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A critical analysis of the 'pay now argue later' principle in the tax administration act and the justifiability thereof

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A research report submitted to the Faculty of Commerce, Law and Management in partial fulfilment of the requirements for the degree of Master of Commerce in the field of Taxation

A critical analysis of the 'pay now argue later' principle in the Tax Administration Act and the justifiability thereof

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Declaration

I declare that this research report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Commerce (specialising in Taxation) at the University of Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination at any other university.

Keotshepile Tlhabano
May 2018

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1.
ABSTRACT

The purpose of this research is to critically analyse and interpret the long standing and legislated principle widely referred to as the pay now argue later principle. This principle requires taxpayers to pay the assessed tax amount (including the associated interest and penalties) over to the South African Revenue Service ('SARS'). This is notwithstanding the fact that the taxpayer is aggrieved by the assessment, that is, the taxpayer is not in agreement with the assessment and has in fact lodged an objection against the said assessment.

The fairness and constitutionality of the pay now argue later principle has been a subject of much debate within and outside taxation circles. In the year 2000, the Constitutional Court, in the *Metcash Trading Limited v SARS*[1] case, found that the *court a quo* erred in finding the principle not to be constitutional (that is, the High Court found that the principle infringes on a basic human right- the right to access to court) and that the principle is indeed constitutional.

In this report, the researcher, through an analysis of the relevant provisions of the Constitution of the Republic of South Africa of 1996, an analysis of sections in the Tax Administration Act of 2011 making up the pay now argue later principle and the judgments of the High Court and the Constitutional Court, seeks to determine whether the principle infringes on the taxpayers' right to access to court and if so, is the infringement a justifiable limitation under section 36 of the Constitution.

Key words: pay now argue later, constitutionality, limitation of rights, tax administration, lodge an objection, basic human rights, access to court, justifiable.

[1] *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454.

Chapter 1.

INTRODUCTION

It was announced by the South African National Treasury ('National Treasury') in the published 2017 Budget Review that for the years 2017, 2018 and 2019 the government of South Africa will spend R751.9 billion on basic education, R606 billion on health, R490.9 billion on social grants and billions more on other basic services.

It is therefore apparent and acceptable that for a government to provide services to its residents and achieve its economic objectives it needs to secure funds. One of the ways in which a government can achieve this feat is by ensuring efficiency in the collection of taxes from taxpayers.

To this end, the SARS has been afforded certain powers under the provisions of the Tax Administration Act 28 of 2011 (the 'Tax Administration Act'). One such power being the fact that taxpayers are obligated to make payment to SARS on an assessment even though the taxpayer disputes the assessment (that is, the 'pay now argue later' rule) to ensure that taxes are collected.

Protecting taxpayers against unjust practices by any organ of the state (for example, SARS) is the Bill of Rights which is enshrined in chapter 2 (sections 7 to 39) of the Constitution of the Republic of South Africa, 1996 (the 'Constitution').

Section 7(1) of the Constitution provides that-

> The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

Further, section 8(1) of the Constitution provides that-

> The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

This means that neither SARS nor the legislature may operate outside the provisions as set out in the Bill of Rights (that is, infringing on the rights as set out in the Bill of Rights).

The rights afforded by the Bill of Rights are not without any limitation. Section 7(3) of the Constitution provides that-

> The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36 or elsewhere in the Bill.

Further, Section 36 of the Constitution provides that-

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

It is therefore apparent that notwithstanding the importance of SARS to efficiently and timeously collect taxes, the collection methods applied by SARS may not unreasonably and unjustifiably infringe on the rights afforded by the Constitution through the Bill of Rights. Both the responsibility to collect taxes, conferred upon SARS and the taxpayers' rights are of paramount importance. This research report will study the constitutionality of the pay now argue later principle. In this regard, the researcher will attempt to establish whether the taxpayers' constitutional right supersedes the legitimate government obligation to its citizens.

1.1 The research problem

Taking into consideration that millions of South Africans depend on the state to provide for their basic human needs (that is, food, shelter, education, healthcare, etcetera), this research report aims to critically analyse whether the taxpayers' constitutional right supersedes the legitimate government obligation to its citizens.

1.2 The sub-problems

In attempting to address the main research problem, a number of sub-problems as detailed below were of assistance.

1. The Constitution of the Republic of South Africa provide for the rights contained therein to, in certain circumstances, be limited. What do the courts need to consider when deciding on the justifiability and reasonableness of the limitation?
2. What is the pay now argue later principle and how is it applied?

3. On what basis did the court in the *Metcash Trading Limited* v CSARS and Another case decide that the pay now argue later principle is constitutional?
4. Do individual taxpayer's rights outweigh the responsibility conferred on the SARS to collect taxes?
5. What is foreign precedent regarding the pay now argue later principle?
6. Are there measures in place to ensure that the SARS does not abuse the power conferred upon it by the Tax Administration Act?

1.3 Research methodology

A qualitative approach has been adopted in the performance of this research. The research will consist of a literature review of various legislation, judicial decisions, journals, articles, internet articles, dissertations, theses and other published material.

1.4 Chapter outline

In the second chapter, a brief summary of the Interim Constitution (1993) and Final Constitution of South Africa (1996) will be provided. Also discussed will be the enactment of the Bill of Rights and the rights afforded therein with greater focus on the right of access to court and the right to property. Further, this chapter will discuss the general limitation provisions as provided for in the Constitution, which provide for the limitation of the rights enshrined in the Bill of Rights.

The third chapter analyses the principle that is widely known as the pay now argue later principle. To fully enforce the pay now argue later principle as provided for in section 164 of the Tax Administration Act 28 of 2011 (the 'Tax Administration Act'), SARS relies on the provisions of sections 172, 174 and 179 of the Tax Administration Act. These sections of the Act afford SARS the power to apply for a civil judgment for recovery of the assessed tax; appoint a third party to withhold the taxpayer's money and settle the assessed tax debt, respectively. In this regard, sections 172, 174 and 179 of the Tax Administration Act will also be discussed.

Also discussed will be the identical provisions to sections 164, 172, 174 and 179 as were provided for in the erstwhile sections of the VAT Act[2] and the Income Tax Act[3], prior to the enactment of the Tax Administration Act.

The constitutionality of the pay now argue later principle was put under the microscope in a number of cases prior and post the enactment of the Tax Administration Act. Most notable to the researcher, being the Constitutional Court case *Metcash Trading Limited v CSARS and Another*, in which the constitutionality of the erstwhile sections 36(1), 40(2)(a) and 40(5) of the VAT Act was decided. The decision by the Constitutional Court to declare the pay now argue later principle constitutional sparked a lot of debate with some learned commentators postulating the view that the Constitutional Court erred in its judgment that the principle is Constitutional and others in agreement with the decision taken by the court. This chapter will examine the *Metcash Trading Limited v CSARS and Another* case including the reviews by commentators.

South Africa, like any other Third World country would, without doubt, like to transition from Third to First World country status. In this regard, the researcher will, in the third chapter also provide a brief overview of the revenue collection methods applied by Revenue Authorities in countries which enjoy a First World status. These countries are the United States of America as it is one of the leading tax jurisdictions, Canada and New Zealand as South African tax legislation is said to resemble these countries' legislation. The methods applied by these countries will be compared to the pay now argue later principle as applied by the SARS.

The fourth chapter, discusses the remedies at the disposal of the taxpayer as enshrined in the Tax Administration Act, the Constitution and the Promotion of Administrative Justice Act (PAJA)[4].

The fifth and final chapter will condense the findings of the research and conclude on whether the taxpayers' constitutional right supersedes the legitimate government obligation to its citizens?

[2] Value-Added Tax Act 89 of 1991
[3] Income Tax Act 58 of 1962
[4] Promotion of Administrative Justice Act 3 of 2000

Chapter 2.

The Constitution of the Republic of South Africa

2.1 The Constitution

On 27 April 1994, as a result of the political changes that took place in that year, the interim Constitution of the Republic of South Africa, which was enacted in November 1993, came into effect. Between May 1994 and October 1996, the final Constitution of the Republic of South Africa was negotiated and came into effect on 4 February 1997[5].

Prior to 1994, parliament was sovereign and commanded law, which meant that it could adopt any law, no matter how unfair or discriminatory.[6] All laws, the constitutions of the time included, were subordinate to the supreme Parliament.[7] It was therefore possible for Parliament to introduce whatever legislation it thought fit and legislation could only be set aside on the grounds that the legislation had not followed the legal process laid down by parliament.[8] Laws could not be changed on the basis that they infringed human rights or breached the Constitution- because of that constitutional dispensation, Parliament reigned supreme.[9]

Before the enactment of the Interim Constitution, SARS was a law unto itself and was able to take action against taxpayers as and when necessary without judicial intervention.[10] For instance, taxpayers were unable to prevent SARS from undertaking search and seizure operations.[11] The Commissioner could decide which taxpayer should be subjected to a search and seizure operation and at that stage there was no judicial oversight to ensure that it was appropriate to use such intrusive means to obtain information from taxpayers.[12]

[5] Government Gazette 17737 Proc R6, 24 January 1997.
[6] Van Heerden 2002.
[7] Van Heerden 2002.
[8] Croome 2009.
[9] Croome 2009.
[10] Croome 2009.
[11] Croome 2016, at p281.
[12] Croome 2016, at p281.

The enactment of the Interim Constitution marked the end of South Africa being a parliamentary state to being a constitutional state. A constitution essentially concerns itself with the legal structure and distribution of legal powers in a state, as well as the exercise of these powers by the state.[13] It is a feature of modern democratic constitutions that these powers are divided between the three arms of government, that is, the legislature, the executive and the judiciary.[14] In a constitutional state, rules made in parliament (that is, legislation, etc.) are bound by the Constitution and any rule that is in contravention of the provisions enshrined in the Constitution may be found by the courts to be invalid. This therefore means that any person that is aggrieved by any law enacted by the government, is able to challenge the said law in the courts.

The relationship between the state and its citizens is unequal by its very nature in that a taxpayer is legally compelled to contribute to the state's coffers, and the revenue authority is given certain powers under fiscal statutes to ensure collection of these taxes.[15] Inherent in this relationship is the potential to infringe on the rights available to taxpayers in terms of the constitution.[16]

After the enactment of the Interim Constitution, the 'Commission of inquiry into certain aspects of the tax structure of South Africa' (Katz Commission)[17] was established. The commission was appointed to investigate and advise on the need for comprehensive tax reform in South Africa, given the democratic transition.[18] In its Interim Report, the Katz Commission dealt with some of the implications of the Interim Constitution and the effect thereof on the fiscal statutes in South Africa.[19] The commission in its report stated that:

> The commission notes that the tax system is subject to the Constitution and must conform to society's commitment of the Rule of Law. This means not only that the system should be effective in the enforcement of all tax laws and irrespective of status, but also that citizen's right to be strictly in accordance with the terms of those laws should be scrupulously protected both in the design of those laws and in their implementation.[20]

[13] Mazansky 2011, at p175.
[14] Mazansky 2011, at p175.
[15] Mazansky 2011, at p177.
[16] Mazansky 2011, at p177.
[17] Commission of inquiry into certain aspects of the tax structure of South Africa (Katz Commission), Interim Report (1994), cited in Mazansky 2011, at p177.
[18] Mazansky 2011, at p177.
[19] Croome 2016, at p282.
[20] Commission of inquiry into certain aspects of the tax structure of South Africa (Katz Commission), *Interim Report (1994),* p9, cited in Mazansky 2011, at p177.

The Katz Commission reviewed the provisions of the tax Act dealing with the recovery of tax and particularly, the erstwhile, section 91(1)(b) of the Income Tax Act (which is akin to the erstwhile section 36 of the VAT Act and whereby the Commissioner could file with the clerk, or registrar of any competent court, a statement certified by the Commissioner as correct, setting out the amount of tax or interest due by the taxpayer.[21] The effect of such a statement was akin to a civil judgment awarded by a court.[22] This had the effect that the Commissioner could institute legal proceedings thereon as if it were a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified. [23] The Katz Commission referred to section 22 of the Interim Constitution, which stated that every person has the right to have legal disputes settled by a court of law and the view was expressed that section 91 breached this provision of the Interim Constitution.[24]

The final Constitution was signed into law by the then President of the Republic, President Nelson Mandela at Sharpeville on 10 December 1996.[25] This Constitution is the ultimate custodian of the democracy enjoyed in South Africa. This can be deduced from the provisions as set out in sections 1 and 2 of the Constitution. The sections provide that-

> (1) The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) ...
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) …
>
> (2) This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

The Constitution must ensure that the state has enough power to govern, but at the same time the state's power must be limited by the Constitution to ensure that it does not violate the law or the human rights of its citizens.[26] The Constitution is thus a tool that ensures that the government of the day and its various arms do not act arbitrarily

[21] Katz Commission *Interim Report* (n 23) para 6.3.29, cited in Croome 2016, at p283.
[22] Croome 2016, at p283.
[23] Katz Commission *Interim Report* (n 23) 75, cited in Croome 2016, at p283.
[24] Croome 2016, at p283.
[25] Currie & de Waal 2013, at p7.
[26] Currie & de Waal 2013, at p8.

when dealing with the citizens. To this end, the Constitution contains a set of basic rights which are afforded to the citizens. These rights are enshrined in the Bill of Rights.

