



Tax & Exchange Control

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SOUTH AFRICA

- PAJA now, argue later: SARS' decision not to suspend payment can be subject to review



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PAJA now, argue later: SARS' decision not to suspend payment can be subject to review

It is well-established that the function carried out by the South African Revenue Service (SARS) is administrative in nature. SARS' actions are accordingly subject to the right of a taxpayer to just administrative action as provided for in section 33 of the Constitution, and generally also the legality requirement found in the common law. In this regard there have been some cases where taxpayers have successfully challenged SARS' decisions under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The recent case of *Ferreria v Commissioner, SARS* [2026] ZAGPPHC 47 is one such instance.

Issue in dispute

This case concerned the so-called 'pay now, argue later' rule contained in section 164 of the Tax Administration Act 28 of 2011 (TAA), which obligates a taxpayer to pay an amount owed to SARS under an assessment, even if such assessment is in dispute. This is subject to a taxpayer being permitted to request suspension of their payment obligation from SARS.

SARS raised assessments against the taxpayer in respect of his 2009 to 2021 years of assessment for an amount of tax close to R532 million. The taxpayer disputed the assessments, and accordingly requested that SARS suspend his obligation to pay the tax pending the finalisation of the dispute. In support of this request, the taxpayer tendered assets as security to SARS.

This request was denied by SARS on the grounds that the value of the assets tendered as security by the taxpayer was inadequate, and thus the collection of the disputed tax (in the event the dispute was decided in SARS' favour) would be in jeopardy.

Given this, the taxpayer tendered additional assets, valued at more than R1 billion, as security, and requested that SARS reconsider its decision not to suspend payment of the disputed tax. Again, SARS denied this request, ostensibly on the basis that collection of the disputed tax would still be in jeopardy (in the event the dispute is decided in SARS' favour) as the additional security was still insufficient.

This led to the taxpayer launching an application under PAJA for the review of SARS' decision to deny the suspension of payment of the disputed tax.

This application was premised on the value of the additional security tendered by the taxpayer being far in excess of the disputed tax, and therefore:

- firstly, SARS had taken irrelevant considerations into account when making its decision, and thus had failed to take relevant considerations into account (contravening section 6(2)(e)(iii) of PAJA);
- secondly, there was no rational connection between the decision taken by SARS and the purpose for which it was taken (contravening section 6(2)(f)(ii) of PAJA);
- thirdly, SARS' decision was so unreasonable that no reasonable person would have reached the same decision (contravening sections 6(2)(h) and 6(2)(i) of PAJA); and
- finally, the taxpayer had been subjected to a procedurally unfair process (contravening section 6(2)(c) of PAJA).

Therefore, the taxpayer requested that the court set aside SARS' decision, and substitute it with an order that payment of the disputed tax be suspended pending the finalisation of his dispute with SARS.

Against this, SARS argued that suspension of the tax debt would be inappropriate as, amongst other points:

- the taxpayer did not challenge the 'pay now, argue later' rule (only its application);
- the taxpayer did not adequately demonstrate the financial prejudice to him of being required to pay the disputed tax;
- the taxpayer was not tax compliant in respect of his other business dealings at the time of requesting the suspension of payment;
- SARS was of the view that the taxpayer had acted fraudulently, this having led to the additional assessments being raised; and
- the security tendered by the taxpayer was insufficient when compared to the disputed tax.

An additional point of contention between the parties was whether SARS had informed its Independent Debt Committee (IDC) of the additional security tendered by the taxpayer prior to taking the decision not to suspend payment of the disputed tax. This was alleged by the taxpayer, but denied by SARS (although without offering any facts to support this denial).

Court's decision

Considering the parties' representations, the court firstly affirmed the principle established in *Metcash Trading Limited v Commissioner, SARS* [2001] (1) SA 1109 (CC) that the 'pay now, argue later' rule is constitutional. However, the court also pointed out that the same principle affirms that SARS' powers to determine whether payment of a tax debt should be suspended are administrative in nature. Therefore, exercise of these powers is subject to section 6 of PAJA.

Secondly, the court accepted that the value of the additional security tendered by the taxpayer was in excess of R1 billion. Therefore, the court concluded that this would, in fact, be adequate security for the disputed tax.

