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THE IMPACT OF THE POWERS OF THE COMMISSIONER ON THE CONSTITUTIONAL RIGHTS OF THE TAXPAYER

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ABSTRACT

Certain legislation in South Africa confers specific powers on the Commissioner (the **Commissioner**). These powers can impact on the constitutional rights of the taxpayer enshrined in the Bill of Rights, which are contained in Chapter 2 of the Constitution. The purpose of the Constitution of the Republic of South Africa is to ensure that the taxpayer's constitutional rights are protected. This research will analyse and evaluate what effect the Commissioner's powers have on the constitutional rights of the taxpayer. The following constitutional rights of the taxpayer will be examined in depth: (*a*) the right to fair administrative action, (*b*) the right to access to the courts, and (*c*) the right to privacy. In the event that it is determined that the taxpayer's constitutional rights are infringed by the Commissioner's power, it will be analysed whether these infringements are justifiable and reasonable in terms of the general limitation clause embodied in section 36 of the Constitution. The analysis of the above suggests that certain powers of the Commissioner justifiably and reasonably infringe upon the taxpayer's rights and in this regard there are certain remedies available to the taxpayer.

Key words: Constitution, Constitution of the Republic of South Africa, Bill of Rights, constitutional right, fair administrative action, Promotion of Administrative Justice Act, access to courts, privacy, remedies, SARS, the Commissioner, the Commissioner's power, tax, tax administration, Tax Administration Act, taxpayer, taxpayer's rights, limitation, general limitation clause.

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DECLARATION

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

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CHAPTER 1: INTRODUCTION

1.1. INTRODUCTION

The democratic election in 1994 brought about significant changes to the Republic of South Africa. The country changed from a parliamentary state to that of a constitutional state. The Interim Constitution was introduced in 1993 and the final Constitution was implemented in 1996. The Bill of Rights was implemented with the final Constitution which contains all fundamental rights.

All Statutes must be read in conjunction with the Constitution, and a person's fundamental rights as laid down in Chapter 2 of the Constitution, must always be upheld. These rights can be limited, however such limitation must be justifiable and reasonable in terms of section 36 of the Constitution (the general limitation clause). Certain legislation confers power on the South African Revenue Service ("SARS") to tax citizens. The legislation also stipulates what taxes are payable by citizens. These powers conferred on SARS have to comply with the rights contained in the Constitution. The legislation ensures that SARS is able to speedily collect taxes. Issues arise when the Commissioner abuses his powers and such abuse results in the taxpayer's rights being infringed. These rights include, but are not limited to, the right to just administrative action, the right to access to the courts and the right to privacy, which will be dealt with in this report.

In the event that provisions within the legislation infringe upon the taxpayer's right, it will need to be determined whether this infringement is justifiable and reasonable in terms of the limitation clause in the Constitution. Certain provisions in legislation therefore will be examined in order to determine whether they are constitutionally valid in respect of the Constitution. If the infringement of the taxpayer's right is justifiable, then a taxpayer needs to be aware of whether there are any remedies available.

1.2. THE RESEARCH PROBLEM

1.2.1. The Problem Statement

The research will examine and evaluate the taxpayer's constitutional rights and whether the powers conferred on the Commissioner violate these rights.

1.2.2. The Sub-Problems

1) The first sub-problem will be to examine the Constitution in order to identify the constitutional rights of the taxpayer and whether those rights can be limited.

2) The second sub-problem will be to identify the powers that have been conferred on the Commissioner through legislation and whether these powers uphold or conflict with certain rights contained in the Constitution. In particular, the following constitutional rights will be examined: (*a*) the right to just administrative action (section 33 of the Constitution); (*b*) the right of access to courts (section 34 of the Constitution); as well as (*c*) the right to privacy (section 14 of the Constitution).

3) The third sub-problem will be to assess the remedies that are available to the taxpayer, in the event that there are any infringements on the above constitutional rights and to determine whether any recommendation need to be suggested.

1.3. RESEARCH METHODOLOGY

The research method followed in this study consists of a literature review. Current income tax legislation, journal articles, legal judgments, dissertations and media studies will be utilised as part of the literature review.

1.4. SCOPE AND LIMITATIONS

The research will analyse and evaluate certain provisions of tax Acts in respect of the taxpayer's constitutional rights, being (*a*) the right to just administrative action (section 33 of the Constitution); (*b*) the right of access to courts (section 34 of the Constitution); as well as (*c*) the right to privacy (section 14 of the Constitution).

