About Understatement Penalties, the Burden of Proof, *Bona Fide* Inadvertent Errors, and Blameworthiness

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Abstract

The purpose of understatement penalties in the *Tax Administration Act* 28 of 2011 (*TAA*) is twofold – it serves as a deterrent, and it serves a compensatory purpose to make good the loss suffered by the South African Revenue Service because of the understatement. In respect of the compensatory purpose, it resembles delict. As such, the authors draw from the commonalities between understatement penalties and delict to argue that understatement penalties constitute a statutory claim for damages. Accordingly, an analogy between the burden of proof in a claim for damages and the burden of proof in the case of understatement penalties must be drawn. This analogy forms the basis for the arguments that section 223 of the *TAA* does not create a shift in the burden of proof in that the taxpayer must prove the presence of a *bona fide* inadvertent error. The contribution also discusses the interpretation of a *bona fide* inadvertent error and makes some recommendations in this regard.

Keywords

Understatement penalties; burden of proof; *bona fide* inadvertent error; tax administration; non-compliance penalties; tax penalties; tax compliance.

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1 Introduction

Since the introduction of the *Tax Administration Act*[1] the courts have battled with understatement penalties, specifically the burden of proof, and the meaning of *bona fide* inadvertent error. In respect of the burden of proof, there are two schools of thought. On the one hand, in *Lance Dickson Construction CC v CSARS*[2] the Western Cape division of the High Court ruled that the burden of proof lies with the Commissioner for the South African Revenue Service (SARS) to show the presence of an understatement, the absence of a *bona fide* inadvertent error, and behaviour fitting the description in the behaviour table in section 223 of the *TAA*. On the other, SARS argues that once it has shown the presence of an understatement penalty, the burden of proof shifts to the taxpayer to prove the presence of an inadvertent error, and if the taxpayer is unsuccessful in doing so, or if the taxpayer disagrees with SARS as to the applicable behaviour in the behaviour table, the taxpayer must submit evidence to prove that the behaviour falls in that other category in the table.[3]

In this contribution we discuss the understatement provisions in the *TAA* and the purpose of the understatement penalties to set the backdrop for this study. We argue that, upon a closer look, understatement penalties resemble a claim for damages. In this explorative research we propose that understatement penalties perhaps constitute a statutory claim for damages. As such, the principles of delict may shed light on those issues pertaining to understatement penalties that remain unresolved by our courts. These

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1 *Tax Administration Act* 28 of 2011 (*TAA*).

2 *Lance Dickson Construction CC v CSARS* 84 SATC 209 (31 January 2023) (hereafter *Lance Dickson*).

3 In this regard see the submissions of SARS in, amongst others, *Lance Dickson, Purlish Holdings (Pty) Ltd v CSARS* 81 SATC 204 (26 February 2019) (hereafter *Purlish Holdings*); *ITC 1890* 79 SATC 62 (4 November 2016) (hereafter *ITC 1890*); *W Taxpayer v CSARS* 84 SATC 268 (14 December 2021) (hereafter *W Taxpayer v CSARS*); *ITC 1948* 84 SATC 110 (11 December 2019) (hereafter *ITC 1948*); *Mr A v CSARS* (IT13725) (DBN) (8 February 2018); 81 SATC 373 (13 February 2018); *CSARS v The Thistle Trust* 2023 2 SA 120 (SCA); 2023 2 SA 120 (SCA) (hereafter *CSARS v Thistle Trust*);*Thistle Trust v CSARS* 2024 12 BCLR 1563 (CC) (hereafter *Thistle Trust v CSARS*); *Coronation Investment Management SA (Pty) Limited v CSARS* 2024 6 SA 310 (CC); *CSARS v Coronation Investment Management SA (Pty) Ltd* 2023 3 SA 404 (SCA) (hereafter *CSARS v Coronation*).

issues can broadly be confined to the burden of proof, the meaning of an inadvertent *bona fide* error and the application of the understatement penalty table. Lastly, we canvass recommendations for the application of the principles of delict in interpreting and applying the understatement penalty provisions in the *TAA*.

2 What are understatement penalties?

2.1 The provisions in the TAA

The understatement penalties contained in Chapter 16 of the *TAA*[4] came into effect with the enactment of the *TAA* on 1 October 2012. The *Memorandum on the Objects of the Tax Administration Bill*[5] provides that the understatement penalties are aimed at targeting more serious non-compliance, and the penalty percentage is levied based upon the taxpayer's behaviour in accordance with the understatement penalty table in section 223[6] of the *TAA*.

This replaces the previous regime whereby SARS had discretionary powers to levy "additional tax" penalties of up to 200 per cent.[7]

The term "understatement" is defined in section 221 of the *TAA* to mean-

> any prejudice to SARS or the fiscus as a result of—
>
> (a) failure to submit a return required under a tax Act or by the Commissioner;
>
> (b) an omission from a return;
>
> (c) an incorrect statement in a return;
>
> (d) if no return is required, the failure to pay the correct amount of 'tax'; or
>
> (e) an 'impermissible avoidance arrangement'.

The above definition has two elements to qualify as an understatement. First, there must be a prejudice to SARS or the fiscus, and second, the prejudice must be as a result of the list of actions in paragraphs (a)-(e) of the definition.

Once an "understatement" has been established, the taxpayer must pay, in addition to the tax payable for the relevant tax period, the determined understatement penalty, unless the understatement results from a *bona fide*

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4 Sections 221-224 of the *Tax Administration Act* 28 of 2011 (the *TAA*).

5 National Treasury 2011 https://staging.sars.gov.za/wp-content/uploads/Legal/ExplMemo/LAPD-LPrep-EM-2011-03-Memorandum-Objects-Tax-Administration-Bill-2011.pdf (*Memorandum on the Objects of the Tax Administration Bill*) 199.

6 Also referred to as the behaviour table.

7 *Memorandum on the Objects of the Tax Administration Bill* 179.

inadvertent error.[8] The phrase *bona fide* inadvertent error is not defined in the *TAA*.

As the third and final step in the levying of understatement penalties, the understatement penalty table in section 223 of the *TAA* must be considered. In terms of section 222(2), the highest applicable understatement penalty percentage must be applied to each determined shortfall in relation to the "understatement".

The current understatement penalty percentage is determined based upon prescribed objective criteria, being the identified behaviour of the taxpayer in accordance with the understatement table.[9]

This behaviour is linked to five categories of understatements. The behaviour table[10] is set out as follows:

1	2	3	4	5	6
Item	Behaviour	Standard case	If obstructive, or if a 'repeat case'	Voluntary disclosure after notification of audit or criminal investigation	Voluntary disclosure before notification of audit or criminal investigation
(i)	'Substantial understatement'	10%	20%	5%	0%
(ii)	Reasonable care not taken in completing return	25%	50%	15%	0%
(iii)	No reasonable grounds for 'tax position' taken	50%	75%	25%	0%
(iv)	'Impermissible avoidance arrangement'	75%	100%	35%	0%
(v)	Gross negligence	100%	125%	50%	5%

8 Section 221(1) of the *TAA*. The term has been removed from section 221(1) with effect from 1 March 2026.

9 SARS 2018 https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-TAdm-G11-Understatement-Penalty-Guide.pdf 5.

10 Section 223 of the *TAA*.

(vi)	Intentional tax evasion	150%	200%	75%	10%

2.2 The purpose of penalties in general

SARS opines that the principal goal of penalties is based on the premise that the threat of punishment or other sanctions such as penalties should deter unwanted behaviour.[11] Doran suggests that tax penalties appear to function as a motivation for taxpayers to comply with their tax obligations.[12] For example, in terms of the deterrence theory, taxpayers comply with their tax obligations to avoid any legal sanctions such as penalties, as the sanctions would be more costly for the taxpayer compared to being tax compliant.[13] Blecker argues that a penalty, as a method of deterrence, is twofold: "Penalties, as a deterrence, then, can represent the fusion of punishment and price. The rule maker and rule enforcer may have designed the penalty to deter, but the individual penalized or other would-be violators may consider it a price worth paying or risking."[14]

Even in sport, one often sees that a penalty operates to compensate an injured opponent and, at least in theory, such compensation seeks to counterbalance the unjust harm suffered, or to remove the unjust benefit obtained by the violator.[15]

2.3 The function of understatement penalties

In *Motloung v Commissioner for the South African Revenue Service*[16] the court indicated that the understatement penalty is aimed at deterring non-compliance with tax administration laws.[17] The court further noted that the understatement penalty not only addresses the shortfall flowing from an understatement but also the damage arising from the understatement.[18]

This is an important submission made by the court, as it recognises that the understatement penalty surpasses serving only as a deterrence measure or to address the shortfall created by the taxpayer's understatement. It also serves a punitive function to address the damage suffered by the fiscus due

11 SARS 2018 https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-TAdm-G01-Short-Guide-to-the-Tax-Administration-Act-2011.pdf 75.
12 Doran 2009 *Harv J on Legis* 122-123.
13 Doran 2009 *Harv J on Legis* 111-113.
14 Blecker 2018 *NY L Sch L Rev* 279.
15 Blecker 2018 *NY L Sch L Rev* 252.
16 *Motloung v CSARS* 85 SATC 504 (21 November 2022) (hereafter *Motloung*).
17 *Motloung* para 29.
18 *Motloung* para 29.