2.2 The Bill of Rights

Contained in Chapter 2 of the final Constitution (sections 7 to 39 of the Constitution) is the Bill of Rights which came into effect on 4 February 1997. Section 7 of the Constitution reads –

> (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.[27]
> (2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.[28]

Section 8 of the Constitution goes on to assert that:

> (1) This Bill applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.[29]

It is clear from the provisions of sections 7 and 8 of the Constitution that the Bill of Rights serves to protect the rights of all citizens when dealing with each other (the horizontal approach) and also when dealing with the organs of the state (the vertical approach).

It is therefore apparent that in drafting the legislation, the legislature may not draft that piece of legislation outside the parameters of the rights as contained in the Bill of Rights. The same applies to the courts (that is, the judiciary) when deciding what the law is and how it should be applied in the disputes and the ministry (that is. the executive) when executing and enforcing the rules of law and lastly all organs of state when dealing with each other and with persons in the Republic of South Africa. This therefore means that neither SARS (as an organ of state) nor parliament (as the legislature) may operate outside the provisions as set out in the Bill of Rights (that is, infringing on the rights as set out in the Bill of Rights).

According to the Organisation for Economic Co-operation and Development ('OECD'):

> Tax administrators are given wide powers to determine the tax base, to verify information provided by taxpayers and third parties and to collect the tax due. There may be a potential conflict between the use of these powers to minimise tax evasion and avoidance and to ensure that all taxpayers are fairly treated, with the need to

[27] Section 7(1) of the Constitution.
[28] Section 7(2) of the Constitution.
[29] Section 8(1) of the Constitution.

> respect the rights of individual taxpayers. The rights to privacy, to confidentiality, of access to information, and to appeal against decisions of the administration, for example, are fundamental rights in democratic societies. A high degree of co-operation is more likely to be forthcoming if taxpayers perceive the system as being fair and if their basic rights are clearly set out and respected. In practice, all OECD governments take great care to ensure that these rights are respected.[30]

The rights as contained in the Bill of Rights are afforded to and apply solely to people in South Africa. Chaskalson CJ in *Kaunda v President of the Republic of South Africa*[31], stated that the bearers of the rights in the South African Bill of Rights are people in South Africa and that nothing in the text of the Bill of Rights suggests that the Bill is of general application beyond South Africa's borders.

2.2.1 Access to court (section 34 of the Constitution)

The courts have been tasked with determining whether the Tax Administration Act infringes some of the rights provided for in the Bill of Rights, one such right is the right to *access to court*. Section 34 of the Constitution provides that –

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

The right of access to courts is a pre-requisite to the enjoyment of other constitutional rights. Without it, the extensive protections and guarantees provided in our Bill of Rights would be meaningless.[32]

In the *Chief Lesapo v North West Agricultural Bank & another*[33] case the Constitutional Court was tasked with determining the validity of clause that allowed a bank to attach and sell its debtors' property in execution without an order of court. The right of the bank to attach and sell its debtors' property was triggered by the debtor being in default to repay a loan. Before the Constitutional Court, the bank argued that the execution

[30] OECD, 1990, Taxpayers' Rights and Obligations: A Survey of the legal situation in OECD countries, cited in Croome 2010, at p14.
[31] *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (4 August 2004)
[32] Brickhill & Friedman 2013, at p59-1.
[33] *Chief Lesapo v North West Agricultural Bank & Another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC).

procedure only applied where there was no dispute between the parties about the underlying indebtedness and, as such, section 34 of the Constitution could have no application: there was no dispute between the parties capable of resolution by the application of law. [34]

Mokgoro J, when dismissing the argument found as follows:

> [15] The judicial process, guaranteed by section 34, also protects the attachment and sale of a debtor's property, even where there is no dispute concerning the underlying obligation of the debtor on the strength of which the attachment and execution takes place. That protection extends to the circumstances in which property may be seized and sold in execution, and includes the control that is exercised over sales in execution.[35]

Mokgoro J went on further to say:

> [16] On this analysis, section 34 and the access to courts it guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order. The effect of this underlying principle on the provisions of section 34 is that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land.[36]

It is thus clear that, attaching of a person's property without giving the person an opportunity to seek recourse with a court or any other tribunal, is in contravention of the right to access to court. This is further buttressed by the conclusion reached by Brickhill & Friedman[37] in analysing the judgment by Mokgoro J in the *Chief Lesapo v North West Agricultural Bank & another* case is that whenever a person is entitled to impose a constraint on the person or property of another without recourse to a court (or other tribunal), section 34 of the Constitution will be limited and the constitutionality of this entitlement will need to be tested with reference to section 36 of the Constitution (see discussion on limitation of rights below).

2.2.2 Right to Property

Section 25 of the Constitution affords everyone in the Republic of South Africa the right to property. It prohibits the deprivation of property 'except in terms of law of general

[34] Brickhill & Friedman 2013, at p59-1.
[35] *Chief Lesapo v North West Agricultural Bank & Another*, at 15.
[36] *Chief Lesapo v North West Agricultural Bank & Another*, at 16.
[37] Brickhill & Friedman 2013, at p59-22.

application' and specifies that 'no law may permit arbitrary deprivation of property'.[38] The section reads:

> (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application—
> (a) for a public purpose or in the public interest; and
> (b) …
> (3) …
> (4) For the purposes of this section—
> (a) …
> (b) property is not limited to land.

It is apparent from the reading of Section 25(4)(b) that this subsection specifically provides, inter alia, that for section 25, the term 'property' is not limited to land.[39] The Constitutional Court dealt with the meaning of the term property in the *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service*[40]. Ackerman J at para 51 held that:

> … ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of section 25.[41]

It is thus clear that the term property refers also to several different things held by a taxpayer (these include taxpayer's entitlement to certain benefits or rights).[42]

The term 'deprivation' was given a wide meaning by the Constitutional Court in the *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service* case.[43] Noting that the term was somewhat misleading or confusing, Ackerman J, remarked that:

> in a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned.[44]

Ackerman J, continued to say that:

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[38] Roux 2013, at p46-9.
[39] Croome 2010, at p17.
[40] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service, and Another* 2002 (4) SA 768 (CC).
[41] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*, cited in Croome, 2010, at p17.
[42] Croome 2010, at p18.
[43] Roux 2013, at p46-18.
[44] Roux 2013, at p46-18.

> The term 'deprived' or 'deprivation' is… somewhat misleading or confusing because it can create the wrong impression that it invariably refers to the taking away of property, whereas in fact, "the term 'deprivation' is distinguished very clearly from the narrower term 'expropriation' in constitutional jurisprudence worldwide."
>
> In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 is applied to this wide genus of interference, "deprivation" would encompass all species thereof and "expropriation" would apply only to a narrower species of interference. Chaskalson and Lewis, using a slightly different idiom and dealing with both the interim and 1996 Constitutions, put it equally correctly thus: "Expropriations are treated as a subset of deprivations. There are certain requirements for the validity of all deprivations."[45]

Ackerman J, held further that:

> Viewed from this perspective section 25(1) deals with all "property" and all deprivations (including expropriations). If the deprivation infringes (limits) section 25(1) and cannot be justified under section 36 that is the end of the matter. The provision is unconstitutional. [46]

It is clear that for the pay now argue later principle to be found to be unconstitutional, the court would consider whether the principle deprives taxpayers of their property. If it is found that the principle represents a deprivation of taxpayer's property, the court would seek to establish whether the deprivation is in terms of law of general application. The court would find the principle unconstitutional if that law arbitrarily deprives taxpayers of their property.

The courts have had to decide on whether or not the pay now argue later principle is unconstitutional in that it infringes on the taxpayer's right to property. Snyders J in the *Metcash Trading Limited v CSARS and Another* case stated:

> Without abandoning the reliance on s25(1) of the Constitution, counsel for the applicant did not pursue the argument contained in the heads of argument during oral address. The respondents persisted in their opposition on this point, which could, broadly speaking, be summarised to be that the first respondent at all relevant times acted in terms of the Act, which is a law of general application and nor arbitrary. In my view, the point was, rightly, not pursued on behalf of the applicant. The argument on behalf of the respondents is, clearly valid.[47]

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[45] First National Bank of SA t/a Wesbank v Commissioner*, South African Revenue Service*, at 57.
[46] *First National Bank of SA t/a Wesbank v Commissioner, South African Revenue Service*, at 58.
[47] *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2000 (2) SA 232 (W); 2000 (3) BCLR 318 (W) cited in Croome 2010, at p39.

It is thus apparent that as the pay now argue later principle is found in law of general application, the taxpayers seeking to challenge the principle face serious difficulties in satisfying the courts that the principle violates their right to property.[48]

2.2.3 Limitation of rights (section 36 of the Constitution)

It is trite that the rights afforded in the Bill of Rights are not without limitation. Many taxpayers have the incorrect impression that because rights are contained in the final Constitution there is no manner whereby such rights can be breached.[49] This research report will not go into great detail in discussing the legal principles relating to the limitation of rights enshrined in the Bill of Rights, a brief overview and of the limitations will be provided so as to provide a general context to the limitation of rights.

Section 36 of the Constitution provides that –

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

It is thus apparent that the rights contained in the Constitution are not absolute and it is possible that a statute of general application can limit those rights.[50] Further, if the legislator wishes to limit any right contained in the Constitution, the right must be limited such that the limitation applies equally to all citizens.[51] Also, for the limitation to be regarded as constitutional, the Constitution requires that infringement of a right to be reasonable and justifiable.

When attempting to establish whether or not one's constitutional rights have been infringed, it is of importance to consider the provisions of Chapter 2 of the Constitution

[48] Croome 2010, at p39.
[49] Croome 2009.
[50] Croome 2016, at p288.
[51] Croome 2016, at p288.

and the rights enshrined therein.[52] If one or more of the rights contained therein is found to be infringed, it is then that one should establish the constitutionality of the limitation (that is, whether the limitation meets the requirements contained in section 36 of the Constitution).[53]

In challenging the constitutionality of a provision in a tax Act, an aggrieved taxpayer must demonstrate that the right has been limited and the legislator and or SARS must demonstrate that the limitation imposed by the impugned provisions of the Act is justifiable and reasonable. This was confirmed by Ackerman J, in the Constitutional Court case *Ferreira v Levin NO.*[54] Ackermann J held that:

> "The task of determining whether the provisions… of the Act are invalid because they are inconsistent with the guaranteed rights here under discussion involves two stages, first, an enquiry as to whether there has been an infringement of the… guaranteed right; if so, a further enquiry as to whether such infringement is justified under section 33(1) [of the Constitution], the limitation clause. The task of interpreting the Chapter 3 fundamental rights rests, of course, with the Courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of the particular right in question. Concerning the second stage, "[it] is for the legislature, or the party relying on the legislation, to establish this justification (in terms of section 33(1) of the Constitution), and not for the party challenging it, to show that it was not justified".[55]

The limitation of a constitutional right by the state is at times motivated by a pressing need to curb certain behavior by the citizens which is unlawful or impedes on the rights of other citizens. For instance, the Constitutional Court in the *Prince v The President of the Law Society of The Cape of Good Hope*[56] case ruled that the responsibility of the state to curb the abuse and trafficking of drugs (that is, marijuana) supersedes the Rastafarian community's constitutional right to religion.

In the *Prince v President of the Law Society of the Cape of Good Hope* case, the applicant wished to be an attorney and had satisfied all the academic requirements for admission as such. The one outstanding requirement for the applicant to be admitted as an attorney was for him to serve a period of community service as required in terms of the Attorney's Act. In his application to register his contract of community service

[52] Croome 2009.
[53] Croome 2009.
[54] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995).
[55] *Ferreira v Levin NO*.
[56] *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002).

with the Law Society of the Cape of Good Hope, he disclosed that he had two previous convictions for possession of marijuana. He also asserted that he intends on continuing to use marijuana as the usage of the drug forms part of his religion.

