrospective legislation'

Graetz argued that the distinction between 'retroactive legislation' and 'retrospective legislation' does not matter much because all changes will have a financial impact in the context of fiscal legislation.[14] This is indeed the case, but the financial implications of 'retroactive fiscal legislation' can be more far reaching than that of 'retrospective fiscal legislation'. This is because (as will be seen further below) 'retrospective legislation' applies to existing rights from date of promulgation, whereas 'retroactive legislation' applies to those same rights from a date before promulgation. Retroactive fiscal legislation has the potential to change the tax consequences associated with already completed transactions, and therefore, retrospective fiscal legislation is less contentious.

The research question in this paper is centred on 'retroactive legislation', and for that reason, it is essential to in clear terms distinguish 'retroactive legislation' from 'retrospective legislation'. '*Retroactive legislation*' operates from a date before the legislation's promulgation and changes the law applicable with effect from that prior date.[15] In other words, retroactive legislation is legislation 'which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute'.[16]

---

[14] Campbell (note 13 above) at 2.2 and the reference therein to Graetz, M. J. ***Retroactivity Revisited*** (1985) 98 Harvard Law Review 1822.

[15] ***Adampol (Pty) Ltd v Administrator, Transvaal*** [1989] 4 All SA 776 (AD) on page 786 and the reference therein to ***West v Gwynne*** [1911] 2 Ch 1 at 11 – 12, and ***Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission*** [1999] 3 All SA 365 (A) at paragraph 13, ***S v Mhlungu*** 1995 (7) BCLR 793 (CC) at paragraph 65, Freedman, W. ***The rights of a child – The right to testify through an intermediary***, 2010 South African Journal of Criminal Justice Volume 23 Issue 2 on page 312 and ***Du Toit v Minister for Safety and Security and Another*** 2009 (12) BCLR 1171 (CC) at paragraph 33.

[16] ***Adampol*** (note 15 above) on page 786 and the reference therein to ***West*** (note 15 above) at 11 – 12 and ***Unitrans Passenger*** (note 15 above) at paragraph 13 and ***Mhlungu*** (note 15 above) at paragraph 65. Also see

Therefore, it applies to transactions completed before the legislation has been promulgated. 'Retroactive legislation' is also generally described as real or strong retrospectivity.[17]

The amendment of the anti-dividend stripping provisions is a good example of 'retroactive legislation' and why it is problematic. On 20 February 2019, as part of the Budget Speech, Annexure C (containing the additional tax policy and administrative adjustments) stated the following:

> *'In 2017, the rules governing share buy-backs and dividend stripping were changed to prevent taxpayers from avoiding taxation of share disposals by companies. In 2018, these rules were again adjusted to prevent harm to legitimate corporate reorganisations. However, some taxpayers are now undermining the adjusted rules. These arrangements involve the target company distributing a substantial dividend to its current company shareholder and subsequently issuing shares to a third party. <u>As a result, the value of the current company shareholder's holding in the shares of the target company is diluted</u> and these shares are not immediately disposed of. ... To curb this new form of abuse, it is proposed that the rules governing share buy-backs and dividend stripping be amended. <u>These amendments will take effect on 20 February 2019</u>.'* (own emphasis)

On 21 July 2019, the Draft Taxation Laws Amendment Bill was released for public comment. In terms of section 59(1)(e) of the mentioned amendment bill, the following subparagraph was inserted into paragraph 43A of the Eighth Schedule to the Income Tax Act[18]:

> *'(3A) Where a company holds shares in another company (hereinafter referred to as the 'target company') and—*
>
> *(a) the target company issues shares (hereinafter referred to as the 'new shares') to a person other than that company; and*

Hochman, C. B. ***The Supreme Court and the Constitutionality of Retroactive Legislation*** Harvard Law Review Volume 73, 1960 on page 692.

[17] ***Adampol*** (note 15 above) on page 786 and the reference therein to ***West*** (note 15 above) at 11 – 12 and ***Unitrans Passenger*** (note 15 above) at paragraph 13.

[18] The Income Tax Act No. 58 of 1962.

(b) the effective interest of that company in the shares of the target company is reduced by reason of the new shares issued by the target company,

that company must for purposes of this paragraph be treated as having disposed, immediately after the new shares were issued, of a percentage of those shares that is equal to the percentage by which the effective interest of that company in the shares of the target company has been reduced by reason of the new shares issued by the target company.' (own emphasis)

Whereas the amendment bill referred to a reduction in existing shareholders' effective interest, indications in the Budget Speech merely referred to the dilution of value in the target company. Further changes were also introduced as part of the final bill, which was eventually promulgated on 15 January 2020 in terms of the Taxation Laws Amendment Act No. 34 of 2019. The amendments were effective from 20 February 2019, being the date of the Budget Speech. Section 62(1)(f) of Taxation Laws Amendment Act No. 34 of 2019:[19]

'(4) Where a company holds equity shares in another company (hereinafter referred to as the 'target company') and—

(a) the target company issues shares (hereinafter referred to as the 'new shares') to a person other than that company; and

(b) the effective interest of that company in the equity shares of the target company is reduced by reason of the new shares issued by the target company,

that company must for purposes of this paragraph be treated as having disposed, immediately after the new shares were issued, of a percentage of those equity shares that is equal to the percentage by which the effective interest of that company in the equity shares of the target company has been reduced by reason of the new shares issued by the target company: Provided that any new shares that are

[19] Section 62(3) of the Taxation Laws Amendment Act No. 34 of 2019 determines that paragraph (f) is deemed to have come into operation on 20 February 2019 and apply in respect of shares held by a company in a target company if the effective interest held by that company in the shares of that target company is reduced on or after that date.

convertible to equity shares must for purposes of this subparagraph be treated as equity shares.'

In contrast, '*retrospective legislation*' only takes effect from the date that it is promulgated but infringes upon existing rights and obligations.[20] Typically, retrospective legislation is legislation which declares pre-existing obligations unenforceable in future.[21] 'Retrospective legislation' is also generally referred to as weaker retrospectivity.[22]

Driedger wrote the following concerning the difference between retroactive and retrospective legislation:[23]

> *'A retroactive 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 backwards 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.'* (own emphasis)

An example of 'retrospective legislation' is the enactment of section 7C of the Income Tax Act. The Taxation Laws Amendment Act No. 15 of 2016 (promulgated on 19 January 2017) introduced section 7C of the Income Tax Act, effective 1 March 2017, which applies to all loans, advances and credits to trusts which were already in existence at that date.[24]

---

[20] ***Mhlungu*** (note 15 above) at paragraph 65, Freedman (note 15 above) on page 312 and ***Du Toit*** (note 15 above) at paragraph 33.
[21] Hochman (note 16 above) on page 692.
[22] ***National Director of Public Prosecutions SA v Carolus*** [2000] 1 All SA 302 (A) at paragraph 33.
[23] ***Carolus*** (note 22 above) at paragraph 34 and the reference therein to Driedger's article, (1978) 56 Canadian Bar Review 264 at 268-9.
[24] The introduction of the capital gains tax is another example of 'retrospective legislation'. However, it is arguably more acceptable than other retrospective legislation, in that the taxpayer can apply specific provisions of the Eighth Schedule to the Income Tax Act to reduce the tax exposure in relation to periods before the enactment of capital gains tax. In this regard see paragraph 25 of the Eighth Schedule to the Income Tax Act, which is used in determining the base cost of pre-valuation date assets (that is to say, assets acquired prior to 1 October 2001).

In determining whether legislation (e.g. an amendment act) is retroactive or retrospective in nature, one must consider the date of enacting the legislation and the ambit and scope of the legislation in question.[25]

The Court in ***Pienaar Brothers*** found that when a judge pronounces the law, it could amount to an acceptable retroactive amendment of the law.[26] Emslie, in contrast, argues that judges pronounce on what the position always was (i.e. interpretation of the law by the judiciary) and that it does not result in a change of the law (which is normally imposed by the legislator in terms of the doctrine of separation of powers).[27] While a detailed analysis of this topic is considered beyond the scope of the paper, it should be noted that the House of Lords decision relied on by the Court in ***Pienaar Brothers*** dealt with a 'change in law' which benefitted the taxpayer, which would be an acceptable form of retroactive legislation as discussed in Chapter 2.

1.2. Problem statement

In South Africa, retroactive fiscal legislation leaves taxpayers with little to no certainty to plan their affairs, with only about two months of transactional certainty each tax year not subject to any potential retroactive draft fiscal legislation - from when the Taxation Laws Amendment Act from the prior legislative amendment cycle is promulgated until the Budget Speech which sets in motion the new legislative amendment cycle. Taxpayers may be caught off-guard when the tax consequences of transactions entered into are altered by promulgated retroactive fiscal legislation.

Arguably, should more certainty exist as to what types of retroactive fiscal legislation are permissible, in which circumstances it is permitted and the remedies available to taxpayers

---

[25] ***Adampol*** (note 15 above) on page 786 and the reference therein to ***West*** (note 15 above) at 11 – 12.
[26] ***Pienaar Brothers*** (note 4 above) at paragraph 45 in referring to the judgment of ***Deutsche Morgan Genfell Group plc v HMCIR*** [2006] UKHL 49. The impact of this judgment on the definition of 'retroactive legislation' is beyond the scope of this paper, and could be considered as an area for future research.
[27] Botha, H. and Marupen, C. ***Retrospective Legislation: The Pienaar Brothers Case*** Business Tax & Company Law Quarterly Volume 8 Issue 3 September 2017 at page 17. Emslie, T. S. ***Editorial: Retroactive Legislation and Completed Transactions*** The Taxpayer Volume 66 Nos 4 & 5, April-May 2017 on page 62.

in cases where such legislation adversely affects their completed transactions, economic activity and tax morality could increase.

1.3. Research objective

The use of 'retroactive fiscal legislation' over the years has left taxpayers with many uncertainties (specifically when determining the tax consequences associated with their transactions) when arranging their affairs. Considering the timeline as outlined in 1.1.1 above, the research aims to evaluate this kind of legislation's legality. This will be done by analysing the rules that exist under the common law, statute law (being the Interpretation Act[28]) and the Constitution. These three sources of South African law (including the relevant judicial precedent pertaining to each) form the primary basis in terms of which South African fiscal legislation should be analysed. It will also be considered whether taxpayers have any remedies against this kind of legislation.

Specifically, the sub-objectives of this paper can be delineated as follows:

- To analyse the relevant common law principles in relation to retroactive legislation, with a specific focus on the presumption against retroactivity.
- To analyse the Constitution's relevant provisions, focusing on the impact of the Constitution (if any) on the presumption against retroactivity and the exceptions to it.
- To analyse the relevant provisions of the Interpretation Act and the Interpretation of Legislation Bill, 2006 ('the Interpretation Bill') to determine the impact (if any) on the presumption against retroactivity.
- To determine what will constitute acceptable 'retroactive legislation' under the common law, statute law and the Constitution and what remedies are available to taxpayers.

[28] The Interpretation Act No. 33 of 1957.

- To re-visit the judgment of ***Pienaar Brothers*** based on the discussion in this paper.

1.4. Research methodology

This study's mode of inquiry is qualitative in nature and follows a doctrinal method as described by Hutchinson and Duncan.[29] The research method adopted to answer the questions identified in the problem statement will be a review of relevant literature, including relevant provisions of the Interpretation Act, the Constitution, case law, and authoritative scholars in the field of statutory interpretation and taxation. As the primary research questions will be answered in the context of South African legislation, the majority of literature considered will be local.

1.5. Limitations of scope

A detailed analysis of the following topics is considered beyond the scope of this paper:

- Whether judicial pronouncements change the legal position (thereby resulting in a change in the law) or merely pronounce on what the position always was (thereby correcting the interpretation of the law);

- The correct approach to statutory interpretation as well as the hierarchy of the rules and presumptions of statutory interpretation (including the interpretation of the Constitution, constitutional interpretation and the impact of the Constitution of the aforementioned);

- Whether the relevant rules and presumptions mentioned above should be applied differently for each specific area of the law, for example, fiscal legislation;

---

[29] Hutchinson, T. C. and Duncan, N. ***Defining and describing what we do: doctrinal legal research*** 2012 Deakin Law Review 17(1): 83–119. Also, McKerchar, M. ***Philosophical paradigms, inquiry strategies and knowledge claims: Applying the principles of research design and conduct to taxation*** 2008 eJournal of Tax Research 6(1): 5–22.

- Retrospective legislation and the presumption against retrospective legislation; and
- All the fundamental rights contained in the Constitution that provide protection to taxpayers.[30] The focus of this paper will be on section 25 of the Constitution.

While a detailed analysis of these topics is considered beyond the paper's scope, it should be noted that a cursory discussion of some of the topics is required to contextualise certain aspects of the study. Therefore, where such cursory discussions are provided, they are provided in this context.

1.6. Chapter structure

Chapter 2 considers the common law presumption against retroactivity and the impact, if any, that the Constitution has had on that presumption. The chapter also considers what constitutes acceptable retroactive legislation under the presumption against retroactivity.

Chapter 3 considers the background in relation to the Interpretation Act as well as the Interpretation of Legislation Bill. The position regarding the commencement date of statutes under both the Interpretation Act and the Interpretation of Legislation Bill is discussed to determine retroactive legislation's acceptability under statute law.

Chapter 4 considers potential remedies against retroactivity in a constitutional dispensation, being the rule of law, infringement of section 25 of the Constitution and the doctrine of separation of powers.

Chapter 5 re-visits the judgment of ***Pienaar Brothers*** based on the analysis contained in Chapters 2 to 4.

Chapter 5 summarises the research findings with reference to the primary research questions. A conclusion is drawn as to whether retroactive fiscal legislation is permissible, in which circumstances it is permitted, and the remedies available to taxpayers in cases where such legislation adversely affects their vested rights.

---

[30] Sections 9, 10, 14, 22, 25, 32, 33, 34, 35 of the Constitution.