to the understatement of taxes. Interestingly, Croome and Olivier[19] argue that the understatement penalty levied at the highest rate (200%) is aimed at punishing a taxpayer, as opposed to ensuring tax compliance with the provisions. They indicate, however, that if a lower understatement penalty is levied one should consider the facts of each case to establish if the aim was punitive or to enforce effective tax administration.[20]

Meyer and Van Zyl[21] argue that interest (levied in terms of the *TAA* or another Tax Act) similarly serves a punitive role, as the guilty party is liable to pay interest to the innocent party to "make good losses suffered by the innocent party for not having access to his money." This is especially so in cases of interest levied on late payment or the non-payment of an existing debt.[22] The role of interest in this scenario constitutes legal damages, which are recognised in our law to serve as compensation for the person who lost his/her money as a result of the actions of the payor.[23] We believe that the same can be said of the understatement penalty – that is, it resembles a claim for damages. This is because one of the aims of an understatement penalty is to "make good" the damage suffered by the State (and society). Furthermore, it is because the State was prejudiced by the under declaration of the taxpayer's taxes, meaning that the State was deprived of revenue. This argument is further supported by the meaning of "any prejudice to SARS or the fiscus" in section 222.

The term "any prejudice to SARS or the fiscus" in section 222 has a broader application than the fiscus or SARS merely being "out of pocket" because of the understatement.[24] The term "prejudice" is not defined in the *TAA*, and the ordinary meaning of the term must therefore be ascribed to it. The definition of "prejudice" means damage, detriment, harm, hurt, impairment, injustice, irreversible damage, loss, unfairness, wrong.[25] Prejudice is not confined to financial prejudice as the definition casts the net much wider with the inclusion of the word "any". In *TCIT13725*[26] the court found that prejudice to SARS or the *fiscus* by implication includes instances where a

19 Croome and Olivier *Tax Administration* 474.
20 Croome and Olivier *Tax Administration* 474.
21 Meyer and Van Zyl 2021 *THRHR* 591.
22 Meyer and Van Zyl 2021 *THRHR* 592.
23 *Land and Agricultural Development Bank of South Africa v Ryton Estates (Pty) Ltd* 2013 6 SA 319 (SCA); *Crookes Brothers Ltd v Regional Land Claims Commission for the Province of Mpumalanga* 2013 2 SA 259 (SCA); *Linton v Corser* 1952 3 SA 685 (A); *Davehill (Pty) Ltd v Community Development Board*, 1987 1 All SA 388 (A); *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *Bellairs v Hodnett* 1978 1 SA 1109 (A).
24 *Purlish Holdings* para 23.
25 Legal Dictionary date unknown https://legaldictionary.thefreedictionary.com/prejudice.
26 *Mr A v CSARS* (TCIT13725) (DBN) (8 February 2018).

taxpayer does not submit a return, leading to the non-payment of taxes.[27] Such non-payment of taxes causes a prejudice to the *fiscus* by depriving it of funds to be used in the state's budget for the year. Where the state is unable to use required funds to complete its constitutional mandate, the greater public good may suffer and prejudice is clearly established.

In *Purlish Holdings* the Supreme Court of Appeal (SCA) ruled that prejudice is not only determinable in financial terms.[28] The court held that SARS' resources used for auditing the appellant's tax affairs resulted in prejudice to SARS in that the time, resources and costs could have been utilised for other matters.[29] The SCA further ruled that even in instances where a taxpayer qualifies for a refund, but administrative resources were allocated to the matter, this could result in a prejudice to SARS or the fiscus.[30] Accordingly, one may argue that any prejudice (or any so-called damage) suffered by SARS or the fiscus as a result of a taxpayer's understatement extends further than merely the monetary damage or harm (the loss of revenue) suffered. In this regard we do not argue that SARS can claim non-patrimonial damage. Rather, we argue that the prejudice goes beyond the unpaid taxes but includes other patrimonial damage such as wasted resources.

We argue that the concept of an understatement penalty, regardless of the penalty percentage, serves a dual function. That is, the understatement penalty serves not only as a deterrence measure to ensure tax compliance, but also to make good the damage suffered by the State because of the understatement. In other words, it resembles a claim for damages. For this reason, we now discuss some principles of the law of delict to emphasise the commonalities.

2.4 The law of delict and the TAA compared

"Damage" (*damnum)* is legal terminology which can be defined as "the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law."[31] In so far as the abovementioned "damage" resulting from an understatement is concerned, we submit that SARS may, in principle, in the alternative[32] to the understatement penalty, institute a claim for damages on the premise of a delict committed against the fiscus. In doing so SARS would have to prove all five elements of

27 *Mr A v CSARS* (TCIT13725) (DBN) (8 February 2018) para 45.
28 *Purlish Holdings* para 23.
29 *Purlish Holdings* para 23.
30 *Purlish Holdings* para 23.
31 *Van der Merwe v RAF* 2006 4 SA 230 (CC).
32 We argue that SARS cannot claim damages and an understatement penalty on the same facts simultaneously because, as we argue throughout, the understatement penalty is intended to make good the damage suffered by SARS. Thus, the purposes of the remedy of the two actions are, in our view, identical.

delict,[33] which are conduct, wrongfulness, fault (blameworthiness), causation and damage.[34] A complete discussion of these elements falls outside the scope of this study. However, to set the backdrop for our arguments below, the elements are discussed briefly and compared with the provisions in the *TAA*.

i) *Conduct:* Conduct takes the form of either a voluntary act or an omission on behalf of the wrongdoer.[35] An omission is the failure to act in an instance where there is either a legal or a moral duty on a person to act and where the person did not act despite this duty.[36] In the case of tax non-compliance, the conduct is the failure to be tax compliant (a breach of duty in terms of the *TAA*). That includes a failure to submit tax returns or where the tax return submitted is void of accuracy. Conduct in the *TAA* is found under the definition of "understatement" in section 222 of the *TAA*, which sets out both acts and omissions by a taxpayer that qualify as punishable behaviour.

ii) *Wrongfulness:* This denotes the violation of an interest protected by law in a legally reprehensible way expressly.[37] In the tax realm, wrongfulness can be inferred from citizens' legal duty to pay tax and from SARS' duty to collect taxes. Thus, it can be argued that because tax is a legal impost on citizens to raise revenue to fund the state's expenditure for the benefit of society,[38] a legal duty exists to be tax compliant. Any conduct amounting to a breach of this duty will be considered wrongful, as it will come at the expense of the *fiscus* and the citizenry.

iii) *Fault:* Fault is generally accepted to take one of two forms; either intention (*dolus*) or negligence (*culpa*), on the part of the actor.[39] For *dolus* or *culpa* to amount to fault, there must be a reprehensible state of mind on the part of the actor in either the intentional or negligent

33 The South African law of delict is historically rooted in the *actio legis Aquiliae.*

34 Neethling and Potgieter *Law of Delict* 8th ed 4; Loubser and Midgley *Law of Delict* 24; *De Klerk v Minister of Police* 2021 4 SA 585 (CC) para 13.

35 Neethling and Potgieter *Law of Delict* 7th ed 32-33; Loubser and Midgley *Law of Delict* 95.

36 Neethling and Potgieter *Law of Delict* 7th ed 32-33; *Minister van Polisie v Ewels* 1975 3 SA 590 (A).

37 Midgley "Delict" 72; *R v Umfaan* 1908 TS 62 66; *Loureiro v Imvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC) para 52; Wessels 2024 *THRHR* 84-90; Loubser and Midgley *Law of Delict* 24.