His application to the Law Society was declined. The Law Society was of the view that the applicant was not fit and proper to be admitted as an attorney. This view was based on the applicant's prior convictions and more importantly, the applicant's intention to keep on breaking the law by using marijuana.

The applicant's cry to the Constitutional Court and the courts below was whether the failure to provide an exception in respect of the use of marijuana for religious purposes by Rastafari, infringed their religious rights under the Constitution.[57]

The court, in a majority judgement, highlighted the importance of the prohibition of the use of use of marijuana. Chaskalson CJ, Ackermann and Kriegler JJ held that:

> The prohibition against the possession and use of cannabis is… part of a worldwide attempt to curb its distribution, of which the present government is fully supportive.[58]

Held further that:

> In a democratic society, the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social…[59]

Regarding the infringement of the right, the court found that the prohibition on the use of marijuana infringes on the Rastafari's right to freedom of religion. The court then needed to ascertain whether or not the infringement is constitutional. Chaskalson CJ, Ackermann and Kriegler JJ, held that:

> … the legislation criminalising the use and possession of cannabis limits the religious rights of Rastafari under the Constitution, and that what has to be decided in this case is, whether that limitation is justifiable under section 36 of the Constitution.[60]

In determining whether this infringement of a constitutional right to religion is constitutional, the court applied the proportionality test. The court weighed the importance of the prohibition against the importance of the right infringed by the prohibition. Chaskalson CJ, Ackermann and Kriegler JJ held that:

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[57] *Prince v President of the Law Society of the Cape of Good Hope*, at 94.
[58] *Prince v President of the Law Society of the Cape of Good Hope*, at 107.
[59] *Prince v President of the Law Society of the Cape of Good Hope*, at 108.
[60] *Prince v President of the Law Society of the Cape of Good Hope*, at 111.

> In the proportionality analysis required by section 36 of the Constitution there can be no doubt that the right to freedom of religion and to practise religion are important rights in an open and democratic society based on human dignity, equality and freedom, and that the disputed legislation places a substantial limitation on the religious practices of Rastafari. It must also be accepted that the legislation serves an important governmental purpose in the war against drugs.[61]

In its analysis and dismissing the applicant's cry, the court found that the state's duty to its citizens outweighs an individual's constitutional right. And therefore, the limitation is reasonable and justifiable as required by section 36 of the Constitution. Chaskalson CJ, Ackermann and Kriegler JJ held that:

> The use made of cannabis by Rastafari cannot in the circumstances be sanctioned without impairing the state's ability to enforce its legislation in the interests of the public at large and to honour its international obligation to do so. The failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari is thus reasonable and justifiable under our Constitution.[62]

The decision in the *Prince v President of the Law Society of the Cape of Good Hope* case is relevant to this research in that the court had to decide whether the state's obligation to its citizens takes precedence over an individual's right. The pay now argue later principle is said to infringe on the taxpayer's right access to court and right to property. If indeed this is so, is the taxpayer's right to access to court or right to property more important than the state's need to enforce its legislation in the interests of the public by collecting revenue timeously?

[61] *Prince v President of the Law Society of the Cape of Good Hope*, at 114.
[62] *Prince v President of the Law Society of the Cape of Good Hope*, at 139.

Chapter 3.

An analysis of the pay now argue later principle

Introduction

The assessment issued by SARS against a taxpayer reflects the amount of tax payable and the date the amount is due by. Should the taxpayer not make the payment as reflected on the assessment so received, SARS is empowered by the Tax Administration Act in Chapter 12, to levy the taxpayer with interest on the outstanding tax debt[63] at the rate prescribed therein. The Tax Administration Act further affords SARS the right to collect the tax utilising the recovery methods as contained in that Act.

To collect the tax due, SARS may affect the pay now argue later principle, provided for in section 164 of the Tax Administration Act. This principle requires that a taxpayer aggrieved by the assessment by SARS, pays to the Commissioner the tax due first and may later lodge a dispute against the amount reflected by the Commissioner as due. To fully effect the pay now argue later principle, SARS further relies on the provisions of sections 172, 173 and 179 of the Tax Administration Act to apply for a civil judgment for recovery of the assessed tax and appoint a third party to withhold the taxpayer's money and settle the assessed tax debt, respectively. In this regard, the provisions of sections 172, 173 and 179 of the Tax Administration Act will be discussed below.

Further, the wording of the sections to the Tax Administration Act, making up the pay now argue later principle, that is sections 164, 172, 173 and 179 is similar to the wording in the erstwhile sections 36, 40(2)(a), 40(5) and 47 of the Value-Added Tax Act 89 of 1991 (VAT Act)[64], respectively. Where the principles differ is that although the principles in both the Acts provide for payment to be suspended pending an objection or appeal, section 36, unlike section 164 does not list the factors for SARS to consider in deciding whether or not to suspend the payment. Lastly, in terms of section 164(6), where a taxpayer has requested for suspension under section 164(2), SARS may not initiate proceedings to recover monies from a taxpayer from the date that request is received by SARS. SARS may only initiate steps to recover the monies ten days after

[63] Section 169 of the Tax Administration Act reads: (1) An amount of tax due or payable in terms of a tax Act is a tax debt due to SARS for the benefit of the National Revenue Fund.
[64] These sections identical to the erstwhile sections 88, 91(1)(b) and 99 of the Income Tax Act.

SARS's notice of its decision has been issued to the taxpayer.[65] This prohibition was not enacted in the erstwhile section 36 of the VAT Act. It can be concluded that the rules are, for all intents and purposes similar and therefore the analysis will focus on sections of the Tax Administration Act.

3.1 The 'pay now argue later' rule: Section 164 of the Tax Administration Act

Upon being furnished with an assessment by SARS, a taxpayer that is not in agreement with or is aggrieved by the assessment, may under the provisions of sections 104 of the Tax Administration Act object[66] to the assessment. Should that taxpayer be aggrieved by the decision provided by SARS in terms of section 106 of the Tax Administration Act, the taxpayer may appeal[67] against the decision to the tax board[68] or tax court[69] in a manner that prescribed in the Tax Administration Act.

The lodging of the objection or appeal against an assessment by an aggrieved taxpayer does not, under the provisions of section 164 of the Tax Administration Act, automatically suspend the payment of the assessed tax amount. Section 164(1) of the Tax Administration Act reads:

> (1) Unless a senior SARS official otherwise directs... –
> (a) the obligation to pay tax; and
> (b) the right of SARS to receive and recover tax,
> will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.

It is thus apparent that in terms of section 164(1) of the Tax Administration Act, the Commissioner for SARS has the discretion as to whether the payment of the assessed tax amount should or should not be suspended pending an objection or appeal by the taxpayer.

This discretion will be applied by SARS should the taxpayer chose to utilise the 'relief' mechanism afforded to the taxpayer as provided for in subsection 2 to section 164 of the Tax Administration Act. Using the provisions of this subsection, a taxpayer is able

[65] Keulder 2013.
[66] See section 104 of the Tax Administration Act.
[67] See section 104 of the Tax Administration Act.
[68] For more on tax boards, see sections 108 to 115 of the Tax Administration Act.
[69] For more on tax courts, see sections 116 to 132 of the Tax Administration Act.

to request that SARS allows her not to pay now and argue later but rather argue first and pay later. Section 164(2) provides that:

> (2) a taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax.

In applying his discretion, the Commissioner may, per section 164(3) of the Tax Administration Act, suspend the assessed tax amount or a portion of the amount. Section 164(3) provides that:

> (3) a senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to relevant factors, including –
> (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
> (b) the compliance history of the taxpayer with SARS;
> (c) whether fraud is prima facie involved in the origin of the dispute;
> (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the fiscus if the disputed tax is not paid or recovered; or
> (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus.

It is apparent that, upon receiving an assessment that she is in disagreement with, an aggrieved taxpayer has two options. At the time that the objection is formulated the taxpayer should decide whether to pay the tax and know that if they succeed with their objection or appeal, they will receive a refund of the tax paid by them together with interest.[70] Should a taxpayer, however, decide against settling the tax reflected on the assessment, that taxpayer will have to request that the Commissioner grants her a postponement of paying the tax.[71] This request will be made under the provisions of section 164(2) of the Tax Administration Act. Should the postponement be granted and subsequent to that, the objection lodged by the taxpayer become unsuccessful, the taxpayer will have to pay over to the Commissioner, the assessed amount and interest.[72]

In applying for a suspension of payment the aggrieved taxpayer bears the onus of persuading the Commissioner to suspend the payment by showing that at least one of the criterion listed in section 164(3) of the Tax Administration Act applies to such taxpayer. The taxpayer must prove to SARS that the recoverability of the amount of tax

[70] Croome & Olivier 2015, at p371.
[71] Croome & Olivier 2015, at p371.
[72] Croome & Olivier 2015, at p371.

in dispute is not at all in jeopardy and that he is not dissipating his assets by giving them away or squandering the assets in any other way.[73] The behaviour of the taxpayer is of great importance as SARS, in deciding whether or not to grant the suspension of payment, considers the compliance history of the taxpayer and also considers whether the dispute has an element of fraud.

In proving financial hardship, the taxpayer faces a mammoth task of proving that paying the disputed amount will result in the taxpayer experiencing irreparable hardship which is not justified by prejudice SARS may encounter if the disputed tax amount is not ultimately paid by the taxpayer.[74]

Should the Commissioner, after consideration of the factors listed in section 164(3), believe that the taxpayer has no grounds to request for the suspension (that is, the taxpayer maybe attempting to defer payment), SARS may decline the taxpayer's request. [75] SARS may also decide to revoke its initial decision to grant the taxpayer's request for the suspension of payment, if on further consideration, SARS believe that the suspension was not supposed to have been granted.[76] The revocation may also occur where the factors listed in section 164(3) materially changed.[77]

It must be noted that the criterion listed in section 164(3) of the Tax Administration Act may not be exhaustive. This is, per Croome and Oliver, as a result of the word 'including' in section 164(3).[78] This means that, there is a possibility that further relevant factors may be considered by SARS when exercising its discretion. [79] The effect of this could be that both the taxpayer and the commissioner may be able to consider other factors which they deem relevant, which are not listed in this subsection.[80] The Commissioner's considering of further factors which will be relevant will most likely not be set in stone but rather be on a case by case basis.[81]

[73] Croome & Olivier 2015, at p379.
[74] Croome & Olivier 2015, at p379.
[75] Section 164(5) of the Tax Administration Act.
[76] Section 164(5) of the Tax Administration Act.
[77] Section 164(5) of the Tax Administration Act.
[78] Croome & Olivier 2015, at p379.
[79] Johannes 2016.
[80] Johannes 2016.
[81] Johannes 2016.

The Tax Administration Act affords the aggrieved taxpayer requesting for suspension, some time to institute a dispute to the revocation or denial of the suspension, albeit at the discretion of SARS. Section 164(6) prevents SARS from invoking recovery proceedings for a period commencing from the date the request for suspension is received by SARS or from the date the initially granted suspension is revoked by SARS ending ten business days after notice of SARS' decision not to suspend or decision to revoke the suspension initially granted.[82] The Tax Administration Act however, permits SARS to proceed with the recovery proceedings if SARS reasonably believes that there exists a possibility that the taxpayer may dissipate her assets.[83]

The constitutionality of the payment of a tax debt pending an objection or appeal was questioned in the *Metcash Trading Limited v CSARS and Another* case. The principle was held by the Constitutional Court to be constitutionally sound. Kriegler J held that:

> … none of the grounds for contending that section 36(1) of the Act falls foul of the constitutionally protected right of access to the courts can be supported.[84]

Held further that:

> …the 'pay now, argue later' rule applicable to a vendor who is aggrieved by an assessment under our VAT legislation does not infringe such vendor's constitutional right to due adjudication or if it does, the limitation is justified.[85]

The *Metcash Trading Limited v CSARS and Another* case concerned the pay now argue later principle from a VAT perspective. It was contended in the *Capstone 556 (Pty) Ltd v Commissioner for the South African Revenue Service* case that the pay now argue later principle may not pass constitutional muster if it were challenged from an income tax perspective. It was held that:

> There are material differences distinguishing the position of self-regulating vendors under the value-added tax system and taxpayers under the entirely revenue authority-regulated income tax dispensation. Thus, the considerations which persuaded the Constitutional Court to reject the attack on the aforementioned provisions of the VAT Act in Metcash might not apply altogether equally in any scrutiny of the constitutionality of the equivalent provisions in the IT Act. In this respect I have the effect of the pay first, argue later' provisions pending the determination of the Commissioner of an objection (as distinct from pending the determination by the Tax Court of an appeal) to an income tax assessment particularly in mind as an aspect that might well receive a different

[82] Section 164(6) of the Tax Administration Act.
[83] Section 164(6) of the Tax Administration Act.
[84] *Metcash Trading v CSARS and Another* (CC) at 48.
[85] *Metcash Trading v CSARS and Another* (CC) at 67.