CHAPTER 2: BACKGROUND TO THE CONSTITUTION

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.[1]

2.1. INTRODUCTION

The implementation of the Interim Constitution[2] and the final Constitution brought about a significant constitutional revolution in the Republic.[3] The Constitution signified a new country, as well as the change in status from a parliamentary state to a constitutional state. The fundamental principle of parliamentary sovereignty was replaced with one of the most important principles, being constitutional supremacy.[4] This ensured that there was a shift in major legal policies, including that of law of taxation. Another significant implementation with the final Constitution was the Bill of Rights.

With the implementation of the Interim Constitution, the Minister of Finance called for the establishment of a commission to enquire into certain aspects of the tax structure within the Republic. The commission was officially called the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa, otherwise known as the Katz Commission. The Katz Commission noted that the tax system is subject to the Constitution and as such, must be aligned with the Constitution, as well as 'conform to society's commitment to the Rule of Law'.[5] Therefore, all taxpayers should be taxed equally in terms of the relevant Acts and further, the taxpayer has a right to be taxed strictly in accordance with such laws. Allowing the taxpayer to be protected by the law.

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[1] Section 2 of The Constitution of the Republic of South Africa, 1996.
[2] The Interim Constitution of the Republic of South Africa, 1993.
[3] LWH Ackerman *The Legal Nature of the South African Constitutional Revolution* (2004) at 633.
[4] I Currie & J de Waal *The Bill of Rights Handbook Sixth Edition* (2016) at 2.
[5] Adv H E Mkhawane *Challenges in "Operationalizing" Taxpayer* Rights at 1.

In 1996, the Constitutional Court implemented the Constitution, which replaced the Interim Constitution.[6] The taxpayer has constitutional rights in terms of the Constitution, however not through the Income Tax Act ("ITA") and the Tax Administration Act ("TAA").[7] SARS, however, cannot '"rob" a taxpayer of a right afforded it by the Act'.[8] The Constitutional Court, in *Pharmaceutical Manufacturers Association of SA and another: in re ex parte President of the Republic of South Africa and Others ("Pharmaceutical Manufacturers")*, held that '[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law'.[9] Further, the Constitutional Court has noted that tax legislation is subject to the Constitution as is any other legislation.[10] Therefore, SARS is subject to the Constitution, as observed in *First National Bank of SA Ltd t/a Wesbank v C: SARS,* 'even fiscal statutory provisions, no matter how indispensable they may be for the economic well-being of the country – a legitimate governmental objective of undisputed high priority – are not immune to the discipline of the Constitution and must conform to its normative standards'.[11]

2.2. PROTECTION OF FUNDAMENTAL RIGHTS

As stated above, the Bill of Rights was implemented with the Constitution in 1996 and it forms as Chapter 2 of the Constitution. There are fundamental rights contained in the Bill of Rights which are of particular significance. The significant rights that will be examined below are: (*a*) the right to just administrative action (section 33 of the Constitution); (*b*) the right of access to courts (section 34 of the Constitution); as well as (*c*) the right to privacy (section 14 of the Constitution).[12]

These rights are, however, not absolute. Section 36 of the Constitution, being the general limitation provision, read with section 7(3), limits these rights. It is referred to as 'general' due to the fact that this section applies to all the rights contained in the Bill of Rights.[13] The general limitation provision, however, can only limit these rights if it is 'in terms of law of general application to the

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[6] *Ibid* at 6.
[7] The Income Tax Act 58 of 1962; The Tax Administration Act 28 of 2011.
[8] *MTN International v C: SARS* [2014] ZASCA 8 at [11].
[9] 2000 (2) SA 674 (CC) at para [20].
[10] AP de Koker & RC Williams *Silke on South African Income Tax* (2019) at 22-6.
[11] 2002 (4) SA 768 (CC) at 787.
[12] *Supra* note 1.
[13] *Supra* note 4 at 152.

extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into consideration all relevant factors'.[14]