38 Steyn, Franszen and Stiglingh 2013 *International Business and Economics Research Journal* 241.

39 Midgley "Delict" 135.

action.[40] Intention occurs when accountable persons direct their will at the result which they cause, while conscious that it is wrongful.[41] Negligence occurs when an actor is blamed for carelessness, thoughtlessness or paying insufficient attention to a matter or his/her actions, failing to adhere to a legal standard of attention that must be paid.[42] In the tax realm, the *TAA* makes provision for fault in the section 223 table by setting out types of behaviour that become increasingly more blameworthy as the percentage of penalty increases, ranging from negligence to outright intent. More about this later.

iv) *Causation:* Causation is the causal nexus between the conduct performed and the damage that occurs in a given case.[43] Put differently, the conduct of the actor must actually have caused the damage. In the case of tax non-compliance, SARS must prove that the non-compliance resulted in the damage suffered by SARS. Causation appears in the *TAA*'s phrasing in section 222 as understatements must actually cause "*prejudice to* SARS or the fiscus" (own emphasis), thereby establishing the nexus between the understatement and the prejudice to the fiscus.

v) *Damage:* Damage refers to the fact that there must have been some loss incurred by a party through the wrongful and culpable act of another.[44] Damage can be distinguished into patrimonial and non-patrimonial damage. Patrimonial damage is pecuniary loss, while non-patrimonial damage is the damage caused to a person's personality (such as pain and suffering).[45] As SARS is not a natural person, only patrimonial damage can be claimed. In the case of non-compliance, the patrimonial damage includes the revenue lost and any other financial loss (wasted resources) suffered because of the non-compliance.[46] It must be noted that patrimonial loss refers to the actual financial damage suffered and not the perceived loss. Damage in a

40 Neethling and Potgieter *Law of Delict* 8th ed155-157.
41 Midgley "Delict" 137; *Khumalo v Holomisa* 2002 8 BCLR 771 (CC) para 20.
42 Midgley "Delict" 148; *Ngubane v SA Transport Services* 1991 1 SA 756 (AD) para 34.
43 Midgley "Delict" 174; Wessels 2024 *THRHR* 92; *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 1 SA 325 (CC) para 35; *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 74; *Minister of Police v Skosana* 1977 1 SA 31 (A) 34-35; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700.
44 Neethling and Potgieter *Law of Delict* 8th ed 255; Midgley "Delict" 192; *Nhlumayo v General Accident Insurance Co of SA Ltd* 1986 3 SA 859 (D).
45 Midgley "Delict" 192.
46 *Purlish Holdings* para 23.

delictual context is not penal but compensatory in nature.[47] In the context of the *TAA*, damage would be the shortfall that results from an understatement and notably would also include the allocation of resources by SARS to audit a matter.[48] As discussed above, the quantum of the damage is determined by the percentage in the behaviour table. In essence, the *TAA* makes provision for SARS to claim understatement penalties from the taxpayer and to punish reprehensible behaviour. Were the *TAA* not in force (and absent any other statutory provision), SARS would likely have to rely on a civil claim under delict for the recovery of the damage. As pointed out above, such a claim is limited to the quantum of the actual damage suffered. This might prove difficult if not impossible to establish – especially where the prejudice cannot be expressed in monetary terms. Notably, the concept of punitive damages is foreign to South African law.[49] The *TAA* provides a statutory mechanism that allows SARS to recover taxes and punish taxpayers for their understatements efficiently and effectively. This is without the undue delay and administrative burden that would undoubtedly accompany an ordinary claim for damages. Moreover, as the *TAA* allows for a penalty even in cases where a refund is due to the taxpayer, it can be argued that it provides for a statutory form of punitive damages.[50] The fact that the quantum may not always correlate accurately with the monetary damage suffered by SARS supports our argument that the penalties constitute statutory punitive damages.

3 The burden of proof

3.1 The law of evidence

3.1.1 General observations

The concept of the burden of proof[51] originates from Roman Law.[52] It is a concept that exists in most Western legal systems.[53] In respect of the factual basis of a dispute, the onus rests on one of the litigants to prove his/her version. Notably, the litigant is not required to prove the law. The litigants may put authority before the court, and they may debate the issues, but they do not prove the applicable law. It is for the court to decide what is law and to apply it. Accordingly, the burden of proof is factual in nature. Once the factual issues have been formulated, the incidence of the burden of proof

47 *SANTAM Versekeringsmpy Bpk v Byleveldt* 1973 2 All SA 173 (A).
48 *Purlish Holdings* para 23.
49 *SANTAM Versekeringsmpy Bpk v Byleveldt* 1973 2 All SA 173 (A).
50 See the discussion of *Purlish Holdings* above.
51 The obligation to prove an assertion or allegation that one makes.
52 Schmidt and Rademeyer *Law of Evidence* 2-4.
53 Schmidt and Rademeyer *Law of Evidence* 2-4.

can begin. In this regard the person who bears the burden of proof (in civil litigation, the plaintiff) commences by leading evidence.[54] To discharge this onus the plaintiff must set out a *prima facie* case.[55] If it succeeds, an evidential burden is placed on the defendant.[56] An evidential burden means that the defendant must rebut the opponent's evidence. This is a burden of rebuttal, not a burden of proof.[57] It is not required of the defendant to achieve a preponderance in its favour.[58] Rather, it is sufficient to bring the scale in equilibrium.[59] Once that succeeds, the evidential burden shifts to the plaintiff to neutralise the defendant's evidence.[60] The litigation proceeds on this basis.

The burden of rebuttal (the evidential burden) is not the same as the burden of proof. The evidential burden shifts between the parties as the probabilities shift. This distinction is important because confusion may result in a party being found (erroneously) to have failed.[61] In some cases the courts have erroneously ruled that this shift means that the opposing party bears the full burden of proof.

In *Timoney and King v King*[62] the plaintiff alleged that money was lent to the defendant. In this case the fact that money had been advanced casts an onus on the defendant to prove that the money advanced was a gift and not a loan.[63] In *Zandberg v Van Zyl*,[64] after submitting *prima facie* evidence that the agreement was a contract of purchase and sale, an onus was put on the opponent who contended that it was something else.[65]

In *Roos v Mossop*,[66] after providing evidence that there was a *prima facie* case that a road was a private road, the court required the defendant to prove its assertion that it was a public road.[67]

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54 Schmidt and Rademeyer *Law of Evidence* 2-11; Morgan *Basic Problems of Evidence* 27-28.

55 Schmidt and Rademeyer *Law of Evidence* 2-11; Morgan *Basic Problems of Evidence* 26-28.

56 Vorster 1980 *Journal for Juridical Science* 115.

57 Schmidt and Rademeyer *Law of Evidence* 2-11; *Pillay v Krishna* 1946 AD 946 951; Vorster 1980 *Journal for Juridical Science* 115.

58 Schmidt and Rademeyer *Law of Evidence* 2-11.

59 Schmidt and Rademeyer *Law of Evidence* 2-11.

60 Schmidt and Rademeyer *Law of Evidence* 2-11 – 2-12; Vorster 1980 *Journal for Juridical Science* 115-116.

61 Vorster 1980 *Journal for Juridical Science* 115-116.

62 *Timoney and King v King* 1920 AD 133. See also Morgan *Basic Problems of Evidence* 22-23.

63 *Timoney and King v King* 1920 AD 133 141.

64 *Zandberg v Van Zyl* 1910 AD 302.

65 *Zandberg v Van Zyl* 1910 AD 302 314.

66 *Roos v Mossop* 1952 1 SA 8 (T).

67 *Roos v Mossop* 1952 1 SA 8 (T) 13. In *Roos v Mossop*, the court followed the principles laid down in *Rex v Erasmus* 1947 3 SA 568 (T). Also see *R v Ndaba* 1953

In *Da Silva v Coetzee*[68] Boshoff J noted that "The onus is *prima facie* discharged when the plaintiff has proved that his wife was attacked and bitten by the dog without apparent cause. To escape liability the defendant, as owner, must then prove that it was the fault of the plaintiff's wife or that the dog had been provoked by some extrinsic cause."[69]

In *Frankel Max Pollak Vinderine v Menell Jack Hyman Rosenberg*,[70] the Appellate Division (as it was then known) remarked that:

> Once the applicant for relief based upon this form of contempt of court has established that the order of the court has been brought to the knowledge of the respondent and that the respondent has failed to comply with it, wilfulness and *mala fides* on the part of the respondent will normally be inferred and the onus will be on the respondent to rebut this inference *on a balance of probabilities* ...[71]

Every factual allegation that is in dispute is subject to the burden of proof.[72] Schmidt and Rademeyer point out correctly that this is necessary because the court could be in doubt as to the correctness or truth of the allegation.[73] In the case of multiple issues, the burden of proof of one factual allegation may rest on one person, and may rest on the other person in respect of other factual allegations.[74] Schmidt and Rademeyer argue that this may often be confused with an actual shift occurring in the burden of proof.[75]

Where the matter proceeds to appeal, the burden of proof is on the appellant. However, this is not the ordinary burden of proof that applies, because the court of appeal must establish the burden of proof in the court *a quo* and apply it where necessary.[76] This is because the court of appeal cannot on appeal subject the same factual basis to two burdens of proof. Ultimately there can be only one rule to determine who would be unsuccessful if the scales were left in equilibrium.[77] Put differently, on appeal it is a matter of assessing credibility rather than a burden of proof. It is only after the court of appeal is unable to make a decision, after assessing the facts and the court *a quo's* credibility assessment as to the exactitude

4 SA 13 (T) 15; *Ethekwini Municipality v Brooks* 2010 4 SA 586 (SCA) paras 17 and 23.

68 *Da Silva v Coetzee* 1970 3 SA 603 (T).

69 *Da Silva v Coetzee* 1970 3 SA 603 (T) 604.

70 *Frankel Max Pollak Vinderine v Menell Jack Hyman Rosenberg* 1996 3 SA 355 (A) (hereafter *Frankel Max*).

71 *Frankel Max* 367 paras I-J. Our emphasis.

72 Schmidt and Rademeyer *Law of Evidence* 2-8(1); Vorster 1980 *Journal for Juridical Science* 115-116.

73 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-9.

74 Vorster 1980 *Journal for Juridical Science* 116.

75 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-9.

76 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-9.