> treatment if challenged, particularly in the context of the fundamental right to administrative justice.[86]

It is, however argued by Croome and Olivier that another court would come to the same decision if the constitutionality of the pay now argue later principle was questioned from an income tax perspective.[87] This is so for the reason that the law in the Tax Administration Act is applicable to all taxpayers (that is, a law of general application).[88]

3.2 Application of civil judgment for recovery of tax: Sections 172 and 174 of the Tax Administration Act

Should a taxpayer not make payment of the amount of tax reflected by SARS as being due or payable by the taxpayer, the Tax Administration Act empowers SARS to employ the provisions of section 172 to apply for a civil judgment against a taxpayer. Similar powers were also provided for in the erstwhile section 91 of the Income Tax Act and the erstwhile section 40 of the VAT Act (both these sections were repealed and replaced by section 172 of the Tax Administration Act).

Section 172(1) of the Tax Administration Act provides that if a taxpayer has an outstanding debt, SARS may, in a bid to recover the tax, file a statement with a clerk or registrar of a competent court setting out the amount of tax payable. SARS may file this statement only after affording the taxpayer ten business days' notice. SARS, according to section 172(3), is not required to issue the taxpayer with the 'ten business days' notice if SARS is of the view that issuing a notice to the taxpayer would prejudice the collection of tax. Notifying the taxpayer is therefore at the discretion of SARS.

This statement may be filed by SARS regardless of whether or not the taxpayer has lodged an objection or appeal. The statement may however, not be filed if the payment of tax has been suspended or the period as referred to in section 164(6)[89] of the Tax Administration Act has not expired.[90]

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[86] *Capstone 556 (Pty) Ltd v Commissioner*, at 9.
[87] Croome & Olivier 2015, at p376.
[88] Croome & Olivier 2015, at p376.
[89] Section 164(6) … a period commencing from the date the request for suspension is received by SARS or from the date the initially granted suspension is revoked by SARS ending ten business days after notice of SARS' decision not to suspend or decision to revoke the suspension initially granted.
[90] Section 172(2) of the Tax Administration Act.

Croome[91] is of the view that the statement filed by the Commissioner at a court constitutes a judgment against the taxpayer. He goes on further to say that where the Commissioner files a statement in respect of a natural person they will be unable to procure a credit card personally and the credit bureaus will blacklist such a person. Croome's views are buttressed by section 174 which provides for the certified statement to be

> treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement.[92]

It is contended that the loss of overdraft facilities at a bank or credit lines with suppliers (as a result of the loss of the taxpayer's creditworthiness due to the "judgment" against the taxpayer) to the taxpayer's business can impair the value of the business and can precipitate the financial collapse of the business.[93] The filing of a statement at a court by the Commissioner constitutes the deprivation of the taxpayer's property.[94] The question that arises is whether or not the filing of a statement is constitutionally valid?

The filing of a statement at a court by SARS has been deliberated in our courts. There has, however, not been a judgement by the Constitutional Court validating or invalidating this procedure. The Constitutional Court in the *Motsepe v Commissioner for Inland Revenue*[95] was called upon to decide on the constitutional validity of the filing of the statement with a court. The Constitutional Court sadly rejected the taxpayer's request to review the validity of the erstwhile sections 91(1)(b), 92 and 94 of the Income Tax Act as, according to the court, the taxpayer's cry was not raised in the Court *a quo*.[96]

The tax court in the matter between *Traco Marketing & Another v Minister of Finance & others*[97], held that a payment reflected as owing by a taxpayer may not be suspended by an objection lodged by a taxpayer. The court also held that a taxpayer may apply to

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[91] Croome 2009.
[92] Section 174 of the Tax Administration Act.
[93] Croome & Olivier 2015, at p388.
[94] Croome & Olivier 2015, at p388.
[95] *Motsepe v Commissioner for Inland Revenue* (CCT35/96) [1997] ZACC 3; 1997 (6) BCLR 692; 1997 (2) SA 897.
[96] Croome & Olivier 2015, at p389.
[97] *Traco Marketing (Pty) Ltd and Another v Minister of Finance and Another, (1996) 2 ALL SA 467 (SECLD) 60 SATC 526*.

a court for the rescission of the statement procedure once the taxpayer is aware of the statement against him.

In the matter *Mokoena v Commissioner for the South African Revenue Service* [98] the court made it clear that the Commissioner may not arbitrarily file the statement with a court. Spilg J held at paragraph 20 that it may be imperative to ensure that certain checks and balances are performed when applying the statement procedure so as to protect the rights afforded to taxpayers. Spilg J also commented that:

> The provision… is draconian and should therefore be exercised with care by properly experienced and suitably qualified personnel since it may otherwise be reduced to an arbitrary guesstimate with grave consequences to the taxpayer. This is so because the Commissioner is entitled, even if there is an objection or an appeal, to seize and realise assets including money standing to the credit of the taxpayer's bank account notwithstanding that these actions may jeopardise the taxpayer's cash flow and business.[99]

3.3 Appointment of a third party as agent: Section 179 of the Tax Administration Act

Section 179 of the Tax Administration Act affords SARS the power to appoint a third party as agent of a taxpayer, whom according to SARS has a tax debt, to ensure that that tax debt is settled.

Section 179(1) provides that:

> SARS may authorise the issue of a notice to a person (third party)[100] who holds or owes or will hold or will owe any money including salary, wage or another remuneration for or to the taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding debt.[101]

This means that the Commissioner is empowered to direct that the taxpayer's bank deliver any funds held in that bank account to the Commissioner in settlement of any amounts reflected as due by the taxpayer.[102] Also, relying on the provisions of section 179 of the Tax Administration Act, the Commissioner could and can direct that an

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[98] *Mokoena v Commissioner for the South African Revenue Service* (05/20445) [2010] ZAGPJHC 79; 2011 (2) SA 556 (GSJ) (31 August 2010).
[99] *Mokoena v Commissioner for the South African Revenue Service*, at 10.
[100] Researcher's emphasis.
[101] Section 179(1) of the Tax Administration Act.
[102] Croome 2009.

employer withholds its employee's salary or a portion thereof in order for the employer to settle taxes due by that employee.[103]

The wording of section 179 does not make it clear whether the Commissioner may instruct a bank to settle a taxpayer's tax debt with SARS using the money held in the taxpayer's credit card account or an overdraft facility.[104] Croome, however is of the opinion that the Commissioner is not entitled to instruct the bank to increase the taxpayer's overdraft limit in order to request the monies from the bank.[105] It is unlikely that that a court would authorise a bank to increase the taxpayer's overdraft to settle tax reflected as owing to SARS as the bank does not, in fact, have any funds belonging to the taxpayer as required under section 179 of the Tax Administration Act (and the erstwhile section 99 of the Income Tax Act), when the taxpayer's bank account is in overdraft.[106]

Section 179(3) provides that –

> a person receiving the notice must pay the money in accordance with the notice and, if the person parts with the money contrary to the notice, the person is personally liable for the money.[107]

Under this provision, a bank or an employer cannot disregard the notice to pay over funds to SARS and if they do chose to do so, they will become liable to the Commissioner for the monies that they held for the taxpayer and which funds could have been paid to the Commissioner.[108] Section 179(2) does however offer relief for a third party that is not able to comply with the requirements of the notice. The section reads:

> (2) A person that is unable to comply with a requirement of the notice, must advise the senior SARS official of the reasons for the inability to comply within the period specified in the notice and the official may withdraw or amend the notice as is appropriate under the circumstances.

SARS is prohibited by the Tax Administration Act in section 179(5), from issuing notice to a third party if the final demand for payment is not delivered to the taxpayer at least ten working days before the issue of the notice. This demand must set out the recovery

[103] Croome & Olivier 2015, at p403.
[104] Croome 2009.
[105] Croome 2009.
[106] Croome & Olivier 2015, at p398.
[107] Section 179(3) of the Tax Administration Act.
[108] Croome & Olivier 2015, at p403.

steps that SARS may institute in the event that the taxpayer fails to make payment of the tax debt as reflected and the available debt relief mechanisms under that Act.[109] The relief mechanisms afforded by the Act to a natural person is for such a person to,

> …within five business days of receiving the demand, apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on the basic living expenses of the tax debtor and his or her dependents.[110]

For a taxpayer that is not a natural person, that taxpayer may

> …within five business days of receiving the demand, apply to SARS for a reduction of the amount to be paid to SARS under subsection (1), based on serious financial hardship.[111]

It is clear that the approval of the reduction of the tax debt, as requested by the taxpayer, is at the discretion of the Commissioner. The natural person will have to prove to SARS that paying the whole amount will result in the taxpayer not being able to afford basic living expenses and the non-natural person will have to prove financial hardship. Whether the taxpayers are successful, will depend on the discretion of the Commissioner.

Also discretionary to SARS is the issuing of the final demand. According to section 179(6) –

> SARS need not issue a final demand under subsection (5) if a SARS is satisfied that to issue a final demand would prejudice the collection of the tax debt.

The constitutionality of appointment of a third party as agent by SARS was challenged in the *Hindry v Nedcor*[112] *case*. In this case, SARS erroneously made a refund to a taxpayer. SARS sought to recover the amount due by appointing the applicant's bank as agent and as a result the bank had to, immediately or as soon as the applicant's account was credited with money, pay the amount over to SARS. The applicant applied for an interdict requesting the court to prohibit the bank from paying the money to SARS on the grounds that the erstwhile section 99[113] of the Income tax act, which empowered SARS to appoint a third party as agent, is unconstitutional.

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[109] Section 179(5) of the Tax Administration Act.
[110] Section 179(5)(a) of the Tax Administration Act.
[111] Section 179(5)(b) of the Tax Administration Act.
[112] *Hindry v Nedcor Bank Ltd & Another* 1999 (2) All SA 38 (W)
[113] Section 99 of the Income Tax Act was replaced by section 179 of the Tax Administration Act.

Wunsh J held that the purpose of the impugned section is to facilitate and enhance SARS's ability to recover taxes which are due, promptly and to avoid taxpayers' assets being put beyond the Commissioner's reach.[114] Held further that a taxpayer's loss of property can be remedied by available legal or administrative relief if there is just cause.[115] Wunsh J also asserted that appointing third parties as agents is recognised in other countries which have open and democratic societies.[116] The court found the appointing of a third party as agent by SARS, is constitutional.[117]

It is important to note, however, that the Constitutional Court has not pronounced on the issues considered in *Hindry v Nedcor*. The judgement in that case is thus inconclusive as to the constitutionality of the erstwhile section 99 of the Income Tax Act and the new and identical version thereof as set out in section 179 of the Tax Administration Act.[118]

These measures are extreme and in Croome's view, the Commissioner's power to declare a person the agent of a taxpayer is a draconian one, but it is not unique to South Africa.[119] Croome further postulates the view that the Commissioner, in practice only resorts to these exaggerated methods where taxpayers have ignored the Commissioner's attempts to requests for payment.[120]

The courts have illustrated in the matter *Nondabula v Commissioner for the South African Revenue Service*[121] that it will not be tolerated for the Commissioner to issue third party notices in an arbitrary manner. In that matter, SARS issued an additional assessment in terms of which the taxpayer was ordered to pay an amount of R1,422,637.83 within 10 days, in a letter dated 29 September 2016. The taxpayer was thereafter issued with a statement of account by SARS which reflected a tax debt of R1,404,517.97. SARS offered no explanation to the taxpayer as to how the balance was arrived at. On 4 April 2016 the taxpayer filed an objection to the assessment to which SARS responded by issuing a letter on 5 May 2016, objecting to the objection

[114] *Hindry v Nedcor.*
[115] *Hindry v Nedcor.*
[116] *Hindry v Nedcor.*
[117] *Hindry v Nedcor.*
[118] Croome & Olivier 2015, at 399.
[119] Croome 2009.
[120] Croome 2009.
[121] *Nondabula v Commissioner: SARS and Another* (4062/2016) [2017] ZAECMHC 21.

and rejecting the taxpayer's objection. The taxpayer then wrote another letter to the Commissioner on 3 June 2016 in which further documentation was submitted and a request was made for the first respondent to reconsider the assessment and note the objection. None of the objections and letters were responded to by SARS.