2. REMEDIES AGAINST RETROACTIVITY UNDER THE COMMON LAW

2.1. Introduction

In this chapter, an analysis of the common law approach to retroactive legislation is provided, as applied by the South African courts, with a specific focus on fiscal legislation. To facilitate the common law analysis in the current context, the present-day role of the common law presumptions of statutory interpretation in our new constitutional dispensation is discussed, focusing on the presumption against retroactivity. The chapter concludes with a discussion of acceptable retroactive legislation. This will allow taxpayers to assess if retroactive legislation is legal under the common law and, further, whether the presumption against retroactivity can act as a remedy against unacceptable retroactive legislation.

Although the common law approach to retroactive legislation is, to a certain extent, codified in the Interpretation Act and potentially subsumed by the Constitution,[31] this chapter focuses on applying the common law rules in their original form, not *per se* as part of codified legislation. The common law and statute law requires separate and distinct analysis for the following reasons:

- Not all common law rules of statutory interpretation have been (or can be) codified;[32] and
- Under the Constitutional dispensation, certain of the common law rules of statutory interpretation is experiencing a revival.[33]

---

[31] The provisions of the Interpretation Act (being statute law) are discussed in detail in Chapter 3.

[32] See the discussion in Chapter 3 below with reference to the ***Discussion Paper*** (note 12 above) at 1.10 where it is argued that any attempt to codify the common law rules and presumptions of statutory interpretation would not only impose undesirable restrictions on the ability of the judiciary to develop the common law to cope with new issues, but would also be unsuccessful, since it is not possible to cater for every interpretive scenario that could potentially arise.

[33] Certain interpretive presumptions have been given "new life" due thereto that the South African courts have held that, where it is possible to decide any case without reaching a constitutional issue, this is the course which should be followed. The effect of this is that in some instances the courts would prefer to rely on the 'remaining' common law presumptions of statutory interpretation (if possible) or the interpretive techniques: reading-down, reading-up, reading-in or severance, instead of deciding the case before them in terms of the Constitution. In other words, our courts would prefer to apply constitutional interpretation (and thereby

2.2. Presumptions of statutory interpretation

The presumptions of statutory interpretation can be defined as preliminary assumptions as to the meaning of the words used in a statute.[34] According to certain authors, these *assumptions* are founded on the expectation that certain basic tenets of any given legal system will be followed in drafting legislation.[35]

Historically, the presumptions were seen as common law principles to assist jurists and the courts in interpreting legislation.[36] In this regard, it has also been suggested that the term 'presumptions' is a misnomer and that the phrase '*presumptions of statutory interpretation*' instead refers to fundamental guidelines and principles which assist jurists and our courts when interpreting legislation.[37]

However, differing opinions exist as to the true nature of these presumptions. *Du Plessis* categorises the differing opinions or approaches as follows:[38]

- Presumptions have a purely auxiliary function and therefore serve as a last resort in the interpretation of legislation. That is to say, only if no other interpretive method leads to a reasonable interpretation should the presumptions be relied on.

- Presumptions qualify the provisions of a statute. That is to say, the interpretation followed in relation to a specific provision should be reasonable, taking into account the various presumptions.

---

promoting the spirit of the Bill of Rights) instead of interpreting a specific provision to be unconstitutional. See ***Mhlungu*** (note 15 above) at paragraph 59. Also, Bishop, M. ***'In the beginning was the word': The role of test in the interpretation of statutes*** 2012 South African Law Journal Volume 129 Issue 4 on pages 683 and 685.

[34] Singh, A. ***A re-evaluation of the common law presumptions of interpretation in the light of the Constitution*** THRHR Band 75 Nommer 1 Februarie 2012 on page 81.

[35] Singh (note 34 above) on page 81.

[36] Singh (note 34 above) on page 79 and Kellaway, ***E. A. Principles of legal interpretation of statutes, contracts and wills*** on page 317.

[37] Dachs, P. ***Retrospective Legislation*** The Taxpayer Volume 61 No. 8, August 2012 on page 145.

[38] Singh (note 34 above) on page 81 and Du Plessis, L. M. ***Law of South Africa Volume 25(1) – Second Edition Volume – Statute Law and Interpretation*** at 333.

- Presumptions are quintessential to the interpretation of legislation. That is to say, in each instance, even if the language used is clear and unambiguous, the interpretation ultimately decided should be tested against the various presumptions.

In his examination, *Du Plessis* found overwhelming support for the first category.[39] However, *Cowen* believes that reliance on the presumptions is necessary even when the language of a statute is 'presumably' clear. That is to say, it falls within the ambit of the second and third categories as indicated above.[40] *Driedger* also supports the view that the presumptions of statutory interpretation form part of our jurisprudence and should, therefore, always be considered by jurists as part of the interpretation process.[41] Other authors have also expressed that the presumptions fulfilled the role of a '*pre-constitutional bill of rights*'.[42]

Cowen and *Driedger's* views are compelling. Certain presumptions of statutory interpretation are legal principles that qualify legislative provisions (i.e. they comprise a fundamental part of the legal system and, therefore, can be applied even where the language of the statute in question is unambiguous).[43] The presumptions' proverbial net will be cast too wide if they are considered quintessential to legislative interpretation. Suppose the interpretation to be adopted is clear, reasonable and not contrary to the Constitution (or any other legislative provision for that matter). In that case, there is no need to rely on the presumptions.

Arguably, the presumptions have obligatory force (i.e. can be applied even where the language of the statute in question is unambiguous), being legal rules derived from the common law, and have greater power concerning, for example, statutes that impose obligations (i.e. fiscal legislation) or penalties, or impacts on vested rights.[44] It is worth

---

[39] Singh (note 34 above) on page 82 with specific reference to footnote 18 where it is stated that Du Plessis refers to Celliers, Labuschagne, and Hahlo and Kahn as the legal scholars who support the pure-auxiliary approach.
[40] Cowen, D. V. ***The Interpretation of statutes and the concept of "intention of the legislature"*** 1980 THRHR 374 at 4.7. Also see Singh (note 34 above) on page 82 and Du Plessis (note 38 above) at 333 and the reference therein to ***Dadoo Ltd v Krugersdrop Municipal Council*** 1920 AD 530 552, ***Union Government v Tonkin*** 1918 AD 553 545 and ***Union Government v Fakir*** 1923 AD 466 469.
[41] Singh (note 34 above) on page 82.
[42] Du Plessis (note 38 above) at 333 and Taljaard, J. C. ***Geld die gewone reëls en beginsels van wetsuitleg by die uitleg van belastingwetgewing*** (2001) M.Comm (Taxation) Stellenbosch University at 2.4. Du Plessis L. M. ***A preliminary estimate of the role of the presumptions of statutory interpretation in the new constitutional dispensation*** 1998 Volume 115 South African Law Journal, Issue 4 on page 750.
[43] Cowen (note 40 above) at 4.7. Also see Dachs (note 37 above) on page 145.
[44] Dachs (note 37 above) on page 145.

noting that 'vested rights' are not limited to property rights or rights in terms of contract, but it extends to rights acquired in terms of a statute.[45]

2.3. Presumption against retroactivity

The presumption against retroactivity is formulated with reference to the imperial decree enacted by Emperors Theodosius and Valentian during 440 AD. It is recorded in *Cod 1.14.7,* which reads as follow:[46]

> *'Leges et constitutiones futuris ctum est dare forman negotiis, non ad facta praeterita revocari: nisi nominatim et de praeterito tempore et adhuc pendentibus negotiis cautum sit'*
> (Joubert JA translates the text to mean: '*It is certain that the laws and decrees give shape to future matters and are not applied to acts of the past, unless express provision is made for past time and for matters which are still pending.*')

In terms of the South African common law, it is generally understood that statutes are not to be construed to operate retroactively unless an express or implied intention exists to the contrary.[47] In ***Bellairs*** the following was stated:[48]

> *'There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be* [*retroactive*] *in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated*

---

[45] ***Cape Town Municipality and Another v Bethnal Investments (Pty) Ltd and Another*** [1972] 4 All SA 326 (C) at page 336.
[46] ***Adampol*** (note 15 above) on page 780.
[47] ***Adampol*** (note 15 above) on page 783, ***Unitrans Passenger*** (note 15 above) at paragraph 12, ***Curtis v Johannesburg Municipality*** 1906 TS 308 on page 311, ***Mohamed NO v Union Government*** 1911 AD 1 at 8, ***Carolus*** (note 22 above) at paragraph 31 and ***Bellairs v Hodnett and Another*** 1978 (1) SA 1109 (A) at 1148F- G. Also see Taljaard (note 42 above) at 2.4.1 and the reference therein to ***Principal Immigration Officer v Pushotam*** 1928 AD 435 443, ***Jockey Club of SA v Transvaal Racing Club*** 1959 1 SA 441 A 451 and ***Edwards v Tuckers Land and Development Corporation (Pty) Ltd*** 1983 1 SA 577 A 580.
[48] ***Bellairs*** (note 47 above) at 1148F-G.

as affecting completed transactions and matters which are the subject of pending litigation.'

In ***Curtis v Johannesburg Municipality*** the following was stated:[49]

'The general rule is that, in the absence of express provision to the contrary, statutes should he considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion.' (own emphasis)

The rationale behind the presumption against retroactivity is the need for legal certainty.[50] Natural and juristic persons should know, with certainty, what the law is to abide thereby.[51] The rationale can also be that those subject to legislative provisions should be treated fairly, irrespective of the legislative provision's prospective or retroactive nature.[52] *Du Plessis*, however, is of the opinion that the existence of the presumption against retroactivity can be best explained with reference to the nature of a statute.[53] Statutes are limited by their existence in time and, therefore, cannot alter the legitimacy of past events.[54] Some authors also deal with the presumption against retroactivity as a subdivision of the presumption against unjust, inequitable and unreasonable legislation.[55]

In the field of statutory interpretation, the question often arises as to whether the relevant rules and presumptions should be applied differently for each specific area of the law, for example, constitutional, fiscal, criminal, etc.[56] This particular question is beyond the scope

---

[49] ***Curtis*** (note 47 above) on page 311.
[50] Louw, H. ***Retrospective application*** Without Prejudice September 2012 on page 8.
[51] Du Plessis (note 38 above) at 341 and ***Carolus*** (note 22 above) at paragraph 36.
[52] Du Plessis (note 38 above) at 341.
[53] Taljaard (note 42 above) at 2.4.1 and the reference therein to Du Plessis, L. M. **Statutory Interpretation** Butterworths 1986 on page 98. Also see Taljaard (note 42 above) at 4.6.1 and the reference therein to ***IRC v Joiner*** (1975) 3 All ER 1050 at 1062.
[54] Taljaard (note 42 above) at 2.4.1 and the reference therein to Du Plessis (note 53 above) on page 98.
[55] Du Plessis (note 38 above) at 341. ***R v Sillas*** [1959] 4 All SA 292 (A) on page 259.
[56] Cowen, D. V. ***Prolegomenon to a restatement of the principles of statutory interpretation*** 1976 J. S. Afr. L. on page 142.

of this paper. Still, for this paper's purposes, we will proceed on the basis that the rules and presumptions of statutory interpretation apply equally and similarly to *fiscal* statutes, as is the case with other statutes, leaving aside the Constitution.[57] The judgment by Botha JA in ***Glen Anil Development Corporation v CIR***[58] also confirms that view:

> *' ... there seems little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation.'*

In the context of fiscal legislation, there is not a vast array of judgments dealing with the presumption against retroactivity under the common law. In the judgment of ***CW v Commissioner of Taxes***[59] it was held that if by express or necessary implication an enactment (be it a newly enacted statute or amending legislation) is to have retrospective or retroactive effect, that effect must be given to it whatever the consequences may be.[60] Therefore, historically, the presumption against retroactivity did not apply where inference from the statute in question must be made that the legislature intended the legislation in question to have retroactive effect.[61]

In another judgment, ***Income Tax Case No. 1637,***[62] the advocate for the taxpayer referred the Court to the decision in ***Bellairs***[63] where it was held that *'even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation.'*. The Court, however, held that if the Commissioner for the South African Revenue Service (further referred to as 'the Commissioner') is entitled to re-open an assessment, a specific transaction cannot be regarded as being completed.[64] However, this decision should be considered in

---

[57] Taljaard (note 42 above) at 4.5.7 and in general chapter 8.
[58] ***Glen Anil Development Corporation v CIR*** 1975 (4) SA 715 (A), 37 SATC 319 at page 334. Also, Silke, J. ***The interpretation of Fiscal Legislation: canons of construction, recent judicial comments and new approaches*** 1995 Acta Juridica on page 127.
[59] ***CW v Commissioner of Taxes*** (1988) 50 SATC 137 (ZH).
[60] ***CW v Commissioner of Taxes*** (note 59 above) at page 145 and the reference therein to ***Purshotam*** (note 47 above) and ***Pretorius v Minister of Defence*** 1981(1) SA 1174(ZAD).
[61] ***CW v Commissioner of Taxes*** (note 59 above) at page 145 and the reference therein to ***Lek v Estate Agents Board*** 1978(3) SA 160(C).
[62] ***Income Tax Case No. 1637*** (1997) 60 SATC 413.
[63] ***Bellairs*** (note 47 above).
[64] ***Income Tax Case No. 1637*** (note 62 above) at pages 416 and 417.

the context of the amendment proposed in ***Income Tax Case No. 1637***, which specifically related to the re-opening of assessments. It is submitted that interpreting the decision to mean that all transactions will only be deemed 'completed' once the Commissioner cannot re-open an assessment would be an over-reach and would go against ***Bellairs'*** decision.

A further judgment of relevance is ***Progress Office Machines CC v South African Revenue Service and Others***[65]. In that judgment, the Court had to decide whether a specific time period commenced on 28 May 1999 (the date of publication of a specific notice) or on 27 November 1998 (the date from which the amendment was to have retroactive effect). The Court held that the fact that the word 'retrospectively' and not 'retroactively' is used does not detract from the conclusion that the amendment was in fact a retroactive amendment.[66] The Court ultimately held that the specific time period commenced on 27 November 1998, being the date from which the amendment was to have retroactive effect.

The judgment in ***Pienaar Brothers*** is also relevant and is discussed under Chapter 5.