77 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-9.

of the facts, that the burden of proof becomes relevant.[78] In tax matters, as we discuss below, an appeal to the Tax Court is not an appeal in the true sense of the word.

3.1.2 The chronicity of the burden of proof

In its simplest form the occurrence of burden of proof can be explained as follows. Our daily lives are premised on decision making to act or not to act. Where a person is not convinced to act, the status *quo* remains. For example, where I am content with the internet provider I am subscribed to (X), the telemarketer who wants me to subscribe to another service provider (Y) must convince me that Y provides better service than X at a lower subscription cost. The incidence of the burden of proof to change the status *quo* (that is to convince me to change to Y) rests on the telemarketer.

In the realm of the courts, the burden of proof lies on the litigant who wants to change the *status quo* – that is, in civil litigation, the applicant/plaintiff who applies for a remedy.[79] In delict, it translates that the plaintiff must prove the extent of the damage suffered as well as the quantum of the damage.[80] Sometimes the defendant in civil litigation not only denies the plaintiff's allegations but also makes allegations of his own to refute the plaintiff's case. In this case, although the defendant is not the one who seeks remedy, he wishes to change the status *quo* by making positive allegations. As such, the burden of proof lies on the defendant who wants to change the status *quo* or who makes a positive assertion.[81] This is not the case where the defendant merely denies the plaintiff's allegations.[82] This is because a denial, by its very nature is not capable of proof.[83] This positive-negative method can be applied successfully in tax cases. For example, a taxpayer can deny that an amount was received, or he can prove that it was received, but that it was not received for his benefit.[84] A taxpayer can deny that he acted *mala fide* or prove that he acted in good faith. However, in *Abrath v North Eastern Railway Co*[85] the court noted that "the terms 'negative' and 'affirmative' are after all relative and not absolute. In dealing with a question of negligence, that term may be considered either as a negative or

78 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-9.
79 Vorster 1980 *Journal for Juridical Science* 114-115, 117; *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 2 SA 706 (A); *HA Millard & Son (Pty) Ltd v Enzenhofer* 1968 1 SA 330 (T).
80 Steynberg 2007 *PELJ* 145.
81 *Pillay v Krishna* 1946 AD 946 951; *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 2 SA 706 (A) 711.
82 Vorster 1980 *Journal for Juridical Science* 115.
83 *Codex* 4.19.23.
84 See the definition of "gross income" in s 1 of the *Income Tax Act* 58 of 1962.
85 *Abrath v North Eastern Railway Co* 1882-1883 11 QBD 440.

affirmative according to the definition adopted in measuring the duty which is neglected."[86]

Referring to *Lisbon v Lyman*,[87] where the court opined that it should be established what is legally positive, Morgan argues that it destroys generalisation as an *a priori* test.[88] In everyday litigation the approach works. This is because facts are neither positive or negative, neither are they an averment or denial.[89] What is positive or negative is dictated by the way the litigant presents the facts. Put simply, that is where the facts are presented as a denial or as a positive allegation.[90] For example, a taxpayer denies that he acted negligently in submitting a tax return, or he alleges that the understatement can be attributed to *vis major* (a virus on his computer).

As an understatement can be equated to delict (see the discussion above), we now proceed to discuss the incidence of the burden of proof in the realm of delict.[91] In delict the plaintiff must prove that the defendant committed an act (or omission), the presence of the fault element (the defendant's negligence or intent), and that because of the act the plaintiff suffered damage. Where the defendant alleges that he acted because of automatism or a blackout, the burden of proof remains on the plaintiff to prove that the defendant acted voluntarily.[92] In *S v Van Zyl*[93] the court ruled that where the accused (in a criminal case) alleges that his actions are because of automatism or blackout resulting from mental illness, the burden of proof is on the accused to prove the mental illness and resulting automated actions.[94] This view was criticised in *Molefe v Mahaeng* where the court ruled that it is the plaintiff that must prove that the defendant acted voluntarily.[95]

It is expected that where the plaintiff proves that the defendant acted wrongfully the plaintiff must also prove the absence of justification. The matter is, however, not that simple. In *Hiltonian Society v Crofton*[96] the court ruled that where a teacher, in a case of assault, acknowledges the action but alleges that he acted on authority in punishing a student, the teacher

86 *Abrath v North Eastern Railway Co* 1882-1883 11 QBD 440; Okpaluba 2013 *PELJ* 254-256.
87 *Lisbon v Lyman* 49 NH 553 (1870).
88 Morgan *Basic Problems of Evidence* 26-27.
89 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-13.
90 Vorster 1980 *Journal for Juridical Science* 115.
91 Morgan opines that there is no reason for distinguishing the burden of proof in common law negligence actions from the burden in other actions (Morgan *Basic Problems of Evidence* 30).
92 *Molefe v Mahaeng* 1998 4 All SA 423 (A).
93 *S v Van Zyl* 1964 2 SA 113 (A).
94 *S v Van Zyl* 1964 2 SA 113 (A).
95 *Molefe v Mahaeng* 1998 4 All SA 423 (A) para 428C.
96 *Hiltonian Society v Crofton* 1952 3 SA 130 (A).

must prove that he punished the student in his capacity as a teacher of that student. It is then for the student to prove that the punishment was excessive for it to constitute assault.[97] In *Wessels v Pretorius*[98] the court found, in a cause of assault, that a defendant's claim to have acted in self-defence is not a special plea. Self-defence is a denial of unlawfulness. The plaintiff alleges that the defendant acted unlawfully. This, the plaintiff must prove. However, the Appellate Division (as it was then known) in *Mabaso v Felix* rejected this approach.[99] In *Mabaso v Felix* Wessels JA ruled that the defendant who alleges to have acted in self-defence bears the burden of proof.[100] This is known as the *Mabaso* principle. In *Merryweather v Scholtz* it was found that an acknowledgment of assault is sufficient to trigger the *Mabaso* principle.[101]

The difficulty with the application of the basic principle that he who avers must prove his case is further compounded by three factors. First, the test is, as discussed above, not always applied consistently. For example, where SARS alleges that a taxpayer has not paid the outstanding tax debt, SARS need not prove the non-payment. It is for the taxpayer to prove that payment was made. Here the onus of proof and the allegation do not coincide. Second, there are no clear distinguishing lines between the cause of action and a special defence.[102] Lastly, the test to determine who must plead is what is derived from the burden of proof. The litigant pleads only the facts it must prove. But this, as Schmidt and Rademeyer point out, results in a circular argument.[103] Whether an allegation is needed for the plaintiff's case depends on whether he would have to prove the allegation; whether he would have to prove it depends on whether it falls within his case.[104] Although it seldom happens, a tactical drafter can get the upper hand by drafting his pleadings in such a way as to place the burden of proof on the defendant.[105]

Conceivably the case of *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd*[106] illustrates the conundrum. In this case Joseph

97 *Hiltonian Society v Crofton* 1952 3 SA 130 (A); *Mabaso v Felix* 1981 3 SA 865 (A) paras 876B-D; *Wessels v Pretorius* 1974 3 SA 299 (NC) paras 302C-F.

98 *Wessels v Pretorius* 1974 3 SA 299 (NC).

99 *Mabaso v Felix* 1981 3 SA 865 (A).

100 *Mabaso v Felix* 1981 3 SA 865 (A) 874F-G; *Minister of Law and Order v Monti* 1995 1 SA 35 (A) 394; *Ferreira v Ntshingila* 1990 4 SA 271 (A) 273A-B; *Merryweather v Scholtz* 2020 3 SA 230 (WCC).

101 *Merryweather v Scholtz* 2020 3 SA 230 (WCC); Van Heerden *Invloed van die Grondwet op die Bewyslas* 10-13.

102 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-27.

103 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-27.

104 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-28-29.

105 *Ah Mun v Ah Pak* 1974 4 SA 317 (E).

106 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* 1942 AC 154 HL(E).

Constantine Steamship Line Ltd (Constantine) in terms of a shipping agreement failed to deliver the goods of Imperial Smelting Corporation Ltd (Imperial) because of an explosion on board. In a claim for damages Imperial alleged that the breach of contract (the failure to perform) was because Constantine caused the explosion. Constantine argued that the explosion was because of the actions of third parties or *vis major*. The King's bench initially held that the onus was on Imperial (the plaintiff), but on appeal it was held to be on Constantine (the defendant).[107] Applying the rule that he who asserts must prove results in both parties having to prove. Applying the principle that he who makes a positive assertion must prove results in both parties having to prove. Imperial made a positive assertion that the damage was caused by Constantine's fault. Constantine made a positive assertion that it was the fault of a third party or *vis major*. Then, the question whether Constantine's fault forms part of Imperial's cause of action or that Constantine's allegations form a special plea takes one nowhere.