Jolwana JA held that:

> The first respondent is obviously exercising a public power or performing a public function in terms of the Act. In terms of section 195 (1) (f) public administration of which the first respondent is part must be accountable and the only way of ensuring its accountability is by ensuring that it complies with the Act. Section 195 (1) (g) provides that "transparency must be fostered by providing the public with timely, accessible and accurate information. Subsection (2) (b) provides that the basic values and principles governing public administration apply to organs of state".[122]

Jolwana JA held further that:

> There is no doubt that the first respondent dealt with the applicant in an arbitrary manner contrary not only to the Act but most importantly the values enshrined in the Constitution were not observed by the first respondent. [123]

And lastly, in upholding the taxpayer's appeal, Jolwana JA held that:

> The least that is expected of the first respondent is to comply with its own legislation and most importantly promote the values of our Constitution in the exercise of its public power. This the first respondent failed to do. [124]

It is therefore apparent that notwithstanding the draconian nature of the provisions of the statement procedure, the taxpayers can count on the courts to ensure that the Commissioner does not abuse his public power and arbitrarily appoint third parties to withhold taxpayer's monies.

3.4 The constitutionality of the pay now argue later principle as decided by the Constitutional Court in the Metcash Trading Limited case

In *Metcash Trading Limited v CSARS and Another*, the Constitutional Court was tasked to adjudicate on the constitutionality of the pay now argue later principle. The court had to decide whether or not the principle limits the taxpayer's right to access to court as enshrined in the Constitution.

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[122] *Nondabula v Commissioner: SARS*, at 24.
[123] *Nondabula v Commissioner: SARS*, at 25.
[124] *Nondabula v Commissioner: SARS*, at 26.

Kriegler J stated that the three impugned provisions of the VAT Act that made up the principle namely:

1. payment of an assessed tax amount pending an appeal (the erstwhile section 36(1) of the VAT Act);
2. recovery of tax by filling a statement with a court which has the same effect as a civil judgment (the erstwhile section 40(2)(a) of the VAT Act); and
3. the correctness of the amount reflected on the certified statement is beyond challenge in the proceedings of recovery of the tax reflected in the statement (the erstwhile section 40(5) of the VAT Act).

The Constitutional Court found that the pay now argue later principle is Constitutional as it does not, contrary to the assertion by Metcash Trading Limited, limit or unjustifiably limit the right to access to court as enshrined in the Bill of Rights.

3.4.1.1 The facts

On 30 May 1999 SARS handed a letter to Metcash Trading Limited indicating that SARS had assessed Metcash Trading Limited for capital tax, additional tax, penalties and interest amounting to R266 million, which had to be paid by 30 June 1999, failing which steps for their recovery would be taken without further notice.[125]

On 30 June 1999 Metcash Trading Limited objected to the assessment as raised by SARS and requested that SARS grants a 60 day extension.[126] SARS granted the extension of 45 days from the date of the request.[127] On 13 August 1999, attorney's for Metcash Trading Limited lodged another objection noting supporting argument in respect of a number of grounds of objection.[128] SARS issued a letter dated 13 September 1999 disallowing Metcash Trading Limited's objection and giving Metcash Trading Limited 48 hours' notice to pay the amount in full, failing which, summary procedures[129] would be implemented.[130]

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[125] *Metcash Trading v CSARS and Another* (CC) at 3.
[126] *Metcash Trading v CSARS and Another* (CC) at 4.
[127] *Metcash Trading v CSARS and Another* (CC) at 4.
[128] *Metcash Trading v CSARS and Another* (CC) at 4.
[129] This was in terms of the erstwhile section 40(2)(a) of the VAT Act. See 3.2 for a discussion on application of civil judgment for recovery of tax.
[130] *Metcash Trading v CSARS and Another* (CC) at 5.

In response, Metcash Trading Limited applied for an urgent interdict with the High Court to block SARS from implementing summary procedures, to which an interim arrangement was made and the case was subsequently heard in the Supreme Court of Appeal.[131]

3.4.1.2 Supreme Court of Appeal judgement

The court was tasked to decide on whether the erstwhile sections 36, 40(2)(a) and 40(5) of the VAT Act limited the rights as provided for in 34 of the Constitution, the right to access to court.[132]

In the judgment, Snyders J found that the impugned sections of the VAT Act did indeed infringe on the fundamental right to access to courts.[133] It was also found that the limitation was neither reasonable nor justifiable under section 36 of the Constitution.

Snyders J submitted that the impugned sections of the VAT Act are inconsistent with the provisions of section 34 of the Constitution as sections empowers the Commissioner to substitute a court in determining every facet of the taxpayer's liability and the enforcement thereto. She further submitted that the impugned sections prohibit a court of law from offering any interlocutory relief to an aggrieved taxpayer whilst the taxpayer pursues a statutory remedy of appeal. According to Snyder J, the fact that SARS will refund the taxpayer with interest should the taxpayer's objection succeed is no answer to the infringement which endures until the refund is made. Snyder J held that:

> Sections 36(1), 40(2)(a) and 40(5) explicitly exclude the need for recourse to a court of law and exclude the powers of the courts of law in interfering with that process regardless of the demands of justice. The only option available to a vendor would be to pay prior to having any dispute settled by a court of law or suffer the course of execution outside the auspices of the judicial process.
>
> There is no doubt that the relevant provisions are inconsistent with the provisions of s 34 of the Constitution in that:
>
> (a) it substitutes the first respondent for the court in determining every facet of the vendors liability and the enforcement thereof;

[131] *Metcash Trading v CSARS and Another* (CC) at 5.
[132] *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2000 (2) SA 232 (W); 2000 (3) BCLR 318 (W), cited in Metcash v Commissioner (CC) at 5.
[133] *Metcash Trading v Commissioner* (SCA) cited in *Metcash Trading v CSARS and Another* (CC) at 5.

(b) it precludes any interlocutory relief by a court of law for the aggrieved vendor whilst the statutory remedy of appeal is pursued.

The prospect that an eventual successful appeal might reverse the situation is no answer to the actual infringement which endures until then."[134]

After finding that the impugned sections were invalid, Snyder J needed to consider whether the limitation by these sections are justifiable and reasonable. The Commissioner asserted that the infringement is reasonable and justifiable as without the pay now argue later principle, there would be frivolous objections made by taxpayers in order to defer their obligation to make payment of taxes. Asserted further that without the limitation, fling of dubious tax returns would be encouraged.[135]

In dismissing the reasonableness and justifiability of the limitation as argued by the Commissioner and the Minister of Finance, Snyder J held that:

> The fairly narrow ambit of the facts of this case in the greater scheme of national tax necessarily lessens the impact of a delay in the recovery of the tax in terms of the present assessment and thus the importance of the purpose of the limitation.[136]

Snyder J Held further that:

> Numerous other measures could be devised in order to discourage or even prevent all the negative consequences foreseen by the respondents. Higher penalties were suggested as a possibility, the furnishing of security, even higher interest rates or time-linked penalties are possibilities. The potential for alternative measures must be numerous and is desirable in order to protect the right embodied in the Constitution.[137]

Consequently, the court a quo declared the statement procedure, the pay now argue later rule (the erstwhile section 36 of the VAT Act) and the prohibition of challenging the correctness of the assessed amount on the statement to be invalid.[138] The matter was then referred to the Constitutional Court for confirmation.[139]

3.4.1.3 The Constitutional Court judgement

The Commissioner and the Minister contended that the judge in the court *a quo* erred in finding that the impugned erstwhile sections 36, 40(2)(a) and 40(5) of the VAT Act

[134] *Metcash Trading v Commissioner* (SCA) cited in *Metcash Trading v CSARS and Another* (CC) at 26.
[135] *Metcash Trading v Commissioner* (SCA) cited in Keulder 2013.
[136] *Metcash Trading v Commissioner* (SCA) cited in *Metcash Trading v CSARS and Another* (CC) at 28.
[137] *Metcash Trading v CSARS and Another* (CC) at 28.
[138] Keulder 2013.
[139] Keulder 2013.

fall foul of section 34 of the Constitution and therefore opposed confirmation of the order granted in that court.[140] The Commissioner and the Minister's main contention was that the erstwhile section 36(1) of the VAT Act does not deny an aggrieved taxpayer a hearing.

Metcash Trading Limited contended that opportunities for a hearing by the Commissioner in section 36 of the VAT Act were not real or not enough as the taxpayer is effectively compelled to pay the amount assessed by SARS and hope to get a refund later and therefore supported the ruling in the court *a quo*.[141]

On the constitutionality of the impugned section 36 of the VAT Act, the court found that this section should not be read in isolation but rather be seen in the context of the part of the Act which deals with objections and appeals being the erstwhile sections 32 to 37.[142] The erstwhile sections 33, 33A and 34 of the VAT Act deals with statutory rights afforded to a taxpayer that is aggrieved by a decision by the Commissioner to challenge such a decision in either a special court, a board or an ordinary court of law (specialist tribunals).[143] Decisions made by SARS are of an administrative nature and not judicial as SARS is not a judicial officer.[144] Therefore the 'appeals' made to the special court or board are not appeals in the judicial sense but rather a statutory mechanism specifically created for reconsideration of administrative decisions made by the Commissioner and appropriate corrective action by a specialist tribunal.[145]

Kriegler J indicated that the VAT Act in the erstwhile sections 33 and 33A provides its own special procedure for review by specialist tribunal.[146] If it were not for the special statutory mechanism afforded to aggrieved taxpayers, there is a probability that the decisions by SARS would have been common law judicial review and as such offending section 33(1)[147] of the Constitution which guarantees everyone a right to just

[140] *Metcash Trading v CSARS and Another* (CC) at 8.
[141] *Metcash Trading v CSARS and Another* (CC) at 9.
[142] *Metcash Trading v CSARS and Another* (CC) at 32.
[143] *Metcash Trading v CSARS and Another* (CC) at 32.
[144] *Metcash Trading v CSARS and Another* (CC) at 32.
[145] *Metcash Trading v CSARS and Another* (CC) at 32.
[146] *Metcash Trading v CSARS and Another* (CC) at 33.
[147] Section 33(1) of the Constitution provides that: (1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 33(2) safeguards the right, it reads: (2) everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

administrative action.[148] Even though there are tailor-made mechanisms for taxpayers to redress complaints about the decisions made by the Commissioner, all other avenues of relief are left intact.[149]

The court pointed out that there are two objectives being achieved by section 36(1) of the VAT Act.[150] The first being that the pursuing of remedies, contained in the erstwhile sections 32 to 37 of the VAT Act, by the aggrieved taxpayer does not delay the taxpayer's obligation to pay their tax, the second being that the refund including interest will be paid to the taxpayer where necessary.[151] The word 'appeal' in the section 36(1) of the VAT Act clearly denotes the procedures mentioned in sections 33 and 33A of the VAT Act and the subsequent resort, under provisions of section 34 of the VAT Act to an ordinary court of law.[152]

It was asserted by the court that the common-law rule that noting of an appeal automatically suspends execution, is not applicable. Kriegler J quoted[153] Corbett JA in *CIR v NCR Corporation of SA (Pty) Ltd*[154]:

> 'the common-law rule of practice that generally the execution of a judgement is automatically suspended upon the noting of an appeal . . . could hardly apply to an appeal noted to the Special Court against the disallowance of an objection to an assessment by the Commissioner, . . .'

Section 36 is concerned with a statutory form of revision of an administrative decision and not an appeal against judgement.[155]

Kriegler J held that nothing in the wording of section 36(1) of the VAT Act can be construed as a prohibition against resort by a taxpayer to an ordinary court of law.[156] It was mentioned further that the section does not afford the Commissioner the authority to circumvent the courts.[157] The provision is directed at non-automatic suspension, and expressly affords the Commissioner the discretion.[158]

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[148] *Metcash Trading v CSARS and Another* (CC) at 33.
[149] *Metcash Trading v CSARS and Another* (CC) at 33.
[150] *Metcash Trading v CSARS and Another* (CC) at 34.
[151] *Metcash Trading v CSARS and Another* (CC) at 34.
[152] *Metcash Trading v CSARS and Another* (CC) at 34.
[153] *Metcash Trading v CSARS and Another* (CC) at 35.
[154] The judgement cites *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544 H – 545 A.
[155] *Metcash Trading v CSARS and Another* (CC) at 36.
[156] *Metcash Trading v CSARS and Another* (CC) at 37.
[157] *Metcash Trading v CSARS and Another* (CC) at 37.
[158] Metcash trading v Commissioner (CC) at 38.