Thirdly, the court considered the dispute between the parties regarding whether the IDC had in fact been made aware of the additional security tendered by the taxpayer. On the basis of the principle established in *Room Hire Company Proprietary Limited v Jeppe Street Mansions Proprietary Limited* [1949] (3) SA 1155 (T), the court concluded that a bare denial of the taxpayer's allegation is not sufficient, and that it was incumbent upon SARS to disclose facts to the court that supported its denial (which it did not do). Therefore, the court concluded that SARS had not in fact disclosed the additional security tendered by the taxpayer to the IDC.

Moving from these conclusions, the court then considered whether SARS' decision not to suspend payment of the disputed tax had contravened section 6 of PAJA. In this regard, it found that:

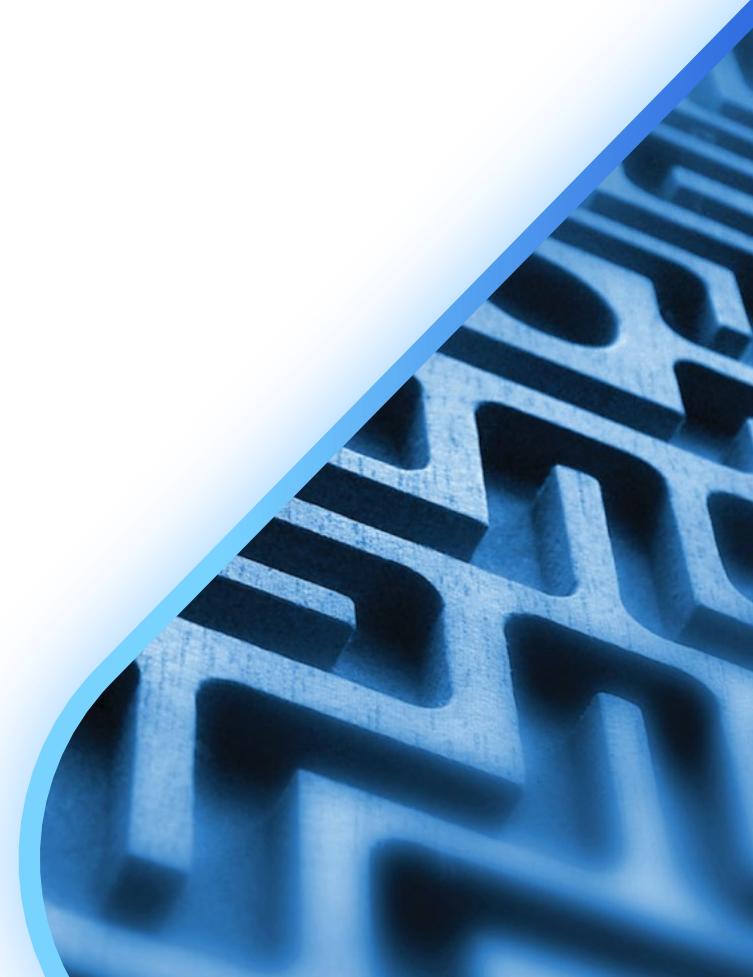
- the value of the additional security tendered by the taxpayer had been ignored by SARS when it reached its decision, and therefore SARS had not taken relevant considerations into account, and the resulting decision was not rationally connected with the purpose for which it had been taken;
- the fact that the additional security tendered by the taxpayer had not been presented to the IDC meant that the taxpayer had been subjected to a procedurally unfair process; and
- the taxpayer would be severely prejudiced should he have to liquidate assets now in order to pay the disputed tax (particularly in a situation where this disputed tax may never, in fact, be payable in the event the dispute is decided in the taxpayer's favour).

In light of this, the court found that SARS had contravened section 6 of PAJA, and its decision not to suspend payment of the disputed tax fell to be set aside. However, as to whether the court could substitute its own decision for that of SARS, the court found that this would require exceptional circumstances to be present.