In the case of understatement penalties, the *Constantine* issue may arise where the taxpayer alleges that the understatement can be attributed to the fault of a third party or *vis major*. In this case SARS must prove that the understatement is caused by the taxpayer's fault. In doing so SARS must prove the absence of a *bona fide* inadvertent error. Where the taxpayer makes a positive assertion that the error is attributable to a third party or *vis major* (for example, duress or a virus on his computer), the burden of proof is on the taxpayer. Fault is at the heart of SARS' cause of action, and the absence of fault, in the current example, is a special plea. The situation is no different where SARS would institute a claim for damages against the taxpayer based on delict. Schmidt and Rademeyer note that there is no logical solution,[108] yet they argue that a possible solution can be found in the maxim *semper necessitas probandi illi, qui agit,* which means that the necessity of proof always lies with the person who lays charges.[109] In other words, the party who invokes the authority of the state, through the courts, to rectify a wrong or to invoke a remedy must prove the facts justifying the State's intervention.[110] This means that an evidentiary burden may sometimes rest on a defendant, but never a burden of proof. Yet this may not be a realistic solution. As Schmidt and Rademeyer point out correctly, it must be accepted that there may be exceptional circumstances dictated by clear precedent or compelling consideration of fairness that a defendant may have the burden of proving an issue.[111] This, we argue below, is what

107 *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* 1942 AC 154 HL(E).
108 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-29.
109 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-29.
110 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-29.
111 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 2-28-29.

the legislature tried to achieve with section 102(2) read with section 222 of the *TAA*.

3.1.3 The role of presumptions

In law a presumption is a device by which the presence of a fact is assumed. In the main, presumptions can be classified as irrebuttable presumptions of law, rebuttable presumptions of law and presumptions of fact. Presumptions are, generally, based on a sense of normalcy.[112] Put differently, it is generally the normal state of affairs that is presumed. Irrebuttable presumptions are a fiction.[113] It is a rule of substantive law dressed up as a presumption. Of relevance for the current discussion is the irrebuttable presumption *ignorantia iuris neminem excusat*, which means that ignorance of the law is no excuse. SARS need not prove that the taxpayer was aware of the provisions in the relevant tax legislation, nor that the taxpayer had a proper understanding of the law. Similarly, a taxpayer cannot assert that his lack of knowledge of the law or lack of understanding of the law is an honest mistake or *bona fide* inadvertent error.

Rebuttable presumptions differ from irrebuttable presumptions in that their function ends as soon as evidence in rebuttal is presented.[114] Wigmore points out that a presumption has a single legal outcome – that is that an evidential burden is placed on the party opposing the presumption.[115] Importantly, as it is the case where *prima facie* evidence is produced, the real burden of proof is not affected.[116] Most presumptions come into play when a basic fact is proved. As soon as fact A is proved, fact B is presumed until evidence of rebuttal is adduced.[117] A common example of a rebuttable presumption is in criminal cases where there is a presumption of innocence in favour of the accused. Similarly, in civil litigation the party who accuses the opponent of criminal, immoral or illegal acts must prove them. In the case of understatement penalties, it can be argued that section 223(3) establishes a presumption of innocence or absence of blameworthiness in favour of the taxpayer. As discussed below, SARS must prove the absence of a *bona fide* inadvertent error. The absence of a *bona fide* inadvertent

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112 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 5-4; *Zandberg v Van Zyl* 1910 AD 302 315; *Kunz v Swart* 1924 AD 618 651; *Cranfield v Hoey* 1932 CPD 265.

113 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 5-4.

114 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 5-5; Kotze 1981 *De Jure* 160-164.

115 Wigmore *Treatise on the Anglo-American System of Evidence* para 2491; Oosthuizen *Bewyslas en Weerleggingslas* 53, 324.

116 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 5-5; Van Heerden *Invloed van die Grondwet op die Bewyslas* 10-11.

117 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 5-5; Oosthuizen *Bewyslas en Weerleggingslas* 53, 82, 326.

error translates that the taxpayer is at fault. Put simply, SARS must prove fault (see the further discussion below).

A presumption of fact is not a legal rule. It comes into play when a court draws an inference from the facts. Unlike rebuttable presumptions, there is no rule or law that compels a judge to apply a presumption of fact. It remains within the judicial discretion to apply a presumption of fact. An example of a presumption of fact is the maxim *res ipsa loquitur,* which means "the facts speak for themselves." For example, if a vehicle that is parked on an incline starts to move by itself, the inference that can be drawn is that the driver failed to apply the parking brake. In *Groenewald v Conradie*[118] and in *Sardi v Standard and General Insurance Co Ltd*[119] the SCA ruled that the maxim *res ipsa loquitur* must be applied only if the facts from which negligence is inferred are to be found in the event itself. When the maxim is applied, it does not shift the burden of proof on the party denying negligence.[120] The evidentiary burden can shift between parties, but not the burden of proof.[121] As discussed below, it is often inferred from the facts that where an understatement is present, fault is present, and that it is for SARS to prove the degree of fault in accordance with the behaviour table in section 223 of the *TAA*. This is not correct. In this case the fault is found to exist because of what the reasonable person would do, and negligence (as a form of fault) cannot be inferred.[122] Yet in delict the plaintiff does not need to prove that the defendant was negligent.[123] Rather, the plaintiff proves how the defendant acted.[124] It is for the court to make a value judgment by comparing the actions of the defendant against that of the reasonable person.[125] Similarly the phrase "unless the 'understatement' results from a *bona fide* inadvertent error" means that, for SARS to prove fault, SARS must present factual evidence of the taxpayer's actions (or omission) to enable the court to make a value judgement as to the presence of negligence or intent.

118 *Groenewald v Conradie* 1965 1 SA 184 (A).
119 *Sardi v Standard and General Insurance Company Limited* 1977 3 SA 766 (A).
120 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 5-20.
121 Van Heerden *Invloed van die Grondwet op die Bewyslas* 6; *Pillay v Krishna* 1946 AD 946 952; Murphy *Practical Approach to Evidence* 89-90.
122 Schmidt and Rademeyer *Law of Evidence* 2-8(1) – 5-34-36.
123 Schmidt 1961 *THRHR* 47-49.
124 Steynberg 2007 *PELJ* 156-157.
125 Schmidt 1961 *THRHR* 47-49.

3.2 The burden of proof in the TAA and case law

Section 102 of the *TAA* provides that-

> (1) A taxpayer bears the burden of proving –
>
> (a) that an amount, transaction, event or item is exempt or otherwise not taxable;
>
> (b) that an amount or item is deductible or may be set off;
>
> (c) the rate of tax applicable to a transaction, event, item or class of taxpayer;
>
> (d) that amount qualifies as a reduction of tax payable;
>
> (e) that a valuation is correct; or
>
> (f) whether a 'decision' that is subject to objection and appeal under a tax Act, is incorrect.
>
> (2) The burden of proving whether an estimate assessment under section 95 is reasonable *or the facts* on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS.[126]

In broad terms, subsection (1) means that when a taxpayer submits a tax return the taxpayer makes allegations as to his/her tax affairs. Practically SARS may accept the information supplied and issue an assessment. SARS may also select a taxpayer for an audit or verification.[127] It is during this phase where the taxpayer is required to submit evidence to prove, albeit not in a court of law, the allegations that the taxpayer made about his/her tax affairs when the tax return was submitted. Where SARS is at any time satisfied that the assessment does not reflect the correct application of a tax Act to the prejudice of the *fiscus*, SARS may, in terms of section 92 of the *TAA*, issue an additional assessment. When SARS issues the additional assessment, SARS denies the taxpayer's allegations. But does it mean that the issue of the additional assessment constitutes a positive assertion that puts the burden of proof on SARS? No, the additional assessment is a mere calculation of what the taxpayer's tax liability must be based on the status *quo* (the facts before SARS). The additional assessment (and the reasons thereto) simply reflect a denial of the taxpayer's allegations. Thus, where the taxpayer disputes the additional assessment (on facts), the taxpayer must prove the allegations that he made when he submitted the original tax return.

Where SARS issues an estimate assessment in terms of section 95 of the *TAA*, there is no tax return (and no allegations made by the taxpayer) or the tax return is incorrect or inadequate (the allegations are incorrect or incomplete). Practically SARS invites the taxpayer to submit an accurate tax

126 Our emphasis.
127 See s 40 of the *TAA*.

return (to make allegations about his tax affairs) which SARS can assess. Where the taxpayer fails to submit an accurate return, SARS issues an assessment based on information at its disposal. Here SARS is making the allegations and the burden of proof rests on SARS.

As discussed above, the purpose of the understatement penalties is to address the damage suffered by SARS as a result of the understatement, and to penalise the taxpayer to deter similar future behaviour. Absent the understatement provisions, SARS would have been entitled, in principle, to claim damages from the taxpayer for the damage resulting from the understatement by way of common law delict. In a claim for damages the burden rests on SARS to prove the facts to enable the court to make a value judgement of the taxpayer's behaviour and whether or not that behaviour entitles SARS to damages. In short, SARS must present the facts to show that the taxpayer's wrongful conduct (action or omission), and through his fault, resulted in SARS suffering damage (in short, SARS must prove conduct, wrongfulness, fault, damage, and causation). In addition, SARS must prove the quantum of the damages to be paid.