2.4. Impact of the Constitution on the presumption against retroactivity and the categorisation thereof

In the pre-Constitutional era, various academics were of the opinion that the common law presumptions of statutory interpretation fulfilled, at least to a limited extent, some of the value regulative functions associated with a democratic constitution.[67] In that regard, it has been stated that the presumptions served the function of (1) keeping the state authority in check, (2) enhancing state administration and (3) acting as interpretive guides in determining the meaning of words used in statutes.[68]

---

[65] ***Progress Office Machines CC v South African Revenue Service and Others*** (2007) 69 SATC 231.
[66] ***Progress Office Machines*** (note 65 above) at paragraph 15.
[67] Du Plessis (note 42 above) on page 750. Also see Du Plessis L. M. ***Bill of Rights interpretation in the South African context (3): Comparative perspectives and future prospects*** 1993 Volume 3 Stellenbosch Law Review on page 361.
[68] Du Plessis (note 67 above) on page 362 and the reference therein to Kruger.

These academics saw the Constitution's enactment as the end of the common law presumptions of statutory interpretation.[69] They were of the opinion that the presumptions acted as a sort of common law bill of rights. With the enactment of the Constitution (and specifically the Bill of Rights), the 'common law bill of rights' was therefore no longer required seeing as all the values of the 'common law bill of rights' were now enshrined in the Constitution.

At first glance, it might seem that they are correct and that the common law presumptions of statutory interpretation have been subsumed under the Constitution or even that those that have not been subsumed no longer have a role to play in the Constitutional dispensation.[70] However, the courts never took the common law presumptions of statutory interpretation to constitute a common law bill of rights.[71] Adding to this, the courts under the new Constitution have held that where it is possible to decide any case without reaching a constitutional issue, that is the course which should be followed.[72] The effect of this is that in some instances the South African courts would prefer to rely on the common law presumptions of statutory interpretation (if possible) instead of deciding the case before them in terms of the Constitution. In other words, our courts would prefer to apply constitutional interpretation (and thereby promoting the spirit of the Bill of Rights) instead of interpreting a specific provision to be unconstitutional.[73] However, the interpretation ultimately decided upon should be reasonable, given the circumstances and the words used.[74] It is, however, worth noting that applying the Constitution directly should not be avoided where its direct application is required.

Therefore, it is clear that the enactment of the Constitution (and specifically the Bill of Rights) did not have the effect of making all the common law presumptions of statutory

---

[69] Du Plessis (note 42 above) on page 751 and the reference therein to the publications of Johan Kruger, Yvonne Burns and Christo Botha.
[70] Du Plessis (note 42 above) on page 750. Also see Taljaard (note 42 above) at 7.4 and the reference therein to Burns, Y. ***Administrative Law under the 1996 Constitution*** Butterworths 1999 on page 8.
[71] Du Plessis (note 42 above) on pages 751 – 752.
[72] ***Mhlungu*** (note 15 above) at paragraph 59. Also see Bishop (note 33 above) on page 683 with reference to the judgment in ***Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others*** 2001 (1) SA 545 (CC).
[73] Bishop (note 33 above) on page 685.
[74] Bishop (note 33 above) on pages 685 and 686.

interpretation completely redundant, and a distinction needs to be drawn between three different categories of presumptions in light of the Constitution:[75]

- Presumptions subsumed under the Constitution;
- Presumptions inconsistent with the Constitution; and
- Presumptions left unaffected by the Constitution.

The rationale behind the categorisation of the common law presumptions of statutory interpretation is twofold. Firstly, since the Constitution's enactment, the common law presumptions can under no circumstances be invoked in such a way that they limit the effects of (and the rights entrenched in) the Constitution.[76] In instances where the Constitution and a specific presumption coincide, the Constitution, being the supreme law of South Africa, will take precedence.

Secondly, the Constitution does not cater for every possible interpretive scenario. Therefore, the common law presumptions of statutory interpretation can assist (i.e. still find application) with regard to the specific areas which the Constitution does not cater for (or only caters for in part).[77] It is therefore clear that the common law presumptions of statutory interpretation can in certain instances enhance the constitutional provisions in question.[78]

The following are examples of presumptions that have seemingly been subsumed under the Constitution:[79]

- The presumption that no enactment seeks to achieve unjust, unreasonable and inequitable results.[80]

---

[75] Du Plessis (note 67 above) on page 361. Also see Du Plessis (note 38 above) at 333 and Du Plessis (note 42 above) on page 751. Ferreira, G. M. and Ferreira-Snyman, M. P. ***Die teoretiese grondslag van die regsgebondeheid van die owerheid (3)*** THRHR Band 68 Nommer 3 August 2005 on page 378.
[76] Du Plessis (note 67 above) on page 363.
[77] Du Plessis, L. M. Bill of Rights Compendium (Electronic Version) – ***Interpretation of Statutes and the Constitution***, June 2002 at 2C17.
[78] Du Plessis (note 77 above) at 2C17. Ferreira *et al* (note 75 above) on page 378.
[79] The categorisation of the common law presumptions of statutory interpretation are beyond the scope of this paper. The focus remains on the presumption against retroactivity and its potential categorisation.
[80] Du Plessis (note 42 above) on page 753. See sections 7(1), 36(1) and 39(1) of the Constitution.

- The presumption that an enactment applies to general and not to particular instances.[81]

- The presumption that an enactment seeks to promote the public interest.[82]

- The presumption that an enactment does not interfere with the jurisdiction of the courts.[83]

- The presumption that an enactment does not interfere with or violate the rules of international law.[84]

The following are examples of presumptions that are seemingly inconsistent with the Constitution:[85]

- The presumption that an enactment does not bind the state.[86]

- The presumption that an enactment does not amend the existing law beyond necessity.[87]

The following are examples of presumptions which, in principle, are seemingly unaffected by the Constitution:[88]

- The presumption that no enactment contains invalid or purposeless provisions.[89]

- The presumption that references in an enactment to conduct are references to legally valid modes of conduct.[90]

- The presumption that an enactment does not apply extra-territorially.[91]

---

[81] Du Plessis (note 42 above) on page 754. See sections 9(1) and 36(1) of the Constitution.
[82] Du Plessis (note 42 above) on page 755. See sections 7(2), 36(1) and 39(1)(a) of the Constitution.
[83] Du Plessis (note 42 above) on page 756. See sections 34 and 165 of the Constitution.
[84] Du Plessis (note 42 above) on page 756. See sections 39(1)(b) and 233 of the Constitution.
[85] The categorisation of the common law presumptions of statutory interpretation are beyond the scope of this paper. The focus remains on the presumption against retroactivity and its potential categorisation.
[86] Du Plessis (note 42 above) on page 756. See section 8(1) of the Constitution.
[87] Du Plessis (note 42 above) on page 756. See section 39(2) of the Constitution.
[88] This category refers to presumptions that still serve their traditional purpose and can still perform their basic functions albeit in a fundamentally new context,
[89] Du Plessis (note 42 above) on page 758.
[90] Du Plessis (note 42 above) on page 758.
[91] Du Plessis (note 42 above) on page 759.

- The presumption that the same words and phrases in the same enactment bear the same meaning throughout.[92]

With regard to the last-mentioned category, it should be noted that no presumption (or rule of statutory interpretation for that matter) has been left wholly unaffected by the Constitution. No common law presumption of statutory interpretation can lead to an interpretation that is not in line with the provisions of the Constitution.

Unlike most of the other common law presumptions of statutory interpretation, the presumption against retroactivity does not fall within only one of the categories stipulated above. The exception to the presumption against retroactivity as discussed under 2.5.4 below (or *nulla crimen sine lege*), has been granted Constitutional status in terms of section 35(3)(l) of the Constitution. It now forms part of each individual's fundamental human rights. Section 35(3)(l) of the Constitution reads as follows:

> *'Every accused person has a 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.'*

Further, a certain provision of the Constitution specifically allows the retroactive application of a statute. In this regard, see section 35(3)(n) of the Constitution, which reads as follows:

> *'Every accused person has a right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing'*

Section 35(3)(l) of the Constitution states that an *accused person* cannot be convicted for an act or omission if that act or omission was not an offence at the time it was committed or omitted. It is therefore (with regard to criminal conduct) in line with the broader common law view on retroactive legislation.

---

[92] Du Plessis (note 42 above) on page 759.

On the other hand, section 35(3)(n) of the Constitution provides for the retroactive operation of a statute that reduces a *convicted person's* criminal liability.[93] This fits squarely into the discussion in 2.5.4 below (that is to say, an enactment that benefits the subject). Even in the pre-constitutional era the courts have not been unwilling to apply provisions that decrease punishment with retroactive effect.[94]

The overall presumption against retroactivity has therefore been specifically subsumed under the Constitution, albeit only to the limited extent as discussed above (i.e. see section 35(3)(l) of the Constitution). With regard to the exceptions to the presumption against retroactivity, it is also clear that they have been specifically subsumed under the Constitution, albeit also to a limited extent (i.e. see section 35(3)(n) of the Constitution).

Regarding matters not dealing with criminal liability, the common law presumption against retroactivity (as well as the exceptions thereto) has been left unaffected by the Constitution. Therefore, the common law presumption against retroactivity (and the exceptions thereto) can be categorised as one partially subsumed under the Constitution (in relation to criminal matters, which would in limited circumstances include fiscal matters[95]) and as one left partially unaffected by the Constitution (in relation to non-criminal matters, which would in most instances include fiscal matters). On the basis that the presumption against retroactivity, in a fiscal context, can still be relied on under the constitutional dispensation, it becomes prudent to qualify what would constitute acceptable retroactive legislation.

2.5. Acceptable retroactive legislation under the presumption of retroactivity

As with any presumption, the presumption against retroactivity can be rebutted, either expressly or by necessary implication.[96] If the presumption against retroactivity is

---

[93] Du Plessis (note 77 above) at 2C17.
[94] Du Plessis (note 77 above) at 2C17 with specific reference to the cases referred to in footnote 22 thereof.
[95] See for example sections 12I(23), 18A(7), 30(11), 30A(9), 30B(10), 30C(7) of the Income Tax Act, paragraph 11A(7) of the Fourth Schedule to the Income Tax Act, paragraph 30 of the Fourth Schedule to the Income Tax Act, which prescribes imprisonment in certain circumstances. Also see the reference to 'serious tax offence' in section 1 of the Tax Administration Act No. 28 of 2011.
[96] Du Plessis, L. M., ***Re-interpretation of statutes*** (2002) on page 98.

successfully rebutted, the statute in question will operate retroactively. However, in the instance of rebuttal, the retroactive effect of the statute in question should be construed restrictively as not unduly to cast the net of the retroactive statute too wide.[97] In what follows, the instances where retroactive legislation is allowed under the common law, are considered.

2.5.1. Retroactive operation is specifically provided for

An amending or newly enacted statute will be allowed to operate retroactively if the legislature provides explicitly for its retroactive operation. This can be achieved by express (i.e. where it is stated explicitly that the amending or newly enacted statute will apply from a date before its enactment) or necessary implication (i.e. where the amending or newly enacted statute deals with past matters and events without specifically stating that it will apply from a date before its enactment).[98]

Concerning this exception Johannes Voet (1647 – 1713) 1.3.17 (quoting *Cod 1.14.7*) states the following:

> *'An exception is when the legislator has nevertheless expressed himself otherwise in clear words, treating both of past time and of present affairs. This particularly happens when special favours are conferred by new laws; for there is no injustice in extending such grants, by enlargement as it were of the favours, to cases which have indeed already arisen but have not yet been decided or set at rest by compromise.'*[99] (Gane's translation)

However, even where express provision is made for the retroactive operation of an amending or newly enacted statute, the general rule in terms of the common law is that the

---

[97] Du Plessis (note 96 above) on page 183. ***Du Toit*** (note 15 above) at paragraph 35. Seligson, M. ***Retrospective Operation of Statutory Amendments to Taxation Laws*** Business Tax & Company Law Quarterly Volume 8 Issue 1 March 2017 on page 26 and the reference to Halsbury's Laws of England.
[98] Du Plessis (note 38 above) at 341.
[99] ***Kruger v President Insurance Co Ltd*** [1994] 1 All SA 146 (D) on page 153.

statute will *not* apply to transactions which have already been finalised.[100] Furthermore, according to Paulus Voet (1619 – 1667), transactions on the verge of completion[101] (which will also include cases in respect of which action has been instituted or the application initiated)[102] would also not be affected by the amending or newly enacted statute.[103] Sub-sections 12(2)(c) and (e) of the Interpretation Act provides support for the aforementioned view expressed by Voet in relation to amendments which repeal the existing law.[104]

An example that would fall into this category is where an amending or newly enacted statute is promulgated on a date, but the legislature includes a section in that statute which stipulates that the statute would be effective from a date before its promulgation. The amendment of anti-dividend stripping provisions discussed in 1.1.2 above and the amendment forming the crux of the issue in ***Pienaar Brothers***, are potential examples of such a scenario. The question that the judiciary has not answered is whether merely stating an effective date and not explicitly stating that the retroactive fiscal legislation will apply to completed transactions is enough to rebut the presumption against retroactivity. The closest the judiciary has come is the judgment of ***Income Tax Case No. 1637*** where it was held if the Commissioner is entitled to re-open an assessment, a specific transaction cannot be regarded as being completed. This will be discussed further in Chapter 5 as part of the analysis of the ***Pienaar Brothers*** judgment.

2.5.2. A retroactive provision confirms or clarifies the existing law or common law

An amending or newly enacted statute will be allowed to operate retroactively to confirm an existing statute's application. Without repealing that existing statute, it is understood that true retroactivity is not at work.[105] Therefore, this is seen as a form of 'allowable retroactive

---

[100] ***Bell v Voorsitter van die Rasklassifikasieraad*** [1968] 3 All SA 1 (A) on page 3 and the reference therein to Paulus Voet (1619 – 1667), De Statutis, 8.1.3. paragraph. 1; Gluck, Pandecten, 1, page 144, Nieuw Nederlandsche Advysboek 1, page 252, paragraph. 22 and ***Terblanche v Ress*** 1920 C.P.D. 505. ***Kruger v President Insurance Co Ltd*** (note 99 above) on page 152 where it was held that *'retrospective effect may be more readily arrived at in a case where vested rights would not be affected'*.