The court indicated that the exercise of discretionary powers by the Commissioner constitute administrative action which is reviewable in terms of the principles of administrative law.[159] Kriegler J[160] quoted the *Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another* case[161]:

> 'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' . . . Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated . . . Some of these grounds tend to overlap.'

The Commissioner in applying section 36 of the VAT Act is applying the legislation.[162] The application of legislation constitutes administrative action which falls within the ambit of the administrative action clause of the Constitution.[163] Kriegler J expressed his disagreement with the finding by the court *a quo* that the exercise of the discretion conferred upon SARS in section 36 of the VAT Act is not reviewable.[164] Held that the Act affords SARS the discretion to suspend the taxpayer's obligation to make payment and the Commissioner must, in the event the obligation is not suspended, prove that the decision is well grounded.[165]

The court indicated that section 36 does not prohibit an aggrieved taxpayer from resorting to a court of law for any relief that the taxpayer may seek.[166] There is nothing in section 36 that suggests that the high court may not grant appropriate or other ancillary relief to a taxpayer.[167] It was further indicated by the court that a taxpayer's right to access to court is upheld by a hearing before a Special Court (tax court).[168] The

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[159] The Judgement cites *Contract Support Services (Pty) Ltd and Others v Commissioner, South African Revenue Services, and Others* 1999 (3) SA 1133 (W) at 1144 – 5.
[160] *Metcash Trading v CSARS and Another* (CC) at 40.
[161] Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another (18/1988) [1988] ZASCA 18; [1988] 2 All SA 308 (A) (22 March 1988), cited in *Metcash Trading v CSARS and Another* (CC) at 40.
[162] *Metcash Trading v CSARS and Another* (CC) at 42.
[163] *Metcash Trading v CSARS and Another* (CC) at 42.
[164] *Metcash Trading v CSARS and Another* (CC) at 42.
[165] *Metcash Trading v CSARS and Another* (CC) at 42.
[166] *Metcash Trading v CSARS and Another* (CC) at 43.
[167] *Metcash Trading v CSARS and Another* (CC) at 43.
[168] Researcher's emphasis.

criteria of section 34 of the Constitution is met when a taxpayer is granted a hearing in a tax court.[169] Kriegler J remarked that

> …the one and only significant respect in which a tax appeal departs from the constitutional norms is that tax cases are heard behind closed doors, a provision for the protection of the confidentiality of the taxpayer's business.[170]

The court found that the taxpayer's constitutional right to approach a court has not been limited by section 36 of the VAT Act.[171] Therefore, the section is constitutionally valid.[172]

The court then turned to the other impugned provisions, sections 40(2)(a) and 40(5) of the VAT Act. The procedure in section 40(2)(a), which affords SARS the power to file a statement with a clerk or registrar of a competent court and the statement has the effect of a civil judgment for liquid cash, was found by the court *a quo* to be Constitutionally invalid as it permits SARS to employ some form of self-help which bypasses the courts.[173]

The court *a quo* placed reliance on the *Lesapo* case. At issue in the Lesapo case was statutory provision which afforded banks the right or power to attach and sell up the assets of a defaulting debtor on conditions determined by the bank.[174] The attachment and selling of the assets would be performed by the agents.[175] The defaulting debtors were without recourse to a court of law.[176]

Mokgoro J, in that case found that that the impugned provision indeed undermined section 34 of the Constitution and infringed the rule of law by endorsing self-help.[177] Held further that the Bank was permitted by the impugned provision to be judge in its own cause.[178]

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[169] *Metcash Trading v CSARS and Another* (CC) at 47.
[170] *Metcash Trading v CSARS and Another* (CC) at 47.
[171] *Metcash Trading v CSARS and Another* (CC) at 48.
[172] *Metcash Trading v CSARS and Another* (CC) at 48.
[173] *Metcash Trading v CSARS and Another* (CC) at 49.
[174] *Metcash Trading v CSARS and Another* (CC) at 50.
[175] *Metcash Trading v CSARS and Another* (CC) at 50.
[176] *Metcash Trading v CSARS and Another* (CC) at 50.
[177] *Metcash Trading v CSARS and Another* (CC) at 50.
[178] *Metcash Trading v CSARS and Another* (CC) at 50.

Kriegler J held that, unlike in the *Lesapo* case, the wording of section 40(2)(a) of the VAT Act explicitly mentions the involvement of the courts.[179] This is contrary to the self-helping process which was deemed constitutionally invalid in the *Lesapo* case.[180] The execution process in section 40(2)(a) specifically goes via the ordinary judicial institutions. [181] Intervention of the court officials and procedures are required.[182] The erstwhile section 40(2)(a) of the VAT Act varies, significantly to the cart blanch to self-help afforded to the banks, which was declared unconstitutional in the *Lesapo* case.[183] An ordinary civil process of execution is employed and SARS is not authorised to take over any judicial functions.[184]

Kriegler J found that the statutory provisions of section 42(2)(a) and those found to be in contradiction to section 34 of the Constitution in the *Lesapo* case are 'far from being similar' as the *Metcash Trading Limited v CSARS and Another* case, in the former case, the impugned provision allowed for a contractual debt to be executed without involving the court.[185] Section 42(2)(a) was therefore found to not infringe the taxpayers' right to access to court.

The erstwhile section 40(5) of the VAT Act does not form part of the pay now argue later principle in the Tax Administration Act as and therefore the decision on the Constitutionality of this section is not discussed.

3.4.1.4 Differing views on the decision of the case

Olivier[186] is of the view that the court has watered down the right to access to court. That the constitutional right to access to court would have been better protected if the Act clearly defined the grounds on which the Commissioner should exercise his discretion and also the grounds on which the taxpayer could oppose the filing of the certificate.[187]

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[179] *Metcash Trading v CSARS and Another* (CC) at 51.
[180] *Metcash Trading v CSARS and Another* (CC) at 51.
[181] *Metcash Trading v CSARS and Another* (CC) at 51.
[182] *Metcash Trading v CSARS and Another* (CC) at 51.
[183] *Metcash Trading v CSARS and Another* (CC) at 51.
[184] *Metcash Trading v CSARS and Another* (CC) at 51.
[185] *Metcash Trading v CSARS and Another* (CC) at 52.
[186] Olivier 2001.
[187] Olivier 2001.

Croome[188] postulated the view that the right for the state to collect tax pending an appeal is of more importance to the taxpayer's right to property (and right to access to court)[189]. Submitted further that the law in the Tax Administration Act is applicable to all taxpayers (that is, it is a law of general application), and thus, another court would come to the same decision on the income tax.[190]

Keulder[191] disagrees with Croome, she is of the view that the *Metcash Trading Limited v CSARS and Another* decision does not create precedent regarding income tax matters as in the *Metcash Trading Limited v CSARS and Another* case, the court dealt with the pay now argue later principle in terms of the VAT Act. Further, there is room for aggrieved taxpayers to prove that the court erred in the *Metcash Trading Limited v CSARS and Another* case.

3.5 Revenue collection methods in other jurisdictions

3.5.1 Canada

The Canadian Income Tax Act contains provisions similar to the statement procedure provided for in sections 173 and 174 of the Tax administration Act. Section 223 of the Canadian Income Tax Act empowers the Minister to certify the amount payable by a taxpayer as an amount payable to the Revenue Authority. Upon registration of the certificate to the Federal Court, the certificate will have the same effect, and all the proceedings may be taken thereon, as if the certificate is a judgment by a court against the debtor for a debt equal to the amount certified plus any interest.[192]

Section 224 of the Canadian Income Tax Act empowers the Minister to appoint a person that is liable or will be liable to make payment to a taxpayer that is a tax debtor, as an agent to withhold the moneys due to be paid to the taxpayer and pay such monies to the Revenue Authority. This is similar to the provisions of section 179 of the Tax Administration Act (see discussion on these provisions under paragraph 3.3 above).

[188] Croome 2009.
[189] Researcher's emphasis.
[190] Croome 2009.
[191] Keulder 2013.
[192] Section 223 of the Canadian Income Tax Act.

The Canadian Income Tax Act contains in section 225, what is termed the 'collections restrictions'. Under these provisions, if a taxpayer has served a notice of objection to an assessment, the Minister is prohibited, for the purposes of collecting revenue, from certifying the amount; appointing a third party; etc. for a period of 90 days after the taxpayer is served with a notice by the Minister confirming or varying the objection. And where the taxpayer has appealed the assessment with the Tax Court of Canada, the minister is prohibited from invoking the aforementioned collections methods before mailing a copy of the court's decision to the taxpayer or the day when the taxpayer discontinues the appeal.

The Minister is afforded the discretion to evaluate whether or not by adhering to the 'collections restrictions', the amount of tax would be in jeopardy. If this determination is made, the Revenue Authority can apply for a jeopardy order to the Federal Court or to the superior court of a province to secure the taxpayer's assets or collect the taxpayer's tax debt right away notwithstanding the fact that the taxpayer has lodged an objection or appeal.[193]

The Revenue Authority would get a jeopardy order in these circumstances, when it has reasonable grounds to believe:[194]

- the taxpayer is in the process of selling or have already sold some of his assets before or after being assessed a tax debt, or while your assessment is in dispute;
- the taxpayer is transferring assets to friends or family members;
- the taxpayer's assets could potentially lessen in value, deteriorate, or perish if there is a delay in collection;
- the taxpayer has a history of not paying the taxes you owed;
- other creditors are taking collection action against the taxpayer;
- the taxpayer is involved in criminal activity; and
- the taxpayer is moving her assets out of the country

It is apparent from the above that, in Canada, whether an aggrieved taxpayer is subjected to the pay now argue later principles, is at the discretion of the Federal Court

[193] 'Collection of tax debts in jeopardy': https://www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/when-you-money-collections-cra/collection-tax-debts-jeopardy.html.
[194] 'Collection of tax debts in jeopardy': https://www.canada.ca/en/revenue-agency/services/about-canada-revenue-agency-cra/when-you-money-collections-cra/collection-tax-debts-jeopardy.html.

or any superior court based on the evidence presented by the Minister. In South Africa, the Commissioner, and not the court, has the discretion. The discretion of the Commissioner, however, may be taken on review by an aggrieved taxpayer in a court of law. This will be discussed in more detail in Chapter 4.

3.5.2 The United States of America

Taxpayers in the United States of America (the 'U.S.') have been afforded a set of fundamental rights they should be aware of when dealing with the Internal Revenue Service ('IRS'). These rights are provided for in what is termed 'The taxpayer Bill of Rights'. [195] The rights afforded to taxpayers under this taxpayer bill of rights, as listed in Publication 1[196] include –

(1) the Right to Be Informed
(2) the Right to Quality Service
(3) the Right to Pay No More than the Correct Amount of Tax
(4) the Right to Challenge the IRS's Position and Be Heard
(5) the Right to Appeal an IRS Decision in an Independent Forum
(6) the Right to Finality
(7) The Right to Privacy
(8) the Right to Confidentiality
(9) the Right to Retain Representation
(10) the Right to a Fair and Just Tax System.[197]

Of relevance to this research report is the Right to Challenge the IRS's Position and Be Heard. Under this right, Taxpayers have the right to raise objections and provide additional documentation in response to formal IRS actions or proposed actions, to expect that the IRS will consider their timely objections and documentation promptly and fairly, and to receive a response if the IRS does not agree with their position.

In the event a taxpayer submits documentation or raise objections during a return examination (or audit), and the IRS does not agree with the taxpayer's position, it will issue the taxpayer with a statutory notice of deficiency explaining why it is increasing

[195] Internal Revenue Service. (2016).
[196] A publication that explains the rights of American taxpayers and the processes for examination, appeal, collection, and refunds. This publication was accessed from the IRS website.
[197] Internal Revenue Service. (2016).

the tax, which gives the taxpayer the right to petition the U.S. Tax Court prior to paying the tax.[198]

Before the IRS takes enforcement action to collect a tax debt by levying, for example, the taxpayer's bank account, or immediately after the IRS files a notice of federal tax lien in the appropriate state filing location, the IRS must generally provide a taxpayer with an opportunity for a hearing before an independent Office of Appeals.[199] If the taxpayer disagree with Appeals' determination, the taxpayer can petition the United States Tax Court.[200]

It is apparent from the above that in the U.S. a taxpayer is afforded the right to object to an assessment prior to the IRS engaging in enforcement actions to collect the tax. The Taxpayer Bill of Rights seems to provide an aggrieved taxpayer the right to argue first and pay the tax later.