In the case of understatement penalties, a three-stage process is contemplated.[128] First SARS must prove that an understatement as defined in section 221 exists.[129] In other words, SARS must prove facts of the taxpayer's unlawful conduct. In contrast to a claim for damages, SARS does not have to prove that the taxpayer's conduct is wrongful. Conduct that fits the parameters of the definition of an understatement is, by law, wrongful.

Second SARS must prove the absence of a *bona fide* inadvertent error.[130] As pointed out above, the absence of a *bona fide* inadvertent error is that case where fault is present. In other words, SARS must prove facts that enable the court to make a value judgement that the taxpayer is to blame (has fault) for the understatement. Absent fault, SARS has no case, and the process ends.[131]

The third stage entails that SARS must prove where the taxpayer's behaviour falls in the understatement penalty table provided for in section 223 of the *TAA*.[132] This equates to SARS having to prove the facts that will enable the court to make a value judgement as to where on the behaviour table the taxpayer's behaviour falls.

In a claim for damages the plaintiff must prove patrimonial or non-patrimonial damage. For the purpose of the current discussion we argue

128 *Lance Dickson* paras 9-14.
129 *Lance Dickson* para 11.
130 *Lance Dickson* para 13.
131 *Lance Dickson* para 13.
132 *Lance Dickson* para 13.

that in a claim for damages SARS must prove patrimonial damage. This is because SARS is not a natural person that has a body to kick or a soul to damn. In this regard SARS must prove that it has either lost income or incurred expenditure (that it would not have incurred) as a result of the taxpayer's wrongful conduct. In respect of an understatement, damage is considered in stage one of the process discussed above. The understatement (or rather the conduct that constitutes an understatement) must cause a prejudice to SARS. It is perhaps here that the presumption of fact (*res ipsa loquitu*r) comes into play. Although in the case law SARS has not argued *res ipsa loquitur* expressly, SARS argued before that an understatement, by default, results in a prejudice to SARS.[133] Put simply, by proving the presence of an understatement (fact A), the court can presume that prejudice (fact B) is present – *res ipsa loquitur.* Kriel mentions that it has become standard SARS practice that the issue of an additional assessment by default means an understatement is present and that it entitles SARS to levy penalties.[134] In *Purlish Holdings (Proprietary) Limited v CSARS* the taxpayer argued that although he had failed to submit the required tax returns, he paid provisional tax in excess of the tax liability for the relevant years of assessment. Accordingly, so the taxpayer argued, there was no prejudice to SARS because it did not lose out on any income.[135] The SCA ruled that prejudice also includes the time-value and the human capital spent on the taxpayer where that time and human capital could have been spent on other investigations had this taxpayer been tax compliant.[136] But this, SARS must prove.[137] We submit that here, *res ipsa loquitur* does not find application. That said, we propose that to prove prejudice it is sufficient for SARS to submit factual evidence that time and/or human capital was spent on the taxpayer other than the ordinary processing of the tax return and issuing of the original assessment. This means that in cases where the additional (or estimate) assessment results in a refund[138] to the taxpayer, SARS would still prove 'prejudice' or damage successfully if it submits evidence of the time spent on the taxpayer.

In the case of a claim for damages the plaintiff must also prove the quantum. In other words, in a claim for damages SARS would have to submit evidence of the quantum of the damage suffered as a result of the understatement. It

133 In this regard see the courts' summary of SARS' arguments in *Lance Dickson, Purlish Holdings* and *CSARS v Thistle Trust*.

134 Kriel 2012 http://www.gt.co.za/publications/2012/12/e-taxline-december-2012/.

135 Also see Van Zyl 2014 *Journal for Economic and Financial Science,* where she argues that a prejudice to SARS is constituted by a shortfall in tax only.

136 *Purlish Holdings* para 23.

137 Pinch 2024 *Business Tax and Company Law Quarterly* 9-19.

138 Where the original assessment did not result in a refund or the additional assessment results in a larger refund or the refund would not have materialised if the taxpayer did not submit tax returns.

would be difficult if not near impossible for SARS to prove the quantum of the damage. In the case of understatement penalties SARS need not prove the quantum. It is sufficient for SARS to submit facts to enable the court to make a value judgement as to where in the behaviour table the behaviour of the taxpayer falls. The quantum is statutorily regulated. The court does not have wide discretion to determine the quantum.[139] The facts are linked to the relevant behaviour in the behaviour table, and the court must levy the penalty (quantum) as provided for in the behaviour table.[140] This is the third stage as discussed above.

3.3 Has SARS proven its case if the matter does not proceed to the Tax Court?

Not all tax disputes progress to trial. The question arises whether, from a practical perspective, SARS has proven its case where the taxpayer does not challenge the understatement penalties on appeal?

Van Zyl argues that SARS does not have a discretion to levy or not to levy understatement penalties.[141] She argues that section 222 is peremptory – SARS must levy an understatement penalty if an understatement is present and absent a *bona fide* inadvertent error.[142] However, the peremptory phrase in section 222(1) reads "the taxpayer must pay." Accordingly it stands to reason that there is a duty on SARS to levy the understatement penalties. Literally, section 222(1) means that the duty is on the taxpayer to pay the understatement penalty regardless of whether or not SARS levied an understatement penalty. A reading together of section 102(2) and section 222(1) can be summarised as: Once SARS has proven the facts that entitles it to an understatement penalty, the taxpayer must pay the understatement penalty.

Practically, as discussed below, it pans out differently.

Generally, SARS detects an understatement during an audit or verification process. Once SARS is satisfied that an understatement is present, it issues an assessment (additional, jeopardy or estimate assessment) in which the understatement penalties are reflected. At this point SARS has made allegations of the understatement only. It is at this stage where the taxpayer, who is aggrieved by an assessment, may, in terms of Rule 6 of the Tax Court Rules, prior to lodging an objection, request SARS to provide reasons for the assessment to enable the taxpayer to formulate his objection. In this

139 Burt 2018 *TaxTalk* 48-50.
140 Burt 2018 *TaxTalk* 48-50.
141 Van Zyl 2014 *Journal for Economic and Financial Science* 907-924.
142 Van Zyl 2014 *Journal for Economic and Financial Science* 907-924.

regard Galgut J in *Arepee Industries Ltd v Commissioner for Inland Revenue* noted that:

> the Commissioner is not obliged to disclose *his grounds* (emphasis added) in advance of the appeal, any facts that he may wish to rely on must also be placed before the Court by calling the necessary witnesses, and any documents he wishes to prove will also have to be put through such witnesses. It will be in the course of the hearing at the latest that the taxpayer will become aware of what facts and submissions the Commissioner relies upon, in short his grounds, and the taxpayer will thereby be left in no doubt what prejudicial facts or submissions he will have to meet in presenting his case in the appeal. It is at the hearing itself that the Commissioner's case must be presented, and it is only what is raised by him at the hearing that is of any relevance to the matters in issue. In this connection, the Commissioner's reasons are totally irrelevant, for it is not his reasons that are in any way at stake at the hearing before the Special Court. At most it is his grounds that may be in issue, but even this statement must be qualified, because whatever grounds the Commissioner might earlier have had when he made the assessment or when he disallowed the objection concerned may also become irrelevant.[143]

SARS notes that the reasons to which the taxpayer is entitled are the findings of facts and law only, and SARS is not obliged to disclose its reasoning.[144] In respect of the understatement penalties there is *prima facie* no reasoning in law. Once SARS has proven the facts that entitle it to an understatement penalty, the penalty must be paid. In this regard, where SARS, in answering the taxpayer's request for reasons, provides the facts that entitles it to an understatement penalty, and the taxpayer cannot dispute the facts, SARS has proven its case, albeit not in a court of law.

Where the taxpayer objects to the understatement penalties, there is no independent hearing where SARS must prove its case. It is SARS itself that considers the objections. Thus, where the objection is rejected and the taxpayer, for economic or similar reasons, decides not to proceed with the matter on appeal, SARS has not proven its case. In this scenario SARS is afforded damages without having proved its case. But is this necessarily procedurally wrong in law? No. In a claim for damages the procedure is broadly as follows. The plaintiff sends a letter of demand to the defendant in which the plaintiff sets out the facts that entitle him/her to damages. Where the defendant ignores the letter of demand or denies that the plaintiff has a claim for damages, the plaintiff issues summons. It is only when the matter proceeds to trial that the plaintiff gets to prove his/her case. The defendant can, at any time prior to trial, adhere to the demands of the plaintiff, and pay the damages. In these circumstances the plaintiff is awarded damages without having proved its case in a court of law.

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143 *Arepee Industries Limited v Commissioner for Inland Revenue* 1993 2 SA 216 (N) paras 222F-J.

144 SARS 2023 https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-TAdm-G05-Dispute-Resolution-Guide.pdf; Van Zyl and Carney 2024 *THRHR* 454-478.

Accordingly, it is only when the tax dispute proceeds to trial (on appeal to the Tax Court) that SARS gets the opportunity to prove its case.[145]

4 The *bona fide* inadvertent error: A special defence or fault?

Section 222 of the *TAA* provides that the understatement penalty, determinable under subsection (2) is payable unless the understatement results from a *bona fide* inadvertent error.[146]

The phrase "*bona fide* inadvertent error" is not defined in the Act, and courts have taken varying positions, thereby leaving the meaning unclear.