[101] *De praeteritis jam decisis, aut brevi terminandis.*

[102] Q*uod etiam non intelligendum de praeteritis pendentibus quod res non sit integra.* In this regard, please refer to the discussion dealing with amendments of a procedural nature below.

[103] ***Bell*** (note 100 above) on page 3.

[104] Refer to the discussion of the Interpretation Act in Chapter 3 below.

[105] Du Plessis (note 38 above) at 341.

legislation'. However, that is not the case where such an amending statute repeals the existing statute without providing a transitional arrangement.

A declaratory enactment clarifying the common law or existing statute law generally settles a dispute. This is achieved by prescribing one possible interpretation, thereby excluding all other possibilities with retroactive effect.[106] This, again, can hardly be described as an instance of true retroactivity. In this regard Williamson R in ***Ex Parte Christodolies*** held the following:[107]

> *'[A] statute which deals with a topic or subject which has been a matter of some doubt and which is intended to clarify and settle that doubt does operate* [*retroactively*]*.'*

An example that would potentially fall into this category is the Supreme Court of Appeal's decision in ***Director of Public Prosecutions, Western Cape v Prins***[108] handed down in 2012 and the subsequent amendment to the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.

The background to the ***Prins*** case is that the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007, as it then read, did not prescribe sentences for certain offences. The issue in the case was whether this infringed the principle of legality. The Court held that it did not, as the Criminal Procedure Act No. 51 of 1977 contains a general empowering provision authorising the courts to impose sentences in all cases. Subsequent to the ***Prins*** case, the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 was amended by inserting a section which clarified that the courts are allowed to impose a sentence, as provided for in section 276 of the Criminal Procedure Act No. 51 of 1977, where no specific sentence is prescribed in the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.

---

[106] Du Plessis (note 38 above) at 341.
[107] ***Ex Parte Christodolies*** 1959 3 SA 838 T 841.
[108] ***Director of Public Prosecutions, Western Cape v Prins*** [2012] 3 All SA 245 (SCA).

2.5.3. A statute dealing with procedural matters

In South African case law, this is the most common exception to the presumption against retroactivity. In terms of this exception, it is generally understood that acts committed or transactions concluded before the coming into force of newly prescribed statutory procedures will be adjudicated in accordance with the new procedures, if action is instituted or application initiated subsequent to its coming into force.[109] This is based on the *rationale* that at the time of the action being instituted or the application being initiated, the previous procedures no longer form part of the statute books.[110]

However, where the action was instituted or the application initiated before the coming into force of the new procedures, the questions of fairness and equity need to be considered to determine whether the new procedures should be followed.[111] The general rule in the aforementioned scenario is that, unless a contrary intention appears from the amending legislation, the previous procedure remains intact.[112] In this regard, section 12(2)(e) of the Interpretation Act needs to be considered where the amending legislation repeals the existing legislation or procedures.[113] This exception is seen as having apparent rather than real retroactive effect. It supposedly does not affect actions instituted or applications initiated before the coming into force of the newly prescribed statutory procedures.[114]

Historically, in considering this exception, a distinction was made between amending statutes affecting substantive rights and those affecting procedural rights. Arguably, this distinction does not add to the debate, for the simple reason that certain amendments may appear to be procedural in nature, but if considered in more detail, it may impact the substantive rights of the parties involved.[115]

---

[109] ***Unitrans Passenger*** (note 15 above) at paragraph 17.
[110] ***Unitrans Passenger*** (note 15 above) at paragraph 17.
[111] ***Unitrans Passenger*** (note 15 above) at paragraphs 19, 20 and 22 and the references therein to ***Bartman v Dempers*** 1952 (2) SA 577 (A), ***Minister of Public Works v Haffejee NO*** [1996] 4 All SA 355 (A) and ***Bell*** (note 100 above).
[112] ***Unitrans Passenger*** (note 15 above) at paragraph 19.
[113] Refer to the discussion of the Interpretation Act No. 33 of 1957 below.
[114] Du Plessis (note 38 above) at 341.
[115] ***Unitrans Passenger*** (note 15 above) at paragraph 15 and ***Haffejee NO*** (note 111 above) on page 359. See also ***Malcolm v Premier, Western Cape*** [2014] 2 All SA 251 (SCA), where again the subject matter of the decision is indicative of the fact that amendments may seem procedural in nature but are rather substantive in nature.

This exception's application is complicated when the amending statute's subject matter is so-called 'time bar provisions' (i.e. provisions stipulating the time within which a legal remedy may be pursued). The question that more often than not arises in such an instance is whether the time period connected to some procedural matter should be calculated from the date of the cause of action, or from the date of promulgation of the amending statute.[116] There is authority for the argument that with regard to causes of action arising prior to promulgation, the time bar should be reckoned from the date when the statute came into force.[117] However, no general rule can be laid down, and the outcome will depend on the words used in the statute in question.[118]

2.5.4. Where an enactment benefits the subject

This exception is most commonly found in criminal law proceedings. The principle is expressed in the Latin maxim *nullum crimen sine lege.*[119] The point of departure is that an accused cannot be convicted of an act that became an offence after being committed. In this regard it is also necessary to consider section 12(2)(d) of the Interpretation Act where an amending statute repeals an existing statute, thereby creating an offence or increased penalty or punishment.[120] This exception supports the principle that natural and juristic persons should know, with certainty, what the law is to be able to abide thereby.[121]

2.6. Conclusion

Jurists have developed the common law rules and presumptions of statutory interpretation to counter the inherent shortcomings of language, being that it does not in every instance

---

[116] ***Curtis*** (note 47 above) on page 313.
[117] Paul Voet *De Statutis, 8, 1, 3* and Wessels C*om. ad Nov. Const. Ult. art. 21*.
[118] ***Curtis*** (note 47 above) on page 322.
[119] Swart, M. ***Legality as inhibitor: The special place of nullum crimen sine lege in the jurisprudence of international criminal tribunals***, 2005 South African Yearbook of International Law Volume 30 on pages 33 and 45. *Nulla poena sine lege* (no punishment without law) has been described as the sentencing counterpart of *nullum crimen sine lege* (no crime without punishment).
[120] Refer to the discussion of the Interpretation Act in Chapter 3 below.
[121] Du Plessis (note 38 above) at 341 and ***Carolus*** (note 22 above) at paragraph 36.

adequately convey the precise will of the draftsmen. Differing opinions exist as to the true nature of these presumptions. *Cowen* and *Driedger's* views (being that certain common law presumptions of statutory interpretation, including the presumption against retroactivity, can be applied even where the language of the statute in question is unambiguous), appear to provide a logical approach to the problem. Furthermore, these presumptions of statutory interpretation have greater power in relation to statutes that impose obligations (i.e. fiscal legislation) or penalties or impact vested rights.

The presumption against retroactivity is generally understood to mean that statutes are not to be construed to operate retroactively, save for the various exceptions to the presumption. The rationale behind the presumption against retroactivity is the need for legal certainty.

The enactment of the Constitution (and specifically the Bill of Rights) did not have the effect of making all the common law presumptions of statutory interpretation completely redundant and a distinction needs to be drawn between three different categories of presumptions in light of the Constitution:

- Presumptions subsumed under the Constitution;
- Presumptions inconsistent with the Constitution; and
- Presumptions left unaffected by the Constitution.

The presumption against retroactivity does not fall within only one of the categories stipulated above. The overall presumption against retroactivity has been specifically subsumed under the Constitution, albeit only to the limited extent as discussed above (i.e. see section 35(3)(l) of the Constitution). With regard to the exceptions to the presumption against retroactivity, it is also clear that they have been specifically subsumed under the Constitution, albeit also to a limited extent (i.e. see section 35(3)(n) of the Constitution). With regard to matters *not* dealing with criminal liability, the common law presumption against retroactivity (as well as the exceptions thereto) has been left unaffected by the Constitution and therefore, in a fiscal context, can still be relied on under the constitutional dispensation.

Therefore, under the common law, the only remedy against retroactive fiscal legislation is the presumption against retroactivity. However, the remedy cannot be relied upon if the legislature *provides explicitly* that the amending or newly enacted statute will operate retroactively. The question that the judiciary has not answered is whether merely stating an effective date (and not explicitly stating that the retroactive fiscal legislation will apply to completed transactions) is enough to rebut the presumption against retroactivity. This will be discussed further in Chapter 5 as part of the analysis of the ***Pienaar Brothers*** judgment.

Further instances of acceptable retroactive legislation also include where a retroactive provision (i) confirms or clarifies the existing law or common law, (ii) deals with procedural matters and (iii) benefits the subject.[122] It is, however, accepted that once the presumption against retroactivity has been rebutted (i.e. the retroactive legislation falls within one of the exceptions to the presumption), the retroactive effect of the statute in question should be construed restrictively.

[122] Bentley, D. ***Taxpayers Rights: An International Perspective*** (1998) 56 at 38 where the view was expressed that retroactive legislation is justifiable to (i) correct wrongs done to taxpayers, (ii) confer benefits on taxpayers, (iii) rectify errors in legislation and (iv) occasionally to close identified loopholes.

3. REMEDIES AGAINST RETROACTIVITY UNDER STATUTE LAW

3.1. Introduction

Besides the common law rules and presumptions of statutory interpretation, our courts can also resort to statute law to assist them in interpreting a specific piece of legislation. Currently, the only piece of statute law that deals with statutory interpretation and specifically the commencement dates of statues or provisions thereof, is the Interpretation Act. It is for that reason that in this chapter, the background in relation to the Interpretation Act as well as the provisions of the Interpretation Act dealing with transitional arrangements as well as retroactive legislation are discussed.

The South African Law Reform Commission found that the Interpretation Act is not aligned with the current constitutional dispensation and set about drafting a new bill (the Interpretation of Legislation Bill) to repeal and replace the Interpretation Act. It is for that reason that further in this chapter, the background to the Interpretation of Legislation Bill (which is proposed to repeal and replace the Interpretation Act) is also provided, followed by a discussion on the commencement of statutes under the bill.

A discussion on whether the Interpretation of Legislation Bill could change the current position under statute law, concludes the chapter.

3.2. The Interpretation Act

3.2.1. Purpose and application of the Interpretation Act

The 1910 Interpretation Act largely repeated the provisions of the United Kingdom Interpretation Act of 1889. The Interpretation Act is a substantial re-enactment of the 1910 Interpretation Act, as the main idea behind the enactment was to replace the former Dutch text with an Afrikaans text.[123]

---

[123] ***Discussion Paper*** (note 12 above) at 1.3.

An interpretation act can broadly be described as a dictionary for other statutes enacted by Parliament.[124] The general purpose of an interpretation act can be summarised as follows:[125]

- to avoid repetition, thereby shortening and simplifying statutes (i.e. to create what may be called legislative shorthand);
- to promote consistency in the drafting of statutes; and
- to assist in the interpretation of statutes by enacting certain rules of statutory interpretation.

The use of general statutory (and also common law) interpretation provisions should, however, be used with caution.[126] Although it might be considered reasonable to expect the informed readers of statutes (i.e. legal professionals) to know of or refer to the contents of the interpretation act of a specific jurisdiction, this cannot be expected of all readers of statutes.[127] Therefore, statutes of general concern to ordinary people (e.g. the Consumer Protection Act No. 68 of 2008 and the National Credit Act No. 34 of 2005) should be drafted in such a manner that they are self-sufficient.[128] That is to say, these statutes must be drafted in such a manner that they need not rely on other statutes for, amongst others, interpretation purposes.

The Interpretation Act does not contain any express indication of its purpose. Section 1 of the Interpretation Act, however, states the following:

> *'The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act, in the Republic or in any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, by-*

[124] ***Discussion Paper*** (note 12 above) at 2.9.
[125] ***Discussion Paper*** (note 12 above) at 2.9.
[126] ***Discussion Paper*** (note 12 above) at 2.20.
[127] ***Discussion Paper*** (note 12 above) at 2.20.
[128] ***Discussion Paper*** (note 12 above) at 2.20.

law, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.' (own emphasis)

From the aforementioned, it becomes clear that all statutes in force in South Africa should be interpreted according to the rules of statutory interpretation in the Interpretation Act.

3.2.2. Commencement of statutes in terms of the Interpretation Act

With regard to the commencement of statutes, the Interpretation Act presently provides as follows:[129]

'(1) The expression "commencement" when used in any law and with reference thereto, means the day on which that law comes or came into operation, and that day shall, subject to the provisions of subsection (2) and unless some other day is fixed by or under the law for the coming into operation thereof, be the day when the law was first published in the Gazette as a law.' (own emphasis)

It is therefore clear from section 13(1) of the Interpretation Act that any statute may contain its own rules regarding its commencement and that such date of commencement can pre-date the publication of the statute in the Government Gazettes. Retroactive legislation is therefore not specifically prohibited under the Interpretation Act.

Section 11 of the Interpretation Act contains transitional provisions with regard to repealed and substitutive statutes and provisions. Section 11 reads as follows:

'When a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.' (own emphasis)

---

[129] Section 13(1) of the Interpretation Act.

Section 12 of the Interpretation Act deals with the effect of repeal of a statute, and the relevant provisions thereof read as follows:

> *'(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not -*
>
> *(a) revive anything not in force or existing at the time at which the repeal takes effect; or*
>
> *(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or*
>
> *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or*
>
> *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,*
>
> *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.'*

Section 12(2) of the Interpretation Act can be seen as a 'transitional provision' which in effect determines that all pending actions, transactions, processes, prosecutions, etc., must be completed as if the legislation has not been repealed.[130] Section 12(2) of the Interpretation Act (and specifically paragraph(c)) counters, only to a limited extent, the potential harsh implications of the enactment of retroactive statutes, as the opening line of section 12(2) of the Interpretation Act contains the wording *'unless the contrary intention appears'*. Therefore, if the statute in question determines otherwise[131], the provisions of section 12(2) of the Interpretation Act will not find application.[132]

---

[130] ***Discussion Paper*** (note 12 above) at 3.154.
[131] This is either stating a commencement date, and further whether it applies to completed transactions.
[132] See further the analysis of the ***Pienaar Brothers*** judgment in Chapter 5 below.