3.5.3 New Zealand

Much like in South Africa, whether or not a payment of disputed tax may be enforced by the New Zealand tax authorities is at the discretion of the Commissioner. Section 128 of the New Zealand Tax Administration Act ('Tax Administration Act NZ')[201] provides:

> (2) A taxpayer is not liable to pay—
> (a) the deferrable tax[202] relating to any tax in dispute; or
> (b) a shortfall penalty, where the penalty is payable in respect of any tax in dispute; or
> (c) the interest accruing under Part 7 on that deferrable tax or that shortfall penalty, —
> until the due date for payment of that deferrable tax.

[198] Internal Revenue Service. (2016).
[199] Internal Revenue Service. (2016).
[200] Internal Revenue Service. (2016).
[201] Tax Administration Act 1994 No 166.
[202] Section 3 of the Tax Administration Act NZ provides that deferrable tax, for a person who is a taxpayer or disputant, means—
(a) an amount of tax, assessed under a tax law as payable by the person, in relation to which the person makes a competent objection under Part 8 or that the person challenges under Part 8A:
(b) goods and services tax, payable (as defined in section 20A(1) of the Goods and Services Tax Act 1985) by the person on a due date, in relation to which the person makes a competent objection under Part 8 or that the person challenges under Part 8A:
(c) an amount of tax assessed under a tax law as payable by the person and
described in section RP 17B(3)(bb) of the Income Tax Act 2007.

> (2B) Despite subsection (2), the Commissioner may require a taxpayer to pay all tax in dispute if the Commissioner considers that there is a significant risk that the tax in dispute will not be paid should the taxpayer not succeed in objection proceedings.
> (4) This section applies only where a taxpayer lodges a competent objection[203].

In South Africa, the payment of a disputed tax is automatic unless an aggrieved taxpayer requests that the Commissioner suspends the payment of such a disputed amount. The New Zealand legislation automatically suspends the payment of an assessed tax where a competent objection has been filed by the aggrieved taxpayer. It is only where the Commissioner determines that there is a risk that the aggrieved taxpayer may, in the instance the Commissioner does not uphold the objection, not pay the tax, that the Commissioner may require that the tax in full.

It is thus clear that whether or not an aggrieved New Zealand taxpayer pays the disputed tax amount now and argues later is at the discretion of the Commissioner, just as in South Africa.

[203] Section 3 of the Tax Administration Act NZ provides that competent objection, for the purposes of Part 8 and in relation to a person, being a taxpayer, and to any assessment, means an objection made by the person, to the assessment, in accordance with section 126; but does not include any non-qualifying objection.

Chapter 4

Remedies available to taxpayers

4.1 Introduction

As discussed in the previous chapter, the Tax Administration Act in section 164 provides for the taxpayer to request that the payment of tax pending an objection, an appeal or a decision of a court of law be suspended by SARS at the discretion of the Commissioner. The Tax Administration Act also contains in section 164(3) considerations the Commissioner should make in reaching the decision as to whether or not to suspend the payment of tax.

The question that arises is whether the taxpayer aggrieved by the decision by the Commissioner, can challenge the discretionary decision made by the Commissioner not to grant the postponement on the basis that the decision made is unconstitutional in that it infringes on the taxpayer's right to just administrative action as afforded to the taxpayer by section 33 of the Constitution.

Also, does the taxpayer have an avenue to seek relief from the decision by the Commissioner not to suspend payment, with the office of the Public Protector, the Human Rights Commission

4.2 Just Administrative Action

The Constitution, in section 33 of that Act, provides for actions taken by organs of state when dealing with the public to be lawful, reasonable and procedurally fair. To give effect to the rights as contained in section 33 of the Constitution, Parliament passed the Promotion of Administrative Justice Act.[204]

Prior to the democratic dispensation and the prior to the enactment of the Constitution, no rights were afforded to taxpayers to insist on just administrative action in their dealings with SARS.[205] As a result, no taxpayer has, prior to the enactment of the Constitution, has attempted to challenge SARS on the exercise of its powers on the basis that SARS did not comply with the general principles of administrative justice.[206]

[204] Currie I, *The Promotion of Administrative Justice Act Administrators' Guide*.
[205] Croome & Olivier 2015, at p571.
[206] Croome & Olivier 2015, at p571.

The Constitution in section 33 affords everyone (this includes taxpayers) with the right to administrative action that is just. The section reads[207]-

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must—
> (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> (c) promote an efficient administration.

It can be noted that the Constitution at subsection 3 of section 33, the Constitution called for an enactment of legislation in which the effect of the rights to administrative action that is just will be given effect. This request was satisfied by the enactment of the Promotion of Administrative Justice Act ('PAJA')[208]. The PAJA is in practice, the primary tool for section 33 of the Constitution.[209] Broadly, the PAJA provides that:[210]

(a) Administrative actions have to comply with procedural fairness;
(b) Reasons have to be provided for Administrative decisions; and
(c) Certain administrative actions may be taken on judicial review.

It is clear that for the provisions of section 33 of the Constitution and therefore PAJA to apply, there has to be an administrative action. This therefore means that, to rely on the right to administrative justice, the aggrieved taxpayer must be able to demonstrate that the Commissioner's conduct in deciding not to approve the request to suspend payment, invoking the statement procedures and finally appointing a third party as agent, constitutes administrative action.[211]

4.2.1 Administrative action

The Constitution does not define what the term 'administrative action' means. The definition of this term is contained in the PAJA. Section 1 of the PAJA defines administrative action as any decision taken, or any failure to take a decision, by an

[207] Section 33 of the Constitution.
[208] Promotion of Administrative justice Act 3 of 2000.
[209] Klaaren & Penfold 2013, at p63 – 2
[210] Croome & Olivier 2015, at p573.
[211] Croome & Olivier 2015, at p573.

organ of state, juristic or natural person exercising or performing public power or authority which adversely affects the rights of any person and which has a direct external legal effect.

The definition of administrative action as provided for in the PAJA has six components, namely: a decision; that is of an administrative nature made in terms of an empowering legislation; that is not specifically excluded; by an organ of state; that adversely affects rights; has 'direct external legal effect'.[212] These components are discussed below.

Decision

The word 'decision' has been defined in section 1 of the PAJA to mean:

> [A]ny decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—
>
> (a) making, suspending, revoking or refusing to make an order, award or determination;
>
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
>
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
>
> imposing a condition or restriction;
>
> (d) making a declaration, demand or requirement;
>
> (f) retaining, or refusing to deliver up, an article; or
>
> (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.'

It is clear that the decision whether or not to suspend the payment of tax under section 164 of the Tax Administration Act, falls squarely within this definition of 'decision'.

'that is of an administrative nature made in terms of an empowering legislation'

Section 1 of the PAJA defines the term 'empowering provision' to mean a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken. As discussed, the Tax Administration Act empowers SARS to apply its discretion as to whether or not to grant a taxpayer's request for suspension of payment pending an objection or appeal. This therefore means that the 'that is of an administrative nature made in terms of an empowering legislation' component of the definition of administrative action would be met.

[212] Croome & Olivier 2015, at p578.

'by an organ of state'

The provisions of the PAJA only applies to organs of state. Section 2 0f the South African Revenue Service Act[213] ('SARS Act') provides that SARS was established as an organ of state. It is thus apparent that the provisions of the PAJA may apply to some decisions of an administrative nature taken by SARS, provided SARS is not an 'excluded organ of state'.

'not specifically excluded'

SARS does not form part of the organs of state that are 'specifically excluded'. The organs of state that are excluded from the definition on the PAJA, and therefore not governed by the Act, are- Policy decisions of the executive; decision making by parliament, the provincial legislature or municipal council; the exercise of the judicial function by officers of courts and other bodies and decisions taken under the Promotion of Access to Information Act[214] ('PAIA').[215]

'that adversely affects rights'

For an action of making a decision to constitute administrative action, the decision taken must adversely affect rights of whoever is on the on the receiving end of the decision. This therefore means that a decision that is favorable to a person, does not constitute an administrative action.[216]

has 'direct external legal effect'

This requirement in essence means that the decision must be final.[217] There is no recourse in the Tax Administration Act, for a taxpayer that is aggrieved by the decision by SARS not to suspend the payment of tax. This means that this decision by SARS is final.

It is apparent from the breakdown of the definition of Administrative action, that the decision by SARS not to grant a suspension of payment, to appoint a third party as an agent and to invoke the statement procedure constitutes an administrative action as

[213] South African Revenue Service Act 34 of 1997.
[214] Promotion of Access to Information Act 2 of 2000.
[215] Croome & Olivier 2015, at p580.
[216] Croome & Olivier 2015, at p580.
[217] Croome & Olivier 2015, at p580.

defined in the PAJA. This is further buttressed by Krigler J in the *Metcash Trading Limited v CSARS and Another* case, where it was held at paragraph 40 that:

> It has long been accepted that when the Commissioner exercises discretionary powers conferred upon him (or her) by statute, the exercise of the discretion constitutes administrative action which is reviewable in terms of the principles of administrative law.[218]

4.2.2 Procedural fairness and reasons

As discussed above, section 33 of the Constitution requires that an administrative action by an organ of state to be amongst others, procedurally fair. Also, the section provides for written reasons to be given to taxpayers whose constitutional rights have been affected by that administrative action in an adverse manner.

Section 5 of the PAJA affords taxpayers the right to request that SARS provides the aggrieved taxpayer with written reasons for the administrative action. The section reads:

> (1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
> (2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.
> (3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

It is thus apparent that an aggrieved taxpayer whose rights have been materially and adversely affected by an administrative action by SARS has a right to request for reasons and the Commissioner has an obligation under the PAJA to furnish the taxpayer with sufficient or adequate reasons for the administrative action taken.

The question that arises is what recourse is available to a taxpayer that did not receive reasons or that is of the opinion that the reasons provided are not sufficient?

4.2.3 Judicial review

[218] *Metcash v Commissioner for the South African Revenue Service* (CC) at 40.

Section 6 of the PAJA provides for the judicial review of administrative action and also provides for instances in which administrative action may be taken. Where the Commissioner makes a decision affecting a taxpayer without citing reasons or citing reasons that are unsatisfactory to the aggrieved taxpayer, that taxpayer has a right to request for judicial review using the provisions of section 6 of the PAJA.[219]

Section 6 of the PAJA reads:

> (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
> (2) A court or tribunal has the power to judicially review an administrative action if—
> (a) the administrator who took it—
> (i) was not authorised to do so by the empowering provision;
> (ii) acted under a delegation of power which was not authorised by the empowering provision; or
> (iii) was biased or reasonably suspected of bias;
> (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
> (c) the action was procedurally unfair;
> (d) the action was materially influenced by an error of law;
> (e) the action was taken—
> (i) for a reason not authorised by the empowering provision;
> (ii) for an ulterior purpose or motive;
> (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
> (iv) because of the unauthorised or unwarranted dictates of another person or body;
> (v) in bad faith; or
> (vi) arbitrarily or capriciously;
> (f) the action itself—
> (i) contravenes a law or is not authorised by the empowering provision; or
> (ii) is not rationally connected to—
> (aa) the purpose for which it was taken;
> (bb) the purpose of the empowering provision;
> (cc) the information before the administrator; or
> (dd) the reasons given for it by the administrator;
> (g) the action concerned consists of a failure to take a decision;
> (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
> (i) the action is otherwise unconstitutional or unlawful.

Section 6 gives effect to the objective of the Constitution of ensuring that taxpayers have the right to administrative justice.[220] Should a taxpayer be able to evidence that

[219] Croome 2010, at p232.
[220] Croome 2010, at p232.

an administrative action by SARS does not meet one of the tests listed above, that taxpayer may approach a court or another tribunal to review the said administrative action.[221]

It is apparent from the reading of section 6 of the PAJA that the onus is on the taxpayer to prove that the administrative action taken by SARS has failed to meet anyone of the grounds as set out in section 6(2). SARS also has the onus to prove that it has not failed to meet the ground as accused by the taxpayer.