As discussed above, the absence of a *bona fide* inadvertent error means that fault must be present. Moreover, the burden of proof is on SARS to submit facts to the court to enable the court to make a value judgement of the absence of a *bona fide* inadvertent error. However, in the cases discussed below it often appears that SARS, taxpayers and the courts have viewed a *bona fide* inadvertent error as the taxpayer's special defence against SARS' claim for understatement penalties. In the next part we argue that the absence of a *bona fide* inadvertent error equates to there being fault. Furthermore, we argue that a proper understanding of the meaning of the phrase can be found in the understanding of the term “blameworthiness” for the understatement.

4.1 The meaning of bona fide *inadvertent error: Case law*

Since the commencement of the *TAA*, the courts have taken different interpretations of the meaning of *bona fide* inadvertent error.

In *ITC 1890* Boqwana J examined the term through the ordinary grammatical interpretation lens and found it to mean “An innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive”[147] thereby giving a wide interpretation that would excuse *bona fide* mistakes made by taxpayers.

In *W Taxpayer v CSARS* and *ITC 1948,* the Tax Court expanded on this by holding that it could not exclude a reasonable degree of care. Reasonable care on the part of the taxpayer was held to be required in all cases, even where a tax return is completed by an accountant or tax professional.[148] Therefore, merely negligent behaviour in completing a return cannot be

145 Van Zyl 2014 *Journal for Economic and Financial Science* 907-924.

146 From 1 March 2026, section 223(3) provides that a *bona fide* inadvertent error applies in the case of substantive understatements only.

147 *ITC 1890* para 45.

148 *W Taxpayer v CSARS* para 86; *ITC 1948* para 9.

considered as a *bona fide* inadvertent error, regardless of the degree of blameworthiness that such negligence gives rise to.

In *Mr A v CSARS* Olsen J described the levying of understatement penalties as being premised on the blameworthiness of the taxpayer in question rather than the harm or prejudice that SARS suffers.[149] Therefore, should blameworthy conduct in the form of either intent or negligence be the cause of an understatement, then a penalty would be correctly imposed.

The SCA in *CSARS v The Thistle Trust* found that the taxpayer's conduct, in basing its tax position on a legal opinion, amounted to *bona fide* inadvertent error.[150] SARS was found unable to issue the penalty as it had itself conceded that the behaviour in question amounted to a *bona fide* inadvertent error.[151] On appeal to the Constitutional Court, the court did not rule on the meaning of a *bona fide* inadvertent error. However, the court confirmed that the onus is on SARS to prove that a taxpayer's conduct amounts to blameworthy behaviour in accordance with the behaviour table.[152] Interestingly, the court ruled that where a taxpayer is in possession of a tax opinion by an independent registered tax practitioner, the taxpayer cannot be held accountable for the understatement.[153] Importantly, section 223(3)(b), which provides that a taxpayer can be excused for an understatement if he/she is in possession of a tax opinion by an independent registered tax practitioner, applies in the case of substantial understatements only. The Constitutional Court in *Thistle Trust* did not limit the application of section 223(3)(b) to substantial understatements only. As a result of the judgment, section 223(3)(b) may apply in respect of any behaviour in the behaviour table.[154]

In *CSARS* v *Coronation* the taxpayer relied on a legal opinion that supported its position and contended that this amounted to a *bona fide* inadvertent error; however, the contents of this legal opinion were not shared with SARS, who accordingly drew a negative inference from the nondisclosure of the opinion, and concluded that it must negate the taxpayer's position.[155] The court dismissed SARS' inference and held that the reliance did amount to a *bona fide* inadvertent error, despite the nondisclosure.[156] This decision was confirmed by the Constitutional Court in *Coronation v CSARS.* The ability of the taxpayer to rely on an opinion it did not disclose seems at odds with the law — it has been argued that reliance on an opinion in a tax matter

149 *Mr A v CSARS* (TCIT13725) (DBN) (8 February 2018) para 41.
150 *CSARS v Thistle Trust* paras 27-29.
151 *CSARS v Thistle Trust* para 29.
152 *Thistle Trust v CSARS* para 87.
153 *Thistle Trust v CSARS* para 88.
154 *Thistle Trust v CSARS* paras 88-90.
155 *CSARS v Coronation* paras 56-65.
156 *CSARS v Coronation* paras 61 and 63.

amounts to an implied waiver of the privilege which protects such an opinion from disclosure.[157] Accordingly, a taxpayer wishing to rely on an opinion should disclose this to SARS.[158]

In the case of *Lance Dickson* the High Court set out a three-step process as discussed above. The second step is important for the current discussion. In this step the court emphasised that SARS must be satisfied that a *bona fide* inadvertent error *had not occurred* (our emphasis).[159] This means that SARS must prove the absence of a *bona fide* inadvertent error. Put differently, SARS must prove fault. This part of the judgment removes the misconception discussed above that a *bona fide* inadvertent error is a special defence (or denial and positive assertion) of which the burden of proof falls on the taxpayer.

In contrast to *Lance Dickson* both the cases of *Purlish Holdings* and *Unitrans Holdings Ltd v CSARS* held *bona fide* inadvertent error to be a special defence rather than a part of SARS' burden of proof.[160] The court in both instances held that *bona fide* inadvertent error was inapplicable as the taxpayers in both cases failed to bring any evidence in support thereof.[161] Thus, by necessary implication the courts seem to have considered *bona fide* inadvertent error as a special plea or exclusion to liability, that the taxpayer has the burden of proving rather than it being the absence of blameworthy conduct that SARS must prove.

Through these cases, the precise meaning of the term remains elusive; however, the commonality between them, other than in *Lance Dickson* and *Mr A v CSARS TCIT13725 DBN,* seems to imply that taxpayers are to prove the presence of a *bona fide* inadvertent error, this being the absence of their own blameworthiness, or, as in the case of *Coronation* and *Thistle Trust*, an absence of blameworthy behaviour. The blameworthiness aspect is in line with the section 223 table in the *TAA,* which sets out different degrees of behaviour on the part of the taxpayers, with more blameworthy conduct attracting higher penalty percentages.[162] However, the consideration as a special defence is not congruent with the burden of proof that SARS bears. It must be noted that from 1 March 2026, a *bona fide* error applies in the case of substantial understatements only.

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157 Blumberg 2024 *Business Tax and Company Law Quarterly* 20-27.

158 Blumberg 2024 *Business Tax and Company Law Quarterly* 20-27.

159 *Lance Dickson* para 13.

160 *Purlish Holdings* para 24; *Unitrans Holdings Limited v CSARC* (A3094/2022) [2024] ZAGPJHC 3 (9 January 2024) para 66.

161 *Purlish Holdings* para 24; *Unitrans Holdings Limited v CSARC* (A3094/2022) [2024] ZAGPJHC 3 (9 January 2024) para 66.

162 These are "substantial understatement"; "reasonable care not taken in completing the return"; "no reasonable grounds for 'tax position' taken"; "impermissible avoidance arrangement"; "gross negligence",and "intentional tax evasion".

4.2 Blameworthiness – some lessons from the law of delict

As we argue that understatement penalties resemble a claim for damages, an understatement penalty must, by necessity, contain all the elements of a delict. In Part Three of this article, we set out which elements of an understatement penalty correspond with the elements of delict. We argue that the absence of a *bona fide* inadvertent error equates to SARS having to prove fault. Fault equates to the taxpayer being to blame for the understatement. Thus, determining whether blameworthiness on the part of the taxpayer is present is essential to SARS's imposition of understatement penalties in line with the burden of proof discussed above.

Fault or blameworthiness on the part of the taxpayer can take the form of either negligence or intent, both of which can be described as a reprehensible state of mind.[163]

On the one hand, intention is that which occurs when accountable persons direct their will at a result that they cause, while being cognisant that it is or may be wrongful.[164] Intent can take one of three forms, namely: *dolus directus*, *dolus indirectus* and *dolus eventualis*. *Dolus directus* is the direct intention to cause a result or harm, whereas *dolus indirectus* is the indirect intention to cause a result or harm, and *dolus eventualis* is a person's actual foresight of potential harm and subsequent reconciliation with this possibility.[165] Intention must be proven by the plaintiff on a balance of probabilities and can be shown by drawing inferences from the defendant's conduct, thereby showing the defendant's state of mind.[166] In the case of understatements, intent will be relevant in the case of intentional tax evasion, impermissible avoidance arrangements, no reasonable grounds for the tax position taken, or in the case of an obstructive repeat case. But this intent SARS must prove, and not merely allege. This principle was confirmed in the *Lance Dickson* case and in *Thistle Trust v CSARS*, where the respective courts held that the imposition of understatement penalties should be grounded in a factual basis, or that there must be proper grounds on the part of SARS to believe the taxpayers' treatment was incorrect.[167] Thus, accurately describing what underlies the standard of behaviour in terms of which the penalty is levied is critical to extinguishing SARS' burden of proof. Should a taxpayer, for example, clearly be acting contrary to fiscal legislation whilst being aware that the actions are reprehensible, it would likely be easy to infer intent.