3.3. The Interpretation of Legislation Bill

3.3.1. Purpose and application of the Interpretation of Legislation Bill

The South African Law Reform Commission was created to conduct research with reference to all branches of the law to make recommendations to Government for the development, improvement, modernisation or reform of the law.[133] In September of 2006 the South Africa Law Reform Commission issued ***Discussion Paper 112 Statutory Revision: Review of the Interpretation Act 33 of 1957 (Project 25)*** (further referred to as 'the Discussion Paper'), in which the Interpretation Act is considered in detail.

The South African Law Reform Commission found that lawmakers in general (not just in South Africa) have been loath to codify common law rules of statutory interpretation. In this regard the South African Law Reform Commission stated the following:[134]

> *'The view was expressed that to the extent that codification could be achieved, it would help to ensure that both drafters and users of legislation applied the same rules in dealing with legislation, and would make those rules more accessible to users as they would not have to be extracted from the case law by each individual user. On the other hand, however, it was felt that codification of any set of legal principles is a difficult task, and mistakes are easily made. It was also argued that attempts to codify the common law would impose undesirable restrictions on the ability of the Courts to develop the common law to cope with new issues.'* (own emphasis)

Any attempt to codify the common law rules and presumptions of statutory interpretation would not only impose undesirable restrictions on the ability of the Courts to develop the common law to cope with new issues, but would also be unsuccessful as it is not possible to cater for every possible interpretive scenario that could potentially arise.

---

[133] Section 4 of the South African Law Reform Commission Act No. 19 of 1973.
[134] ***Discussion Paper*** (note 12 above) at 1.10.

The South African Law Reform Commission also found that the Interpretation Act is in line '*neither with the current constitutional dispensation nor with the principles and practices of drafting and interpretation which the legislature and the courts have adopted since 1994*' and set about drafting a new bill (the Interpretation of Legislation Bill) to repeal and replace the Interpretation Act.[135] The following purpose provision was proposed for the Interpretation of Legislation Bill:[136]

> *'The purpose of this Act is –*
> *(a) to align the interpretation of legislation with constitutional supremacy as envisioned by the Constitution;*
> *(b) to facilitate the interpretation and understanding of legislation; and*
> *(c) to promote uniformity in the use of language in legislation.'*

The proposed purpose provision of the Interpretation of Legislation Bill indirectly confirms the Constitution as the supreme law of South Africa. It also aims to promote consistency in the drafting and interpretation of statutes in South Africa.

It is proposed that the Interpretation of Legislation Bill should find application to the interpretation of all statutes.[137] However, if any provision of the Interpretation of Legislation Bill is inconsistent with any specific statute, that provision must be disregarded in the interpretation of that statute.[138] This is in line with the idea that statutes (especially statutes of general concern to ordinary people) should be drafted in such a manner that they are self-sufficient.

---

[135] ***Discussion Paper*** (note 12 above) at 1.2 and 1.4. The Interpretation of Legislation Bill has not yet become an act of parliament and remains a bill.
[136] Section 2 of the Interpretation of Legislation Bill.
[137] Section 3(1) of the Interpretation of Legislation Bill.
[138] Section 3(2) of the Interpretation of Legislation Bill.

3.3.2. Commencement of statutes in terms of the Interpretation of Legislation Bill

In the Discussion Paper it is proposed that the name of the Interpretation of Legislation Bill be the 'Interpretation of Legislation Act'.[139] Furthermore, the following wording is proposed for the long title of the Interpretation of Legislation Act:[140]

> *'To give effect to the principle of constitutional supremacy in the interpretation of legislation; to provide certain rules and practices for the interpretation of legislation; to promote uniformity in the language of legislation; and to provide for incidental matters'*

The Interpretation of Legislation Bill, therefore, reaffirms the supremacy of the Constitution and that in interpreting statutes the spirit, purport and objects of the Bill of Rights in chapter 2 of the Constitution must be promoted.[141]

The South African Law Reform Commission deemed it appropriate that a general provision explaining the commencement or coming into force of statutes should be included in the Interpretation of Legislation Bill.[142] The general idea is that a statute which is *not* subject to a 'commencement provision'[143] takes effect immediately after the end of the day on which it is gazetted.[144] Under the Interpretation Act the statute would take effect on the day when the statute is published in the Government Gazette, which differs from the proposed treatment in the Interpretation of Legislation Bill.[145] The treatment as proposed in the Interpretation of Legislation Bill is more equitable as the statute will only become effective after it has been published.

---

[139] ***Discussion Paper*** (note 12 above) at 2.3.
[140] ***Discussion Paper*** (note 12 above) at 2.4.
[141] Section 4 of the Interpretation of Legislation Bill.
[142] ***Discussion Paper*** (note 12 above) at 3.17.
[143] See the definition of 'commencement provision' in section 14(1) of the Interpretation of Legislation Bill.
[144] Section 15 of the Interpretation of Legislation Bill.
[145] Section 13(1) of the Interpretation Act.

Statutes which are subject to a 'commencement provision' take effect (or must be regarded as having taken effect) as provided for in the commencement provision.[146] The phrase 'commencement provision' is defined as follows:[147]

> *'"Commencement provision" means a provision in legislation which regulates the commencement of that or any other specific legislation by –*
> *(a) specifying a date on which the legislation will take effect or must be regarded as having taken effect; or*
> *(b) conferring a power on an executive organ of state to determine the date on which the legislation will take effect or must be regarded as having taken effect.'*

If Part 3 of the Interpretation of Legislation Bill (dealing with 'Amendment and repeal of legislation') is considered, read with the proposed section 3(2) thereof, the treatment of statutes containing so-called commencement provisions is the same under both the Interpretation of Legislation Bill and the Interpretation Act.

3.4. Comparison between the Interpretation Act and the Interpretation of Legislation Bill

In a comparison of the Interpretation Act and the Interpretation of Legislation Bill the following becomes apparent:

- The Interpretation Act applies to all statutes, whereas the Interpretation of Legislation Bill only applies to the extent that it is not inconsistent with any specific statute. In that regard the Interpretation of Legislation Bill promotes the idea that statutes (especially statues of general concern to ordinary people) should be drafted in such a manner that they are self-sufficient.

- The treatment of statues which are *not* subject to a commencement provision differs under the Interpretation Act and the Interpretation of Legislation Bill. Under the

---

[146] Section 16 of the Interpretation of Legislation Bill.
[147] See the definition of 'commencement provision' in section 14(1) of the Interpretation of Legislation Bill.

Interpretation Act the statutes in question becomes effective on the day when the statute is published in the Government Gazette. Under the Interpretation of Legislation Bill, the statute in question only becomes effective after the end of the day on which it is gazetted. The treatment as proposed in the Interpretation of Legislation Bill is more equitable as the statute will only become effective after it has been published.

- The treatment of statutes containing so-called commencement provisions is the same under both the Interpretation Act and the Interpretation of Legislation Bill, that is to say, the commencement is determined with reference to the wording of the specific commencement provision. In other words, no outright prohibition on retroactive legislation is contained in either the Interpretation Act or the Interpretation of Legislation Bill.

3.5. Conclusion

The South African Law Reform Commission found that the Interpretation Act is in line '*neither with the current constitutional dispensation nor with the principles and practices of drafting and interpretation which the legislature and the courts have adopted since 1994*'. It therefore proposed that the Interpretation Act be repealed and replaced by the Interpretation of Legislation Bill. The South African Law Reform Commission, however, warned against the codification of the existing common-law rules and presumptions of statutory interpretation. This is despite the fact that an interpretation act serves a purpose by simplifying statutes and promoting consistency.

Any attempt to codify the common law rules and presumptions of statutory interpretation would not only impose undesirable restrictions on the ability of the Courts to develop the common law to cope with new issues, but would also be unsuccessful as it is impossible to cater for every possible interpretive scenario that could potentially arise. Codification would also detract from the legislators' objective to draft plain and understandable self-sufficient legislation, especially with regard to statutes of general concern to ordinary people.

The treatment of statues which are *not* subject to a commencement provision differs under the Interpretation Act and the Interpretation of Legislation Bill. Under the Interpretation of Legislation Bill, the statute in question only becomes effective after the end of the day on which it is gazetted, which is more equitable. The treatment of statues which are subject to commencement provision are dealt with similarly under the Interpretation Act and the Interpretation of Legislation Bill, in that neither contains an outright prohibition on retroactive legislation.

Therefore, based on the analysis provided in this chapter, the following may be concluded: under statute law (both in terms of the Interpretation Act and the Interpretation of Legislation Bill) where retroactive fiscal legislation contains a commencement provision, no remedy exists for taxpayers. This would not prevent taxpayers from relying on the common law presumption against retroactivity (as discussed in Chapter 2) or any constitutional remedies (as will be discussed in Chapter 4).

4. REMEDIES AGAINST RETROACTIVITY UNDER THE CONSTITUTION

4.1. Introduction

In this chapter, an analysis of the potential constitutional remedies to retroactive fiscal legislation are provided. These are: the rule of law, impermissible deprivation of property (section 25 of the Constitution) and the doctrine of separation of powers. This analysis is done in order to determine which would provide an effective remedy to taxpayers.

4.2. The rule of law

The 'rule of law' is one of the oldest principles in the Western legal tradition. Inherent in this principle is the right to certainty, thereby allowing citizens the opportunity to conform their actions to the laws of the country in question.[148] The principle contains both a procedural and substantive component, and was developed to protect the citizens of a country from arbitrary and unfair actions by government.[149] The procedural component forbids arbitrary decision making, whereas the substantive aspect dictates that government must respect the basic rights of individuals.[150]

The underlying principles of the rule of law, in the context of retroactive legislation, are reflected in the Latin maxims *nulla poena sine crimen* (translated as 'no penalty without a

---

[148] Sampford, C. ***Retrospectivity and the Rules of Law***, Oxford University Press, 2006 on pages 1 and 2. Also see Liptak, E. ***Retrospective legislation – II***, Tax Planning Corporate and Personal Volume 22 No. 6 December 2008. Ganta, Z. ***The constitutionality of retroactive tax legislation*** (2018) LLM (Mercantile Law) University of Pretoria at 2.2 and the reference to Devenish, G. 2004. ***The rule of law revisited with special reference to South Africa and Zimbabwe*** TSAR 675.

[149] Liptak (note 148 above). Currie, I. and De Waal, J. et al ***The New Constitutional and Administrative Law*** Volume I 3rd reprint (2003) on page 79.

[150] Currie *et al* (note 149 above) on pages 79 and 81.

crime') and *nulla crimen sine lega* (translated as 'no crime without a law').[151] The rule of law is entrenched in South African law by its inclusion in section 1 of the Constitution:

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

The rule of law embraces the idea that legislation should not be retroactive in its operation.[152] In this regard in ***Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others*** Chaskalson P quoted the following passage:[153]

> *'[It] 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 [retroactive] in its operation; and that it be applied equally, without unjustifiable differentiation.'*

This was also confirmed by Mokgoro J, in her concurring judgement in the case of ***President of the Republic of South Africa v Hugo*** where the following was held:[154]

> *'the need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know the law, and be able to conform his or her conduct to the law.'*

Where a taxpayer is expected to arrange its affairs in terms of 'legislation by press release'[155] (i.e. what was mentioned in the Budget Speech) or draft legislation which may or may not come into effect in the same form, it is impossible for a taxpayer to *'know the law'* and *'be able to conform his or her conduct to the law'*. Based on the definition of 'retroactive

---

[151] Jay, T. ***Retro Active Tax Legislation: A 'Deaf Leopard' and His Spots***, Revenue Law Journal, Vol. 17, Issue 1 (2007).
[152] Dachs (note 37 above) on pages 145 and 146. ***Robertson v City of Cape Town and Another, Truman-Baker v City of Cape Town*** 2004 (5) SA 412 (C) at paragraphs 131 and 135.
[153] ***Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others*** 2000 (2) SA 674 (CC) at paragraph 39.
[154] ***President of the Republic of South Africa v Hugo*** 1997 (4) SA 1 (CC).
[155] Campbell (note 13 above) at 2.3.

legislation' (as provided in Chapter 1), such legislation will undermine the rule of law.[156] To comply with the rule of law, a fair warning should be provided for such legislative enactments to permit taxpayers to rely on their meaning until the amendment is promulgated.[157] Section 1 of the Constitution, particularly the rule of law, does not give rise to *'discrete and enforceable rights in themselves'*.[158] Taxpayers who rely on the rule of law alone to challenge 'retroactive legislation' are making *'facile references to the rule of law'*.[159] The argument of the rule of law always needs to be coupled with an entrenched right contained in the Constitution and, in particular, the Bill of Rights. It is for this reason that section 25 of the Constitution is discussed in 4.3 below.

4.3. Deprivation of property

Imposing taxes and securing payment is acceptable in a democratic society, subject to the safeguards in the Constitution, and specifically the Bill of Rights.[160] This is because the government needs to fulfil its constitutional mandate towards its citizens.[161] The fundamental rights contained in the Constitution (including those contained in section 25) are not absolute and are capable of being limited. The onus is placed on the State to justify the limitation.[162] In assessing whether the limitation is allowable under the Constitution, one first needs to consider whether there was an infringement of any substantive right as protected in the Bill of Rights. In the event of an affirmative answer, such infringement

---

[156] Campbell (note 13 above) at 3.2. Also, ***Anglo Platinum Management Services (Pty) Ltd and Others v Minister of Safety and Security and Others*** 2000 (1) SA 1127 (SCA).
[157] Dachs, P. and Marais, D. ***Retrospectivity Rears Its Head Taxpayer*** The Taxpayer Volume 65 No. 10 October 2016 on page 185.
[158] ***Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*** 2005 (3) SA 280 (CC) at 21. Ganta (note 148 above) at 2.1.
[159] Liptak (note 148 above).
[160] Croome, B. J. ***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*** (2008) Doctor of Philosophy in the Department of Commercial Law University of Cape Town at page 32. Murphy, J. ***The Constitutional Review of Taxation*** 1995 Acta Juridica on page 90. Section 8(1) of the Constitution.
[161] Croome, B. ***Constitutional law and taxpayers' rights in South Africa - an overview*** 2002 Acta Juridica on page 8.
[162] Silke, J. ***Taxpayers and the Constitution: A battle already lost*** 2002 Acta Juridica on page 283.

needs to satisfy the requirements for limitation as entrenched in section 36 of the Constitution.[163]

In ***Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another***, the two-stage test was outlined:[164]

> *'This is essentially a two-stage exercise. First, there is the threshold enquiry aimed at determining whether or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b). Subsections (1) and (2) of section 39 of the Constitution give guidance as to the interpretation of both the rights and the enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality and freedom. If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed there and then.*
>
> *If there is indeed a limitation, however, the second stage ensues. This is ordinarily called the limitations exercise. In essence this requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out these factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved.'* (own emphasis)

---

[163] Croome, B. J. ***Constitutional law and taxpayers' rights in South Africa - an overview*** 2002 Acta Juridica on page 7. Silke (note 162 above) on page 283.
[164] ***Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*** 2002 (7) BCLR 663 at paragraph 26 and 27.