It is therefore clear that should a taxpayer be of the opinion or have reason to believe that the Commissioner has infringed on their right to Just Administrative Action, that taxpayer can rely on the provisions of section 6 of the PAJA to take the decision by the Commissioner on review. For an example, should a taxpayer not receive written reasons for the Commissioner's decision not grant the request by the taxpayer, to suspend the payment or should, in the taxpayer's opinion, the reasons furnished by SARS be deemed to be inadequate or not sufficient, the taxpayer may rely on section 6 of the PAJA to take the administrative action by SARS on review on the grounds that the action infringes on the right to receive adequate reasons and therefore unconstitutional.

Another example is where the taxpayer is of the view that the Commissioner in rejecting the taxpayer's request for suspension of payment, acted without considering the relevant reasons furnished by the taxpayer or acted arbitrarily, the taxpayer may rely on section 6 of the PAJA to take the administrative action by SARS on review on the grounds that the administrative action taken by the Commissioner is not just and fair. The Court should therefore set aside such a decision made by the Commissioner.

4.3 The Public Protector

Section 182 0f the Constitution created the Public Protector as a state institution supporting constitutional democracy.[222] Section 182(1) of the Constitution provides that:

> (1) The Public Protector has the power, as regulated by national legislation—

[221] Croome 2010, at p232.
[222] Croome 2016, at p290.

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
(b) to report on that conduct; and
(c) to take appropriate remedial action.

The office of the Public Protector has therefore been formed to be the guardian of the public against any improper conduct by the state and or all who represent the state.

Subsection 4 of section 182 of the Constitution provides that:

(4) The Public Protector must be accessible to all persons and communities.

It is therefore apparent that a taxpayer is not precluded from filing a grievance against the Commissioner with the Public Protector, where the taxpayer is aggrieved by the conduct of the Commissioner (that is, a conduct that the taxpayer may feel infringed his constitutional right).[223]

4.4 The Human Rights Commission

Section 184 0f the Constitution created the Human Rights Commission. Section 184(1) and (2) of the Constitution provides that:

(1) The South African Human Rights Commission must—
(a) promote respect for human rights and a culture of human rights;
(b) promote the protection, development and attainment of human rights; and
(c) monitor and assess the observance of human rights in the Republic.
(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power—
(a) to investigate and to report on the observance of human rights;
(b) to take steps to secure appropriate redress where human rights have been violated;
(c) to carry out research; and
(d) to educate

The Human Rights Commission was created to investigate and report on the observance of human rights and take steps to secure appropriate redress where a violation of human rights has occurred. [224] This therefore means that taxpayers who may be of the view that their human rights have been violated by the Commissioner may request the Human Rights Commission to conduct an enquiry into the said violation.[225]

[223] Croome 2016, at p290.
[224] Croome 2016, at p290.
[225] Croome 2016, at p290.

Chapter 5
Conclusion

For a government to provide services to its residents and achieve its economic objectives it needs to secure funds. One of the ways in which a government can achieve this feat is by collection of taxes from its residents.

In this regard, the South African Revenue Service has been afforded certain powers under the provisions of the Tax Administration Act to ensure that taxes are collected. This is illustrated by the provisions of section 164 of the Tax Administration Act which provides for the obligation of the taxpayer to make payment of the assessed tax amount, not to be automatically suspended by the lodging of an objection or appeal or pending the decision of a court of law pursuant to an appeal.

The implications of section 164 of the Tax Administration Act are that once SARS has assessed a taxpayer and issued a taxpayer with the said assessment, the taxpayer has an obligation to pay the tax reflected as owing per the SARS assessment. The obligation to pay stands even when the taxpayer is not in agreement with or is aggrieved by the assessment raised against him.

The Tax Administration Act, does however afford aggrieved taxpayers an opportunity to request that the payment of the tax reflected as owing on the assessment, be suspended. Contained in subsections 2 and 3 of section 164 of the Tax Administration Act, are the remedies afforded to an aggrieved taxpayer that is not able to comply with the request to make payment to SARS while disputing the tax debt. Using the provisions of these subsections, a taxpayer is able to request that the SARS allows him not to pay now and argue later but rather argue first and pay later should it be found that there is any payment to be made by the taxpayer.

The request by a taxpayer to SARS for a suspension to make payment as per the assessment is not automatic. In terms of section 164(3), the Commissioner of the SARS is afforded the power to use its discretion whether or not to grant the taxpayer with the suspension so requested. The Commissioner may, in certain circumstances,

agree to a postponement of the payment of the tax due after taking the following factors into consideration[226]:

- the recoverability of the tax amount in dispute (that is, whether the taxpayer may squander his assets)
- Whether the taxpayer has, in the past, been compliant with SARS
- Whether the dispute arose as a result of fraud?
- Whether paying the assessed amount will cause the taxpayer to incur financial difficulties that he may not recover from
- if the taxpayer has offered security that is satisfactory to the Commissioner.

It is clear from the above that the main mischief that the legislature, through the Tax Administration Act, was attempting to remedy by enacting the provisions of section 164 of the Tax Administration Act, is "delay tactics" by taxpayers. In the absence of these provisions, there exist possibilities that taxpayers may object to any and every assessment as a ploy to delay paying the tax due by them to SARS.

It is comprehensible that the Tax Administration Act may seek to prevent taxpayers from delaying paying their tax liabilities as the deferral may result in the state not being able to fulfil its obligations towards its citizens (that is, the state may not have the required funds to pay 'grants for the older persons', 'child support grants', provide healthcare to the poor and needy, etc.). The question of whether or not the manner in which Tax Administration Act attempts to remedy this mischief is constitutional (that is, whether the principle reasonably and justifiably infringes on the tax payers' constitutional rights) has been answered by the Constitutional Court. The question is whether the Court erred, as some commentators have suggested, in coming to the decision that the pay now argue later principle is constitutional? Also whether the correct balance has been struck between the taxpayers' Constitutional rights and the right of citizens of South Africa to receive services from the state?

In 1996, South Africa enacted the Final Constitution which replaced the interim Constitution which was drafted in the year 1993. The Constitution is the supreme law of the land. No other law or government action can supersede the provisions of the Constitution. Section 2 of the Constitution invalidates any law in South Africa or

[226] Section 164(3) of the Tax Administration Act.

conduct which contradicts the Constitution. This is because per the provisions of section 2, the Constitution is supreme. It follows therefore that the provisions of the law provided for in the Tax Administration Act and any other Act in South Africa has to be consistent with the constitution.

Contained in chapter 2 of the Constitution is a Bill of Rights. According to section 7 of the Constitution, the Bill of Rights is the foundation of the democracy that South Africans enjoy. Contained therein are democratic rights that every South African is entitled to. Section 7 also provides, however, that these democratic rights are not without restrictions.

It is clear from the provisions of section 7 of the Constitution that the Bill of rights serves to protect the rights of all citizens when dealing with each other (the horizontal approach) and also when dealing with the organs of the state (the vertical approach). This therefore means that the Constitution protects the rights of all taxpayers against SARS (which is an organ of state).

As mentioned, subsection 3 of section 7 of the Constitution, provides that there are limitations to the rights that the citizens of South Africa enjoy. These limitations are provided for in section 36 of the constitution. Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application. Section 36(1) of the Constitution also provides that in limiting the rights, consideration of the following factors must be had –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.[227]

Another requirement contained in the Constitution, for the limitation of any constitutional right to be regarded as Constitutional, is that the limitation must be reasonable and justifiable. The limitation must also apply equally to all citizens and it

[227] Section 36(1) of the Constitution.

should not be possible for regulations to be introduced to apply only to a section of the community of taxpayers.[228]

It is submitted that it is critical that a balance between the taxpayer's constitutional rights and SARS duty to efficiently and effectively collect tax needs to be achieved. Achieving this balance may sometimes mean that the rights may be limited.

In the *Prince v President, Cape Law Society* case the panel of judges were tasked with ruling whether or not the provisions of the Drugs and Drug Trafficking Act and Medicines and Related Substances Control Act were constitutional. These Acts prohibit the recreational use and possession of cannabis were constitutional. It was argued by the applicant that, although prohibiting the use of harmful drugs is necessary, the legislation unreasonably limited his right to freedom of religion, that he as a Rastafari and a citizen of South Africa is entitled to as it did not enable him to legally use cannabis for his religious purposes.

In the majority judgement it was held that the legitimate government purpose of the legislation in preventing harmful drug use outweighed the impact on the applicant's right to freedom of religion and therefore the provisions prohibiting drug use. This decision in the Prince v President case clearly asserts that the rights of the state and in turn its citizens as a collective should be above the right of any individual.

The question of whether or not the pay now argue later principle is constitutional was answered in the *Metcash Trading Limited v CSARS and Another* case. Majority judgement in the case ruled that the pay now argue later principle is constitutional. The taxpayer attempted to convince the court that the principle is unconstitutional as it infringes on the taxpayer's right to access to court. The court could not be convinced. In delivering the majority judgment, Kriegler J, held that the erstwhile provisions making up the pay now argue later principle (similar provisions to sections 164, 172, 174 and 179 of the Tax Administration Act) did not infringe on the taxpayer's right to access to court as there are no hidden or implicit ousters of the jurisdiction of the courts to be found in the sections making up the pay now argue later principle.

[228] Croome 2009.

Croome states the pay now argue later principle is not unreasonable or unjustifiable in an open and democratic society as the Commissioner is required to collect tax for the proper running of the country.[229] The right of the state to collect tax pending an appeal is more important than the taxpayer's right to property and the provisions of section 36 of the Constitution is of great assistance to the Commissioner in this regard.[230] The learned Croome further states that, interest on the overpayment will be paid to the taxpayer if that taxpayer succeeds in his/her appeal and had already settled the tax in dispute.[231]

Taxpayers that are disgruntled that SARS, according to the taxpayers, acted arbitrarily in not acceding to the said taxpayer's request to postpone payment have recourse. SARS is an Organ of state as defined and as such the discretionary decisions made by the Commissioner constitute administrative action. This therefore means that the decisions by SARS may be taken on judicial review on the grounds that the decision infringes on the taxpayer's right to just administrative action. The Commissioner may therefore not arbitrarily decline a taxpayer's request for suspension. A taxpayer that is aggrieved by the decision by the Commissioner not to accede to the taxpayer's request for suspension may also approach the office of the Public Protector and the Human Rights Commission for relief.

Conclusion

In conclusion, all the provisions making up the pay now argue later principle seem draconian however this principle appears, in fact to be necessary and constitutional. It is submitted that taxpayer's rights are not infringed as the provisions do not preclude the taxpayer from approaching a court of law to seek interlocutory relief. Also, the decision by the Commissioner to decline the taxpayer's request for suspension of payment may be taken on review by the taxpayer on the grounds that the Commissioner infringed on the said taxpayer's right to just administrative justice. The office of the Public Protector and the Human Rights Commission are also available to the aggrieved taxpayer.

[229] Croome 2010, at p40.
[230] Croome 2010, at p40.
[231] Croome 2010, at p40.

It is further submitted that even if the pay now argue later principle was to be found to infringe on the rights of taxpayers, the infringement would be found to be reasonable and justifiable and therefore constitutional. The Constitution allows for the infringement of rights if the exercise of those rights puts in jeopardy, the state's obligations towards its citizens. Although the matter in the *Prince vs President of the Law Society* case did not concern taxation, it can be deduced from the judgement that the rights of the citizens as a collective supersedes the rights of an individual or a small group of individuals.

The funds that the Commissioner collects benefit each and every person in South Africa and the delay (as a result of outstanding monies which will eventually be found to be due to SARS) might impact the running of the country. The right conferred on SARS to collect taxes is thus more important than the right of a taxpayer who may or may not be using the dispute with SARS to delay paying the tax.
It is in the best interest of the citizens of South Africa for the government to enact laws which enables the Commissioner to prevent 'delay tactics' by taxpayers and collect funds which will be utilised by the government of the day to fulfil its constitutional duties.

The courts have demonstrated in various cases that even though the right conferred on the Commissioner to collect revenue, in the form of taxes, is important, SARS will not be allowed to exercise its powers arbitrarily. SARS has an obligation to ensure that, in collecting revenue, it complies strictly with the law as laid out in the Tax Administration Act, other tax Acts and most importantly, the Constitution. Also, the discretionary powers afforded to the Commissioner are reviewable. This means that SARS must genuinely consider the relevant factors when applying its discretion.

The courts and the Constitution therefore play a hugely important role in ensuring that an acceptable balance is achieved between the rights of taxpayers and the rights of the citizens of the Republic, to service delivery is achieved.

3.
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