Turning to the decision in *Trencon Construction Proprietary Limited v Industrial Development Corporation of South Africa Limited* [2015] (5) SA 245 (CC), the court stated that the point of departure is that an administrator (i.e. SARS, in this case) is best placed to make administrative decisions, and therefore any decision which has been set aside should be remitted to the administrator for the decision to be taken again, unless:

- the court is in as good a position as the administrator to make the decision (i.e. the decision does not require a special competence, and all relevant information is before the court);
- the decision, once remitted to the administrator, would be a foregone conclusion; and
- it would be just and equitable for the court to substitute its own decision for that of the administrator.

Given that the papers before the court were comprehensive (i.e. the court had all the relevant information at its disposal), that the decision to be taken was a question of application of law (i.e. it was not concerned with policy), and that only two decisions were available to SARS (to decline suspension of payment of the disputed tax, or to allow it), the court found that the circumstances above were present. Therefore, the court concluded that it was competent to substitute its decision for SARS', and that payment of the disputed tax was suspended pending the outcome of the dispute.



Conclusion

The frustration of the taxpayer in *Ferreria* will likely resonate with other taxpayers who have been involved in a dispute with SARS. Issues with processing disputes, in particular SARS providing (or not providing) reasons for decisions reached, or deciding whether to grant suspension of payment of a disputed tax debt, are becoming commonplace.

However, taxpayers would be wise not to run to court immediately. There are many decisions taken by SARS that in the first instance must be addressed through the objection and appeal process set out in the TAA and the dispute resolution rules promulgated in terms thereof. Being guided by an experienced tax practitioner is always best when engaging in a dispute with SARS.

That being said, the court's decision in *Ferreria* may result in more cases being taken on review in terms of PAJA, especially those that are not subject to objection and appeal in terms of the TAA, such as decisions in relation to the suspension of payment. The decision will hopefully also encourage SARS to take another look at its internal decision-making processes.

Nicholas Carroll
Overseen by Heinrich Louw



OUR TEAM

For more information about our Tax & Exchange Control practice and services in South Africa, Kenya and Namibia, please contact:

**Emil Brincker**

Practice Head & Director:
Tax & Exchange Control
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com

**Heinrich Louw**

Director:
Tax & Exchange Control
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com

**Mariska Delport**

Associate:
Tax & Exchange Control
T +27 (0)11 562 1574
E mariska.delport@cdhlegal.com

**Gerhard Badenhorst**

Director:
Tax & Exchange Control
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com

**Howmera Parak**

Director:
Tax & Exchange Control
T +27 (0)11 562 1467
E howmera.parak@cdhlegal.com

**Denis Maina**

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E denis.maina@cdhlegal.com

**Jerome Brink**

Director:
Tax & Exchange Control
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com

**Stephan Spamer**

Director:
Tax & Exchange Control
T +27 (0)11 562 1294
E stephan.spamer@cdhlegal.com

**Puleng Mothabeng**

Associate:
Tax & Exchange Control
T +27 (0)11 562 1355
E puleng.mothabeng@cdhlegal.com

**Petr Erasmus**

Director:
Tax & Exchange Control
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com

**Tertia van Schalkwyk**

Tax Consultant:
Tax & Exchange Control
T +27 (0)21 481 6404
E tertia.vanschalkwyk@cdhlegal.com

**Charity Muindi**

Associate | Kenya
T +254 731 086 649
+254 708 562 546
+254 710 560 114
E charity.muindi@cdhlegal.com

**Dries Hoek**

Director:
Tax & Exchange Control
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com

**Varusha Moodaley**

Senior Associate:
Tax & Exchange Control
T +27 (0)21 481 6392
E varusha.moodaley@cdhlegal.com

**Saveria Singh**

Associate:
Tax & Exchange Control
T +27 (0)11 562 1575
E saveria.singh@cdhlegal.com

**Alex Kanyi**

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E alex.kanyi@cdhlegal.com

**Nicholas Carroll**

Associate:
Tax & Exchange Control
T +27 (0)21 481 6433
E nicholas.carroll@cdhlegal.com

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

ONGWEDIVA

Shop No A7, Oshana Regional Mall, Ongwediva, Namibia.

T +264 (0) 81 287 8330 E cdhnamibia@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

WINDHOEK

1st Floor Maerua Office Tower, Cnr Robert Mugabe Avenue and Jan Jonker Street, Windhoek 10005, Namibia.

PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020

T +264 833 730 100 E cdhnamibia@cdhlegal.com

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