4.3.1. Infringement of substantive rights

Section 25(1) of the Constitution contains the constitutional right to property:

> *'(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'*

In assessing what constitutes 'property', section 25(4)(b) of the Constitution specifically provides that the term 'property' is not limited to land. However, to furnish a comprehensive definition of 'property' for purposes of section 25 of the Constitution would be unwise.[165] According to De Waal the term 'property' has at least three possible meanings:[166]

> *'First the clause could refer to physical property itself ... second the term could refer to, a set of legal rules governing the relationship between individuals and physical property – what the common law terms property rights ... third the term could refer to any relationship or interest having an exchange value.'*

Further, in assessing whether the right to property applies to both natural and juristic person, regard must be had to section 8(4) of the Constitution:[167]

> *'A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'*

The introduction of retroactive legislation would therefore constitute a 'deprivation'[168] of property as envisaged in section 25 of the Constitution (for both natural and juristic persons),

---

[165] ***First National Bank of SA Ltd t/a Wesbank v Commissioner for South African Revenue Services and Another*** 2002 (7) BCLR 702 (CC) at paragraph 51. Reaffirmed in ***Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and Others*** 2015 (10) BCLR 1158 (CC).

[166] Croome (note 160 above) on page 27 and the reference to De Waal, J. et al ***Bill of Rights Handbook*** 4 ed (2001).

[167] ***First National Bank*** (note 165 above) at paragraph 41 and paragraph 45 where it is found that *'the property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons'*.

[168] ***First National Bank*** (note 165 above) at paragraph 57 where it is held that *'any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned'* and that the term 'deprivation' has a wider meaning and includes the term 'expropriation'.

where the retroactive legislation impacted on or will impact on the entitlement of taxpayers to certain benefits or rights.[169] This is further evident if it is considered that, firstly, the obligation to pay tax is not suspended by an objection or appeal and, secondly, failure to comply with tax Acts is a criminal offence.[170] Therefore, taxpayers cannot retain their 'property' whilst challenging retroactive fiscal legislation.[171] Further in this regard, section 38 of the Constitution determines that anyone has the right to approach a competent court, if it is alleged that a right in the Bill of Rights has been infringed or threatened.

Deprivation of property will be 'arbitrary', as envisaged in section 25(1) of the Constitution, if the 'law'[172] referred to in section 25(1) of the Constitution *'does not provide sufficient reason for the particular deprivation in question or is procedurally unfair'*.[173] Cheadle is of the view that if the 'deprivation' is found to be 'arbitrary', then the judiciary must declare such legislation unconstitutional without considering section 36 of the Constitution.[174] Only if the 'deprivation' is found to not be 'arbitrary' should section 36 of the Constitution be considered.[175]

4.3.2. Limitation as entrenched in section 36 of the Constitution

On the hypothesis that the introduction of retroactive fiscal legislation constitutes a deprivation of property which is not arbitrary for purposes of section 25 of the Constitution, it then remains to be assessed whether the deprivation is permissible under section 36 of the Constitution, which reads as follows:

---

[169] Croome (note 160 above) on pages 28 and 56 and the reference to Duncan, A. ***Hidden Assets*** De Rebus (July 2004) 30.
[170] Sections 164(1) and 234 of the Tax Administration Act No. 28 of 2011. Ganta (note 148 above) at 3.1.2.
[171] Ganta (note 148 above) at 3.1.2.
[172] This would be the Income Tax Act, read with the amendment act of any legislative cycle.
[173] ***First National Bank*** (note 165 above) at paragraph 100. It was further held at paragraph 62 that *'the word "arbitrary", depending on its statutory context, may only impose a low level of judicial scrutiny, requiring nothing more than the absence of bias or bad faith to satisfy such scrutiny'* and at paragraph 71 that *'if the deprivation is not arbitrary, the section 25(1) right is not limited and the question of justification under section 36 does not arise'*.
[174] Ganta (note 148 above) at 3.2 and the reference to Cheadle, MH & Davis, DM & Haysom, NRL. 2002. ***South African Constitutional law: The Bill of rights***.
[175] Ganta (note 148 above) at 3.2. ***First National Bank*** (note 165 above) at paragraph 110 where the court held it was necessary to decide on this matter for purposes of the matter at hand.

'(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

The amendment act of any particular legislative cycle (containing retroactive legislation) could be a law of general application where it does not apply to only particular taxpayers.[176] With regard to the 'reasonableness and justifiable' test, the following passage is appropriate:[177]

> *'to satisfy the limitation test then, it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefit it is designed to achieve (the purpose of the law).'*

To assess if the limitation was for a purpose that is *'reasonable and necessary in a democratic society',* competing values need to be measured against each other and an assessment made based on proportionality.[178]

Section 36(1)(e) of the Constitution appears to suggest that prospective legislation is preferred to retroactive legislation.[179] Furthermore, National Treasury and the

---

[176] Croome (note 160 above) on page 59.
[177] De Waal et al ***The Bill of Rights Handbook*** 2ed (1999) on page 150.
[178] ***S v Makwanyane*** and Another 1995 (6) BCLR 665 (CC) at paragraph 104.
[179] Croome (note 160 above) on pages 59 and 60.

Commissioner for the South African Revenue Service, in seeking a less *'less restrictive means'*[180] to collect taxes and prevent the abuse of perceived loopholes, should rather rely on specific anti-avoidance rules incorporated in the Income Tax Act, or more broadly the general anti-avoidance rule contained in sections 80A to 80L of the Income Tax Act. The mere fact that the anti-avoidance rules provided for in the Income Tax Act may not be successful is arguably irrelevant. 'Retroactive fiscal amendments', where *'less restrictive means'*[181] are available, would be a violation of the constitutional right to property enshrined in section 25 of the Constitution, read with section 36 of the Constitution.[182]

The principles outlined above (relating to the rule of law and the deprivation of property) have been the subject of much (primarily academic) debate following the judgment in ***Pienaar Brothers***, which judgment will be re-visited in Chapter 5.

4.4. The doctrine of separation of powers

Charles Montesquieu is credited with the formulation of the modern doctrine of separation of powers, which encompasses:[183]

- that a formal distinction be made between the legislature, executive and judiciary;
- that the three branches of government be staffed with different employees; and
- that each branch of government exercise only those powers which are appropriate to its functions.

The doctrine of separation of powers in South Africa is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of

---

[180] Section 36(1)(e) of the Constitution.
[181] Section 36(1)(e) of the Constitution.
[182] Tredoux, L. G. and Van Zyl S. P. ***Some Drastic Measures to Close a Loophole: The Case of Pienaar Brothers (PTY) LTD v Commissioner for the South African Revenue Service (87760/2014) [2017] ZAGPPHC 231 (29 May 2017) and the Targeted Retroactive Amendment of Section 44 of the Income Tax Act 58 of 1962*** PER / PELJ 2018(21) at 8.
[183] Currie *et al* (note 149 above) on page 91. ***Law of South Africa Volume 7(2) – Third Edition - Constitutional Law: Structures of Government*** at 19 and 20.

the principle in the Constitution, as is the case for the rule of law.[184] The doctrine vests the legislative authority in the legislature, the executive authority in the executive, and the judicial authority in the judiciary (or the courts).[185] The underlying objective of the doctrine of separation of powers in South Africa can be found in the following passage:[186]

> *'The idea is that the existence of three separate autonomous institutions will act as a control upon government excesses. Each institution will act as a check upon the arbitrary exercise of power by the others, while no one institution will have undue influence over another because it is restricted to its own function. The main aim of such separation is thus seen to be the prevention of arbitrariness and oppression in government, but in the United States proponents of the separation of powers emphasised its efficiency as a system of government as well.'*

The Commonwealth countries have not required a strict separation between the executive and the legislature.[187] The doctrine of separation of powers is, however, more strictly observed in the United Stated of America.[188] The jurisprudence of South Africa indicates that a model similar to that of the Commonwealth countries is followed: no strict separation between the executive and the legislature, while fiercely protecting the independence of the judiciary.[189] In the current fiscal environment, lawmaking has become a highly technical and specialised process and therefore the legislature mostly performs a watchdog function.[190] That does not mean, given the model adopted in South Africa, that the doctrine of separation of powers is breached: ultimately, the proper process (as outlined in 1.1.1 above) is followed.

---

[184] ***South African Association of Personal Injury Lawyers v Heath and Others*** 2001 (1) BCLR 77 (CC) at paragraphs 21 and 22.
[185] ***Heath*** (note 184 above) at paragraph 21.
[186] Ferreira *et al* (note 75 above) on page 384 and the reference therein to Dixon ***Devolution in constitutional law*** 1983 TSAR 4.
[187] ***South African Association of Personal Injury Lawyers v Heath and Others*** (note 184 above) at paragraph 23.
[188] Currie *et al* (note 149 above) on page 92. ***Heath*** (note 184 above) at paragraph 23.
[189] Currie *et al* (note 149 above) on pages 92 and 97.
[190] Currie *et al* (note 149 above) on page 94.

4.5. Conclusion

To comply with the **rule of law**, fair warning of legislative enactments is needed in order for taxpayers to know the law, and be able to abide thereto. Should the warning differ materially from what is ultimately enacted, the rule of law will be undermined. However, the rule of law, on its own, cannot provide an effective remedy against retroactive fiscal legislation. It needs to be coupled with an entrenched right contained in the Bill of Rights.

In assessing the constitutionality of retroactive fiscal legislation under **section 25 of the Constitution**, a two-stage test is followed. With regards to the *first stage of the test*, it needs to be determined if the deprivation of property was arbitrary for purposes of section 25 of the Constitution. Retroactive fiscal legislation would constitute an *arbitrary deprivation of property*, where such legislation impacts on (or will impact on) the entitlement of taxpayers to certain benefits or rights, without sufficient reasons being provided. In the context of section 25 of the Constitution, the judiciary must declare such legislation unconstitutional without the need to consider section 36 of the Constitution.

On the hypothesis that the introduction of retroactive fiscal legislation constitutes a deprivation of property which is not arbitrary for purposes of section 25 of the Constitution, we move on to the *second stage of the test*, being section 36 of the Constitution. The amendment act of any particular legislative cycle could be a law of general application where it does not apply to only particular taxpayers or transactions. In assessing if the limitation was reasonable and justifiable, one needs to strike a fair and proportionate balance between governments constitutional mandate towards its citizens and the protection of fundamental rights. Section 36(1)(e) of the Constitution suggests that prospective legislation is preferred to retroactive legislation, especially where the Commissioner has less restrictive means available to it, being the anti-avoidance rules provided in the Income Tax Act.

The doctrine of **separation of powers** vests the legislative authority in the legislature, the executive authority in the executive, and the judicial authority in the judiciary. Due to the complex nature of fiscal legislation, the legislature requires the involvement of the executive. That does not mean that the doctrine of separation of powers is undermined: ultimately the legislature has the final say and the proper process (as outlined in 1.1.1 above) is followed.

Therefore, based on the analysis provided in this chapter, the following may be concluded: The judiciary has an obligation to safeguard the fundamental rights of taxpayers, and acts as a last resort when these rights are infringed upon. Where retroactive fiscal legislation is enacted, taxpayers do not have an effective remedy under the rule of law or the doctrine of separation of powers. Instead, taxpayers should rely on section 25 of the Constitution, read with section 36 of the Constitution.

Irrespective of the constitutional remedies, ample scope remains for reliance on the common law presumption against retroactivity with regard to matters *not* dealing with criminal liability as discussed under Chapter 2.

5. PIENAAR BROTHERS: RE-VISITED

5.1. Introduction

In this chapter, the research objective of this paper is considered in the context of the Court's decision in ***Pienaar Brothers***. The primary issue which the Court had to decide on was whether the retroactive amendments applied to completed transactions: Is retroactive fiscal legislation legal, and what remedies do taxpayers have?

First, the salient facts of the case are summarised and the issue is crisply stated.[191] This summary is followed by an analysis of the rule of law, section 25 of the Constitution, the doctrine of separation of powers and the common law presumption against retroactively as they apply to the facts and the judgment handed down. ***Pienaar Brothers*** deals with several ancillary matters, which are not all relevant to the research objective. In this chapter, the emphasis is therefore placed on aspects of retroactivity as they appear from the judgement.[192]

5.2. Background facts

Serurubele Trading 15 (Pty) Ltd (further referred to as 'resultant company') entered into an amalgamation transaction in terms of section 44 of the Income Tax Act with Pienaar Brothers (Pty) Ltd (as the amalgamated company) on 16 March 2007. In terms of the amalgamation transaction, the resultant company acquired the assets of the amalgamated company effective 1 March 2007 as a going concern. Following the amalgamation transaction, Serurubele Trading 15 (Pty) Ltd was renamed Pienaar Brothers (Pty) Ltd on 7 August 2007.

On 1 April 2007, the business was transferred to the resultant company and on 3 May 2007 the directors of the resultant company decided to make a distribution to its

---

[191] The judgment garnered significant media attention and for this reason only the salient facts and dates relevant for the analysis is highlighted below. See ***Pienaar Brothers*** (note 4 above) at paragraphs 6 and 7 for the full factual background as it relates to the amalgamation transaction.