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163 Neethling and Potgieter *Law of Delict* 8th ed 155-157; Loubser and Midgley *Law of Delict* 154.

164 Neethling and Potgieter *Law of Delict* 8th ed 157.

165 Midgley "Delict" 137.

166 Midgley "Delict" 137.

167 *Lance Dickson* para 43; *Thistle Trust v CSARS* paras 86-88.

On the other hand, negligence occurs when a person acts carelessly, thoughtlessly, or pays insufficient attention to the matter at hand. Negligence is tested against the standard of the reasonable person. Any conduct not deemed to be reasonable against that standard is negligent and thereby blameworthy.[168] The standard of the reasonable person will depend upon the person in question. Persons with expertise or knowledge will be tested against the standard of what a reasonable person in the same position with the same knowledge and skills would deem to be reasonable behaviour.[169] As such, experts in a particular field are held to a much higher standard than the average person on the street, where the negligence in question concerns their field expertise.[170] In *Kruger v Coetzee*[171] the then Appeal Court ruled that negligence is a three-part test, namely; was there reasonable foreseeability of the consequences, could this have been counteracted by reasonable precautions, and were these reasonable precautions taken? Should the latter not have been taken, the conduct will be negligent.[172]

Applying this in the context of tax, and particularly understatement penalties, would lead to the application of the reasonable taxpayer test to determine whether the behaviour in question was reasonable. It should also be the case that taxpayers with a professional background in tax should be held to a higher standard than everyday taxpayers without special expertise in the field. Thus, should a taxpayer reasonably foresee that his/her return or other behaviour contemplated in section 222 will lead to an understatement and know that s/he can take steps to prevent this, such behaviour will be negligent if he/she fails to take these steps.

Notably, it is not incumbent upon SARS to prove the level of blameworthiness that a taxpayer is guilty of when levying the understatement penalty. All that is required is that blameworthiness is indeed proven. The degree of the blameworthiness will be important in considering the quantum of damage in accordance with the behaviour table.

As the quasi-delictual liability under the *TAA* depends on blameworthiness, we now consider what circumstances give rise to the absence of either intention or blameworthiness. This is by no means an exhaustive list.

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168 Neethling and Potgieter *Law of Delict* 8th ed 164-166; *Goliath v MEC for Health, Eastern Cape* 2015 2 SA 97 (SCA); *Ngubane v SA Transport Services* 1991 1 SA 756 (AD) 776.

169 Neethling and Potgieter *Law of Delict* 8th ed 173-176.

170 Neethling and Potgieter *Law of Delict* 8th ed 173-176. For a complete discussion of the intricacies of "negligence" see Fagan *Aquilian Liability.*

171 *Kruger v Coetzee* 1966 2 SA 428 (A) paras 430E-F.

172 *Kruger v Coetzee* 1966 2 SA 428 (A) paras 430E-F.

Recall the SCA judgments in *Thistle Trust* and *Coronation*. In both cases the taxpayers relied on expert tax advice to clarify a tax position unclear to them. In neither cases can the intention to avoid tax be inferred from the conduct of seeking advice and following such advice. Thus, intent is excluded. Considering negligence, the taxpayers foresaw the possibility of causing an understatement; however, they both sought to take, and did take, precautionary steps in seeking professional independent tax advice. Thus, negligence is absent. In applying the reasonable taxpayer criteria, one would be hard-pressed to argue that the reasonable taxpayer would have acted differently. On appeal in the Constitutional Court in *Thistle Trust v CSARS*, SARS argued that there is a duty on a taxpayer to verify with SARS if the tax advice so obtained is correct. The court correctly ruled that such a duty would elevate SARS to the only almighty institution with the powers to interpret tax legislation.[173] Not only is this wrong in law, but it also interferes with the principle of the separation of powers.[174] However, such professional tax opinions or advice must be given with due diligence, and without contravening the clear letter of the law.[175] Thus, in both *Thistle Trust* and *Coronation* the Constitutional Court ruled that the taxpayers were blameless, as neither intent nor negligence could be proven. As such, we argue that the absence of intent or negligence (the absence of fault) constitutes a *bona fide* inadvertent error.

Another such instance whereby blameworthiness could potentially be excluded on the part of a taxpayer is where an understatement is the result of a technological glitch or failure. Consider the case where a bug in an accounting software or error results in an understatement. But is there a duty on a taxpayer to doubt software and double check the calculations? We don't think so. It is common for modern society to rely on advanced software. It is counterproductive to doubt such software and verify the correctness of the calculations thereof. Where the taxpayer relies on reputable accounting or like software and the software is duly updated, we believe that a technological fault too would give rise to a *bona fide* inadvertent error.

Another example is where a taxpayer becomes incapacitated (for example falls into a coma or suffers from a mental illness) and fails to submit a tax return. The curator *bonis* who is later appointed to administer the affairs of the taxpayer may argue that the failure to submit a tax return is no fault of the taxpayer. Similarly, a taxpayer undiagnosed and unaware of his/her dyslexia, ADHD or similar disability who records incorrect figures in his/her tax return, cannot be blamed for the understatement.

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173 *Thistle Trust v CSARS* para 89.
174 *Thistle Trust v CSARS* para 89.
175 Van der Zwan 2013 *TaxTalk* 30-32.

Moreover, where a taxpayer acts on advice from a SARS official or in accordance with a position taken by SARS previously, and that action is later considered an understatement, the taxpayer is without blame. This must be distinguished from a taxpayer's following guidelines or a tax position as provided for in Interpretation Notes and Guidelines issued by SARS. This is because these documents are not binding on SARS. The circumstances relevant here are typically where the taxpayer acts in accordance with a High Court, SCA or Constitutional Court judgment or in terms of a private or general binding ruling.

Cumulatively summed up, a *bona fide* inadvertent error is more than just a typographical error. Put plainly, it is the absence of fault. Moreover, and contrary to a substantial number of existing judgments, a *bona fide* inadvertent error is not a taxpayer's special defence to understatement penalties. Rather, it places the onus on SARS to prove that the taxpayer's conduct is either negligent or intentional.

5 Conclusion

In our view, and as evidenced from the dissenting judgments, a few misconceptions in respect of understatement penalties exist. These are in respect of the purpose of understatement penalties, the burden of proof, and the meaning of *bona fide* inadvertent errors.

The purpose of understatement penalties is two-fold. First, they serve as a deterrent to encourage tax compliance. Second, they serve to make good the patrimonial damage suffered by the fiscus because of the understatement. Put differently, they resemble a claim for damages. Accordingly, guidance in respect of the burden of proof in respect for a claim for damages must be sought in the law of evidence.

SARS must prove the presence of an understatement, that the understatement is wrongful, that the understatement caused prejudice (damage) to the fiscus, that the taxpayer is at fault for committing the understatement, and lastly, that the damage was suffered by SARS. This SARS must prove and not merely allege. In respect of the presence of an understatement, SARS must prove that any one or more of the instances of an understatement in the definition of an understatement in section 221 is present. Wrongfulness can be proven with reference to the constitutional duty to pay tax inferred from section 213 of the *Constitution*. Causation can be established by showing that SARS resources were utilised to detect or uncover the understatement. In respect of fault, SARS must prove the absence of a *bona fide* inadvertent error. With reference to the *dicta* in *Purlish Holdings*, to prove damage, it is sufficient for SARS to show that SARS resources were utilised on this taxpayer where it could have been utilised elsewhere. It is not necessary for there to be an outstanding tax as

a result of the understatement. In respect of the quantum, the behaviour table provides for the quantum based on the relevant behaviour. Here also SARS must submit evidence of the taxpayer's behaviour matching that in the behaviour table on which SARS relies. It is only in the case of a "substantial understatement" that behaviour is inferred. In this regard it is sufficient for SARS to show that the understatement falls within the monetary parameters of the definition of a "substantial understatement" in section 221. Importantly, there is no shift in the burden of proof from SARS to the taxpayer in any of the stages of the proceedings.

The quantum of the damage is determined in terms of the percentages in the behaviour table. As such, the quantum may not correlate with the damage suffered by SARS accurately. In some cases, it may be lower than the actual cost to the fiscus, and in others more. This supports the argument that understatement penalties constitute statutory punitive damages.

The meaning of a *bona fide* inadvertent error remains elusive. Twice the Constitutional Court had an opportunity to rule on the meaning, but the court noted that it would be inappropriate for the court to make such a ruling. This leaves various contradictory judgments as the ruling law. As a claim for understatement penalties is a statutory claim for damages, we believe that a *bona fide* inadvertent error is, in its simplest form, the absence of fault.

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List of Abbreviations

CSARS	Commissioner for the South African Revenue Service
Harv J on Legis	Harvard Journal on Legislation
PELJ	Potchefstroom Electronic Law Journal
NY L Sch L Rev	New York Law School Law Review
TAA	Tax Administration Act 28 of 2011
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
SARS	Commissioner for the South African Revenue Service
SCA	Supreme Court of Appeal