[192] For other areas of consideration and potential future research see the analysis in Tredoux *et al* (note 182 above) at 4, 5, 6 and 7.

shareholders, out of its share premium account. The dispute in the judgment related to the liability of the resultant company to secondary tax on companies on the distribution made on 3 May 2007. The following with regards to the 2007 legislative cycle is important (with the transaction steps also included to provide for a full timeline):

- 20 and 21 February 2007: Following the Budget Speech, a press release was issued in terms of which it was announced that section 44(9) of the Income Tax Act (which contained the secondary tax on companies' exemption for amalgamation transactions)[193] would be withdrawn, with no alternative provision being stipulated.

- 27 February 2007: The 2007 Draft Taxation Laws Amendment Bill was published, in terms of which sections 44(9) and (10) of the Income Tax Act would be repealed with retroactive effect, from the date of the Budget Speech.

- 16 March 2007: The amalgamation transaction is entered into, with an effective date of 1 March 2007. The amalgamation transaction relied on the bill published 27 February 2007.

- 1 April 2007: The business of the amalgamated company was transferred to the resultant company.

- 3 May 2007: The directors of the resultant company made a distribution to its shareholders out of its share premium account.

- 7 June 2007: The 2008 Taxation Laws Amendment Bill was published, in terms of which sections 44(9) and (10) of the Income Tax Act would be repealed with retroactive effect from the date of the Budget Speech. Furthermore, a new section 44(9A) of the Income Tax Act would be inserted with retroactive effect, from the date of the Budget Speech.[194]

---

[193] See ***Pienaar Brothers*** (note 4 above) at paragraph 11: The resultant company was of the view that exemption pertained exclusively to the exemption from secondary tax on companies of the disposal of consideration shares by an amalgamated company to its shareholders.

[194] See ***Pienaar Brothers*** (note 4 above) at paragraph 11: The resultant company stated that this was the first indication of any amendment that would impact on the secondary tax on companies position of an entity in the position of the resultant company and prior to this it was not placed on any guard by any public statement.

- 8 August 2007: The Taxation Laws Amendment Act No. 8 of 2007 was promulgated. Sections 44(9) and (10) of the Income Tax Act were repealed and a new section 44(9A) of the Income Tax Act inserted with retroactive effect from the date of the Budget Speech.

The primary issue the Court had to decide on was whether the retroactive amendments introduced in terms of section 34(2) of the Taxation Laws Amendment Act No. 8 of 2007, applied to completed transactions or whether the retroactive amendments were inconsistent with the provisions of the Constitution.

5.3. The rule of law, as in *Pienaar Brothers*

It is a firm principle of South African law that taxpayers are entitled to structure their tax affairs in such a tax-efficient manner as possible under the appropriate tax acts.[195] The resultant company entered into the transaction for a well-established commercial reason and not to derive a tax benefit.

For taxpayers to so arrange their affairs, they require tax certainty as to the time of payment, the manner of payment and the quantity to be paid in respect of any tax liabilities arising.[196] Taxpayers also need peace of mind that the tax legislation will not arbitrarily or irrationally be amended retroactively.[197] Tredoux *et al* make the argument that the right to tax certainty does not mean that retroactive fiscal legislation is not allowed.[198] The legislator, in order to protect the tax base and counter any genuine loopholes, has a legal duty to amend fiscal legislation.[199] However, in determining whether the rule of law (as discussed in Chapter 4.2 above) has been violated, rationality is the test and that a rational nexus needs to exist between the legislative scheme (the retroactive amendment) and the

---

[195] ***CIR v Conhage (Pty) Ltd*** (1999) 61 SATC 391, ***CIR v Estate Kohler*** 1953 (2) SA 584 and ***Duke of Westminster v IRC*** 1936 19 TC 490.
[196] See note 3 above. Also, Tredoux *et al* (note 182 above) at 8.
[197] See note 3 above. Also, Tredoux *et al* (note 182 above) at 8.
[198] Tredoux *et al* (note 182 above) at 8.
[199] Tredoux *et al* (note 182 above) at 8.

pursuit of a legitimate government purpose (the collection of taxes and the protection of the tax base).[200]

Campbell suggests that the Commissioner had satisfied the Court that there was *'a legitimate threat to the fiscus, and that a prospective amendment would have been insufficient to adequately deal with such threat'*, and therefore passed the test of rationality.[201] This finding is in contrast with taxpayers right to tax certainty and the principle that retroactive amendments cannot target specific transactions or taxpayers.[202] This is especially the case where, upon reliance on ***Bellairs*** and ***Curtis*** (as discussed in Chapter 2), the retroactive amendments do not specifically state that they apply to completed transactions.[203] Furthermore, since less restrictive means were available to the Commissioner (in the form of the general-anti avoidance rule), it is submitted, that the retroactive amendments cannot be said to be either rational or non-arbitrary.

Therefore, the retroactive amendments negatively impacted the vested rights of the resultant company and its shareholders without a fair warning being provided or specifically stating that it would apply to completed transactions.[204] On the facts of ***Pienaar Brothers***, it is submitted that the rule of law was undermined. An argument based on the rule of law, however, needs to be coupled with an entrenched right contained in the Bill of Rights. Therefore, section 25 of the Constitution also needs to be considered.

5.4. Deprivation of property, as in *Pienaar Brothers*

If an argument under section 25 of the Constitution is considered, it is clear that the retroactive amendments infringe upon the taxpayer's (being the resultant company and its shareholders) constitutional right to property. The retroactive amendment applied to (and

---

[200] Ganta (note 148 above) at 3.1.3 and the reference to Kruger, L. 2014. ***Retrospective legislation: Do taxpayers have any recourse? Business Tax & Company Law Quarterly*** 5 (1). ***Law Society of South Africa and Another v Minister of Transport and Another*** 2011 (2) BCLR 150 (CC) at 32. Tredoux *et al* (note 182 above) at 8.
[201] Campbell (note 13 above) at 6.2.1.
[202] See discussion in Chapter 5.4 below.
[203] Tredoux *et al* (note 182 above) at 8. This is also the crux of the common law presumption against retroactivity as is evident from the judgments in ***Bellairs*** (note 47 above) and ***Curtis*** (note 47 above).
[204] Tredoux *et al* (note 182 above) at 8. Also see note 100 above, and, the discussion in Chapter 5.4 below regarding adequate notice.

targeted) a particular transaction and a very specific class of taxpayers and could therefore not be seen to be of *'general application'*.[205]

The fact that taxation falls within the ambit of 'deprivation of property' is what underlies the *contra fiscum* rule of interpretation, which is an application of the wider principle that where a statutory provision that infringes on the right of individuals is ambiguous, the ambiguity must be resolved in favour of the person whose rights are being infringed.[206] This supports the concept entrenched in section 36(1)(e) of the Constitution, in that the legislation should be interpreted to impact existing rights as little as possible.

Should the taxpayers in ***Pienaar Brothers*** have had adequate warning of the intention to implement retroactive amendments, they arguably would not have relied on the current legislation. Any such retroactive amendment (being retroactive amendments subject to adequate warning to taxpayers) would more easily have passed constitutional muster. The Court found that the announcement as part of the Budget Speech was adequate and because the retroactive amendment was rationally connected to a legitimate purpose (being the closing of the loophole in order to protect the fiscus), no precise warning was required before retroactive legislation was passed.[207]

Some authors agree with the judgment in ***Pienaar Brothers*** on the basis that adequate notice of the proposed retroactive amendments was given.[208] Tredoux *et al.* offer a very compelling view that even though no precise warning is required, any retroactive amendment passed is still subject to the safeguards in the Bill of Rights and that without adequate prior warning, any such amendment should not pass the test of constitutionality.[209] This even more so in the instances where:[210]

- Any notice of an amendment or a draft bill differs materially from the final version;

---

[205] Section 36 of the Constitution.
[206] Emslie (note 27 above) on page 61.
[207] ***Pienaar Brothers*** (note 4 above) at paragraphs 64 and 100.
[208] See in this regard Botha *et al*. (note 27 above), Campbell (note 13 above), Davis, D. M. ***Retroactive Legislation and Completed Transactions – Another View*** The Taxpayer Volume 66 No. 6, June 2017.
[209] Tredoux *et al* (note 182 above), Camay, A. ***The perils of introducing tax "legislation by press release*** (http://financialregulationjournal.co.za/2017/10/18/the-perils-of-introducing-tax-legislation-by-press-release/), Emslie (note 27 above), Emslie, T. S. ***Retroactive Legislation and Completed Transactions – A Cryptic Rejoinder*** The Taxpayer Volume 66 No. 6, June 2017, Ganta (note 148 above).
[210] Tredoux *et al* (note 182 above) at 6 and 7 and the discussion pertaining to section 36(1)(e) of the Constitution under Chapter 4.3 above.

- The Commissioner had other remedies available to it; or
- Where tax would otherwise, in any event, have been collected.

In applying the view of Tredoux *et al.* to the facts in ***Pienaar Brothers***, the following can be concluded:

- The announcement that the resultant company relied on differed materially from the amendment finally enacted. The transaction was fully completed before the resultant company was made aware of the differing approach, and therefore, it cannot be held that adequate notice was provided to the resultant company.
- The Commissioner had other remedies available to it, in the form of the general anti-avoidance rule.
- The *fiscus* would have collected other taxes on the transaction in future.

What is also of importance in analysing the ***Pienaar Brothers*** judgment is whether a loophole in the tax legislation existed. Retroactive fiscal legislation would be more readily accepted where *'prospective amendment would have encouraged taxpayers to exploit the loophole in the last few months before the loophole was closed'*.[211] The law as it stands represents the *'general scope of the Act'*.[212] Where an amendment act expands the general scope of the Income Tax Act, it cannot be said that the loophole previously existed. Irrespective of the correct approach to fiscal interpretation, taxpayers should not be required to determine what was intended rather than read what was enacted. It is submitted that in ***Pienaar Brothers*** no loophole existed and the general scope of the act was expanded by the retroactive amendment.[213] Therefore, the retroactive amendment should arguably not have been allowed.

---

[211] ***Pienaar Brothers*** (note 4 above) at paragraph 85. Also, Tredoux *et al* (note 182 above) at 8.
[212] Emslie (note 27 above) on page 62 and the reference to ***Commissioner for Inland Revenue v King*** 1947 (2) SA 196 (A).
[213] Tredoux *et al* (note 182 above) at 8.

5.5. Separation of powers, as in *Pienaar Brothers*

In considering if the doctrine of separation of powers would have been a valid remedy, the impact of the original announcement needs to be determined. Two possibilities exist:[214] (i) did the original announcement by the Finance Minister or National Treasury change law as at that date (also referred to as 'legislation by press release')?; or (ii) was the original announcement merely that - an announcement of impeding legislative changes to be made by the legislature. The difference being, that in the former, taxpayers are directed to act in a particular manner, while the latter merely places taxpayers on alert of changes to come.[215]

Although the Court in ***Pienaar Brothers*** did not expressly deal with the doctrine of separation of powers, the following has some bearing on the matter:[216]

> *'The fact that this was done in a manner different to that which was initially contemplated does not render the process procedurally unfair. Were I to hold otherwise, the democratic parliamentary and public participation process would be seriously undermined. The executive does not make laws.'* (own emphasis)

The above passage indicates that the Court considered the doctrine of separation of powers and concluded that legislation by press release would fall foul of the doctrine. It, however, also concluded that the announcement and press release did not change the law, but was merely an announcement of impending legislative changes.

If the first possibility is followed, then the doctrine of separation of powers would arguably have been breached as the legislator did not delegate any powers to the executive. Also, irrespective of the separation of powers, the legislative process, as outlined in 1.1.1 above with regards to money bills would not have been followed, which would mean a breach of the constitution on general terms.[217] From a practical perspective, the argument

---

[214] Campbell (note 13 above) at 6.2.3.
[215] Campbell (note 13 above) at 6.2.3.
[216] ***Pienaar Brothers*** (note 4 above) at paragraph 111.
[217] Campbell (note 13 above) at 6.2.3.

would, it is submitted, not be successful for the mere fact that after the announcement, the proper process (as outlined in 1.1.1 above) will be followed.

5.6. The common law presumption against retroactivity, as in *Pienaar Brothers*

Irrespective of a successful constitutional challenge, in terms of either the common law presumption against retroactivity (as applied to a completed transaction), or a challenge in terms of section 12(2)(c) of the Interpretation Act, it is respectfully submitted that the Court's decision in ***Pienaar Brothers*** cannot be supported.[218] If regard is had to the judgment of ***CW v Commissioner of Taxes***[219] (discussed in Chapter 2.3), it is respectfully submitted that it cannot be said that by express or necessary implication section 34(2) of the Taxation Laws Amendment Act No. 8 of 2007 applied to completed transactions. Furthermore, based on the discussion in Chapter 2.3 above, it is submitted that the decision in ***Income Tax Case No. 1637***[220] cannot be relied upon to determine that transactions will only be deemed 'completed' once the Commissioner cannot re-open an assessment.

In ***Pienaar Brothers***' context, it was common cause that all elements of the amalgamation transaction, including the distribution, were completed before the amendment act was promulgated. The legislator did not *'make the consequential modifications, and establish the practical legislative machinery, that will allow the retrospective [retroactive] rule to be practically, fairly and sensibly implemented'*.[221] If regard is had to the wider practical consequences of applying the retroactive amendment to completed transactions, it cannot be said that by express or necessary implication (as held in ***CW v Commissioner of Taxes***[222]) section 34(2) the Taxation Laws Amendment Act No. 8 of 2007 applied to completed transactions.

---

[218] See discussions under Chapter 2 (specifically 2.3) and Chapter 3 (specifically 3.2.2).
[219] ***CW v Commissioner of Taxes*** (note 59 above).
[220] Note 62 above.
[221] ***Pienaar Brothers*** (note 4 above) at paragraph 19.
[222] ***CW v Commissioner of Taxes*** (note 59 above).

5.7. Conclusion

In applying the aforementioned to the judgment in ***Pienaar Brothers***, it is respectfully submitted that the Court unsatisfactorily dealt with retroactivity. The following can be concluded:

- Should the taxpayers in ***Pienaar Brothers*** have had adequate warning of the intention to implement retroactive amendments, they arguably would not have relied on the current legislation. Any such retroactive amendment (being retroactive amendments subject to adequate warning to taxpayers) would more easily have passed constitutional muster. No adequate warning was provided as the notice differed materially from the final version of the enactment.

- The taxpayers in ***Pienaar Brothers*** had no remedy available to them under the rule of law or the doctrine of separation of powers.

- The taxpayers in ***Pienaar Brothers*** had a remedy available to them under section 25 of the Constitution, as the retroactive amendments infringed upon their constitutional right to property. Further, the retroactive amendments applied to a particular transaction and a very specific class of taxpayers and could not be seen to be of general application for purposes of section 36 of the Constitution.

- If it is accepted that the amendments were laws of general application, the retroactive amendments should be interpreted to impact existing rights as little as possible, in terms of section 36(1)(e) of the Constitution. Less restrictive means were available to the Commissioner. Therefore, the retroactive amendments should not have passed the test in section 36 of the Constitution.

- Irrespective of a successful constitutional challenge, the taxpayers in ***Pienaar Brothers*** had a remedy available to them under the common law presumption against retroactivity (as applied to the completed transaction). The retroactive amendments negatively impacted their vested rights without specifically stating that it would apply to completed transactions.

6. CONCLUSION

In South Africa, retroactive fiscal legislation leaves taxpayers with little to no certainty to plan their affairs, with only about two months of transactional certainty each tax year not subject to any potential retroactive draft fiscal legislation - from when the amendment act from the prior legislative amendment cycle is promulgated until the Budget Speech which sets in motion the new legislative amendment cycle. Taxpayers are instinctively suspicious of retroactive fiscal legislation, and economic activity and tax morality could increase, should more certainty exist as to:

- What types of retroactive fiscal legislation are permissible?
- In which circumstances it is permitted? and
- The remedies available to taxpayers in cases where such legislation adversely affects their completed transactions (and vested rights).

In order to conclude on the aforementioned, the rules as they exist under the common law, statute law and the Constitution is considered. Regarding the common law rules and presumptions of statutory interpretation, *Cowen* and *Driedger's* approach (being that certain common law presumptions of statutory interpretation, including the presumption against retroactivity, can be applied even where the language of the statute in question is unambiguous), is compelling.

Under **the common law**, the only remedy against retroactive fiscal legislation is the presumption against retroactivity. The remedy cannot be relied upon if the amendment act *provides explicitly* that it will operate retroactively and apply to completed transactions. Once the presumption against retroactivity has been rebutted (i.e. the retroactive amendment *provides explicitly* that it will operate retroactively), the retroactive effect of the amendment act should be construed restrictively. Further instances of acceptable (and less contentious) retroactive legislation include where a retroactive provision (i) confirms or clarifies the existing law or common law, (ii) deals with procedural matters and (iii) benefits the subject.

With regard to matters *not* dealing with criminal liability (as is mostly the case for fiscal matters), the common law presumption against retroactivity has been left unaffected by the

Constitution and can still be relied on. Statute law (being the Interpretation Act) also does not prevent taxpayers from relying on the common law presumption against retroactivity.

Under **statute law**, the treatment of statues that are subject to commencement provision is dealt with similarly under the Interpretation Act and the proposed Interpretation of Legislation Bill. Neither contains an outright prohibition on retroactive legislation. It is submitted that in applying statute law, the scope of any retroactive amendment would also be limited by the application of the common law presumption against retroactivity.

Under **the Constitution**, a challenge based on either the rule of law or the doctrine of separation of powers will most likely not be successful. The constitutional remedy against retroactive fiscal legislation most likely to succeed would be one based on section 25 of the Constitution, which requires a two-stage test: *Firstly*, it needs to be determined if the deprivation of property was arbitrary for purposes of section 25 of the Constitution. *Secondly*, it needs to be determined if the limitation of section 25 of the Constitution is justifiable under section 36 of the Constitution.

The deprivation of property will be arbitrary if sufficient reasons are not provided for the particular deprivation. If found to be arbitrary, then the judiciary must declare such legislation unconstitutional without the need to consider section 36 of the Constitution. Should an assessment under section 36 of the Constitution be required, the competing values need to be measured against each other and an assessment made based on proportionality. Section 36(1)(e) of the Constitution suggest that prospective legislation is preferred to retroactive legislation and further that the Commissioner should rather rely on the anti-avoidance rules provided in the Income Tax Act instead of retroactive legislation.

The taxpayers in ***Pienaar Brothers*** should have been successful based on either the common law presumption against retroactivity (the retroactive amendments negatively impacted their vested rights) or a challenge under section 25 of the Constitution (less restrictive means were available to the Commissioner, the retroactive amendment was not reasonable or justifiable or a law of general application and the taxpayers did not receive adequate warning).

The judiciary has an obligation to safeguard the fundamental rights of taxpayers and acts as a last resort when these rights are infringed upon. Although beyond the scope of this

paper (and a possible area for future research), in ***First National Bank***[223] it was held that the Courts have an obligation to develop the common law where it is deficient. It is submitted, that in order to regain tax certainty in South Africa, the courts have to develop the common law, in line with section 39(2) of the Constitution, with regards to the topic of retroactive fiscal legislation. Furthermore, the Commissioner should also rather rely on the general anti-avoidance rule and not increasingly impose draconian *ex post facto* changes that have inevitably also had a serious impact on perfectly innocent transactions.

In the words of Jinyan Yi:[224]

> *'Uncertain law also penalizes those anxious to obey it and eventually creates contempt for the law. Uncertain law will thus erode the confidence of taxpayers in the system and their willingness to support and comply with the system.'*

[223] ***First National Bank*** (note 165 above) at paragraph 31 and the reference to *Carmichele v Minister of Safety and Security and Another*, 2001 (10) BCLR 995 (CC).
[224] Jinyan Yi, ***Taxpayers' Rights in Canada***, 7 Revenue Law Journal 81, 131 (1997).

7. BIBLIOGRAPHY

List of dissertations, articles and other sources considered:

Case law

Adampol (Pty) Ltd v Administrator, Transvaal [1989] 4 All SA 776 (AD)

Anglo Platinum Management Services (Pty) Ltd and Others v Minister of Safety and Security and Others 2000 (1) SA 1127 (SCA)

Bell v Voorsitter van die Rasklassifikasieraad [1968] 3 All SA 1 (A)

Bellairs v Hodnett and Another 1978 (1) SA 1109 (A)

Cape Town Municipality and Another v Bethnal Investments (Pty) Ltd and Another [1972] 4 All SA 326 (C)

Curtis v Johannesburg Municipality 1906 TS 308

CW v Commissioner of Taxes (1988) 50 SATC 137 (ZH)

Director of Public Prosecutions, Western Cape v Prins [2012] 3 All SA 245 (SCA)

Du Toit v Minister for Safety and Security and Another 2009 (12) BCLR 1171 (CC)

Ex Parte Christodolies 1959 3 SA 838 T 841

First National Bank of SA Ltd t/a Wesbank v Commissioner for South African Revenue Services and Another 2002 (7) BCLR 702 (CC)

Glen Anil Development Corporation v CIR 1975 (4) SA 715 (A), 37 SATC 319

Kaiser Aluminium and Chemical Corporation et al v Bonjorno et al., 494 US 827, 855 (1990)

Kruger v President Insurance Co Ltd [1994] 1 All SA 146 (D)

Malcolm v Premier, Western Cape (207/2013) [2014] ZASCA 9 (14 March 2014)

Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others 2005 (3) SA 280 (CC)

Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (7) BCLR 663

Mohamed NO v Union Government 1911 AD 1

Law Society of South Africa and Another v Minister of Transport and Another 2011 (2) BCLR 150 (CC)

National Director of Public Prosecutions SA v Carolus [2000] 1 All SA 302 (A)

Pienaar Brothers (Pty) Ltd v the Commissioner for the South African Revenue Service (2017) 80 SATC 1

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

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

Progress Office Machines CC v South African Revenue Service and Others (2007) 69 SATC 231

R v Sillas [1959] 4 All SA 292 (A)

Robertson v City of Cape Town and Another, Truman-Baker v City of Cape Town 2004 (5) SA 412 (C)

Income Tax Case No. 1637, (1997) 60 SATC 413

South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC)

S v Makwanyane and Another 1995 (6) BCLR 665 (CC)

S v Mhlungu 1995 (7) BCLR 793 (CC)

Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission [1999] 3 All SA 365 (A)

Dissertations

Campbell, D. L. A Critical Analysis of the Retrospective Introduction of Tax Legislation (2018) Masters in Advanced Taxation University of Kwazulu-Natal

Croome, B. J. 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 (2008) Doctor of Philosophy in the Department of Commercial Law University of Cape Town

Ganta, Z. The constitutionality of retroactive tax legislation LLM (Mercantile Law) University of Pretoria

Taljaard, J. C. Geld die gewone reëls en beginsels van wetsuitleg by die uitleg van belastingwetgewing M.Comm (Taxation) Stellenbosch University

Articles and journals

Bentley, D. Taxpayers Rights: An International Perspective (1998)

Bishop, M. 'In the beginning was the word': The role of test in the interpretation of statutes 2012 South African Law Journal Volume 129 Issue 4

Botha, H. and Marupen, C. Retrospective Legislation: The Pienaar Brothers Case Business Tax & Company Law Quarterly Volume 8 Issue 3 September 2017

Camay, A. The perils of introducing tax "legislation by press release (http://financialregulationjournal.co.za/2017/10/18/the-perils-of-introducing-tax-legislation-by-press-release/)

Cowen, D. V. Prolegomenon to a restatement of the principles of statutory interpretation 1976 J. S. Afr. L.

Cowen, D. V. The Interpretation of statutes and the concept of "intention of the legislature" 1980 THRHR 374

Croome, B. J. Constitutional law and taxpayers' rights in South Africa - an overview 2002 Acta Juridica

Dachs, P. Retrospective Legislation The Taxpayer Volume 61 No. 8, August 2012.

Dachs, P. and Marais, D. Retrospectivity Rears Its Head Taxpayer The Taxpayer Volume 65 No. 10 October 2016

Davis, D. M. Retroactive Legislation and Completed Transactions – Another View The Taxpayer Volume 66 No. 6, June 2017

Du Plessis L. M. Bill of Rights interpretation in the South African context (3): Comparative perspectives and future prospects 1993 Volume 3 Stellenbosch Law Review

Du Plessis L. M. A preliminary estimate of the role of the presumptions of statutory interpretation in the new constitutional dispensation 1998 Volume 115 South African Law Journal, Issue 4

Du Plessis, L. M. A Preliminary Estimation of the Role of the Presumptions of Statutory Interpretation in the new Constitutional Dispensation 1998 South Africa Law Journal

Emslie, T. S. Editorial: Retroactive Legislation and Completed Transactions The Taxpayer Volume 66 Nos 4 & 5, April-May 2017

Emslie, T. S. Retroactive Legislation and Completed Transactions – A Cryptic Rejoinder The Taxpayer Volume 66 No. 6, June 2017

Ferreira, G. M. and Ferreira-Snyman, M. P. Die teoretiese grondslag van die regsgebondeheid van die owerheid (3) THRHR Band 68 Nommer 3 August 2005

Freedman, W. The rights of a child – The right to testify through an intermediary, 2010 South African Journal of Criminal Justice Volume 23 Issue 2

Hochman, C. B. The Supreme Court and the Constitutionality of Retroactive Legislation Harvard Law Review Volume 73, 1960

Jay, T. Retro Active Tax Legislation: A 'Deaf Leopard' and His Spots, Revenue Law Journal, Vol. 17, Issue 1 (2007)

Liptak, E. Retrospective legislation – II, Tax Planning Corporate and Personal Volume 22 No. 6 December 2008

Louw, H. Retrospective application Without Prejudice September 2012

Murphy, J. The Constitutional Review of Taxation 1995 Acta Juridica

Sampford, C. Retrospectivity and the Rules of Law, Oxford University Press, 2006

Seligson, M. Retrospective Operation of Statutory Amendments to Taxation Laws Business Tax & Company Law Quarterly Volume 8 Issue 1 March 2017

Silke, J. The interpretation of Fiscal Legislation: canons of construction, recent judicial comments and new approaches 1995 Acta Juridica

Silke, J. Taxpayers and the Constitution: A battle already lost 2002 Acta Juridica

Singh, A. A re-evaluation of the common law presumptions of interpretation in the light of the Constitution THRHR Band 75 Nommer 1 Februarie 2012

Swart, M. Legality as inhibitor: The special place of nullum crimen sine lege in the jurisprudence of international criminal tribunals, 2005 South African Yearbook of International Law Volume 30

Tredoux, L. G. and Van Zyl S. P. Some Drastic Measures to Close a Loophole: The Case of Pienaar Brothers (PTY) LTD v Commissioner for the South African Revenue Service (87760/2014) [2017] ZAGPPHC 231 (29 May 2017) and the Targeted Retroactive Amendment of Section 44 of the Income Tax Act 58 of 1962 PER / PELJ 2018(21)

Textbooks

Currie, I. and De Waal, J. et al The New Constitutional and Administrative Law Volume I 3rd reprint (2003)

De Waal et al The Bill of Rights Handbook 2ed (1999)

Du Plessis, L. M., Re-interpretation of statutes (2002)

Du Plessis, L. M. Law of South Africa Volume 25(1) – Second Edition Volume – Statute Law and Interpretation

Du Plessis, L. M. Bill of Rights Compendium (Electronic Version) – Interpretation of Statutes and the Constitution, June 2002

Freedman, D. W. Law of South Africa Volume 20(1) – Second Edition – Parliament

Kellaway, E. A. Principles of legal interpretation of statutes, contracts and wills

Law of South Africa Volume 7(2) – Third Edition - Constitutional Law: Structures of Government

Smith, A. An enquiry into the nature and causes of the wealth of nations 1776

Statutes and bills

Income Tax Act No. 58 of 1962

Interpretation Act No. 33 of 1957

Interpretation of Legislation Bill, 2006

Money Bills Amendment Procedure and Related Matters Act No. 9 of 2009

Tax Administration Act No. 28 of 2011

Taxation Laws Amendment Act No. 34 of 2019

The Constitution of the Republic of South Africa, 1996

South African Law Reform Commission Reports

South African Law Reform Commission Discussion Paper 112 Statutory Revision: Review of the Interpretation Act 33 of 1957 (Project 25) September 2006