In order for the legislation to infringe upon the taxpayer's fundamental rights, as enshrined in the Bill of Rights, it must show that the 'law in question serves a constitutionally acceptable purpose and that there is a sufficient proportionality between the harm done by the law (the infringement of fundamental rights) and the benefits it is designed to achieve (the purpose of the law)'.[15] Therefore, if the limitation on the taxpayer's rights are reasonable and just, then the limitation is allowed. If, however, the limitation is unreasonable and unjust then the limitation is unconstitutional and the taxpayer has the right to approach a competent court. For example, in *First National Bank of SA Ltd t/a Wesbank v C: SARS*,[16] 'the Constitutional Court acknowledged that the difficulties of applying the limitation clause to a violation of section 25(1) but found it unnecessary to decide the question whether the property right could ever be justifiably limited'.[17]

There are two procedural steps that need to be followed in order for the taxpayer to prove that a constitutional right has been unjustly limited. The first is whether the respondent has infringed the taxpayer's right by law or conduct.[18] In the event that the first step is proved, then the second step must be examined, which is whether the infringement of this specific right can be a reasonable and justifiable limitation.[19]

There is a significant difference between the two stages of the enquiry. When a court considers the question of whether there has in fact been an infringement on the right, the court has to consider a more factual enquiry than simply the question of infringement.[20] In the event that this is not done, the court may reach the decision that the limitation of the right is unjustifiable. Therefore, section 30 of the Constitution makes provision for the introduction of factual evidence which is relevant to determine whether there is an unjust limitation on the right.[21]

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[14] *Supra* note 1 at Section 36.
[15] *Supra* note 4 at 163.
[16] *Supra* note 11.
[17] *Supra* note 4 at 152.
[18] *Ibid* at 153.
[19] *Ibid*.
[20] *Ibid*.
[21] *Ibid* at 155.

The onus, however, rests on the party invoking the general limitation provision and must show that it is reasonable and justifiable to limit one's rights. In *Jeeva v Receiver of Revenue, Port Elizabeth,* Jones J held that[22]

> As a rule, this onus is not easily discharged. The Courts are slow to hold that an erosion of a constitutional right is either reasonable or justified. But they will do so if the limitation serves an important objective which is in the interests of a democratically oriented society. The question is under what circumstances and to what extent they will do so. The Constitution itself gives guidance, and tests may be evolved to assist. In Qozeleni's case . . . Froneman J alludes to the proportionality test of R v Oakes . . . which has been adopted by the Canadian Courts in pronouncing upon the validity of a limitation upon a Charter right in terms of their limitation clause . . ., but he does not find it necessary to make use of it. He says at 643H-644B:
>
> The Canadian case of R v Oakes . . . provides that, to satisfy the Canadian Charter's limitation clause (which differs from s 33(1), but also refers to reasonableness as a criterion for limitation), the interest underlying the limitation must be of sufficient importance to outweigh the right that was infringed, and the means used to protect that interest must be proportional to the object of the limitation (at 227 of the report). This formulation, or at least the second portion thereof, echoes the provisions of s 24 (d) of the Constitution, which provides that administrative action must be justifiable in relation to the reasons given for it. It may be that in the interpretation of s 33(1) some kind of proportionality test should also be required, but in my view it is inadvisable, at this early stage, to lay down any gloss on the actual wording of the section. The words 'reasonable and justifiable' in themselves set sufficient standards whereby individual cases may be judged from time to time. The notion of reasonableness is not foreign to our law and is applied as a standard in other fields of law, such as the law of delict.

Myburgh J used the same test as above when deciding the matter of *Khala v Minister of Safety and Security*.[23] Prior to applying the test, he stated that[24]

> It is instructive to have regard to the approach adopted by the Supreme Court of Canada in assessing whether a limitation is reasonable and demonstrably justified in a free and democratic society. In R v Oakes (Supra at 227) it was said that two central criteria must be satisfied:
>
> 1. The objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.

[22] 1995 (2) SA 433 (SE) at 453D.
[23] 1994 (4) SA 218 (W) at 228D–I.
[24] *Ibid* and *supra* note 10 at 22-12.

> The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.
>
> 2. Once a sufficiently significant objective is recognised, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of proportionality test. Although the nature of the proportionality test will vary depending on the circumstances, in each case Courts will be required to balance the interests of society with those of individuals and groups. There are three important components of a proportionality test:
>
> *(a)* The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. They must be rationally connected to the objective.
>
> *(b)* The means, even if rationally connected to the objective in this sense, should impair as little as possible the right or freedom in question.
>
> *(c)* There must be a proportionality in the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance.
>
> The Canadian Supreme Court has subsequently emphasised that in describing the criteria composing the proportionality requirements the Court has to be careful to avoid rigid and inflexible standards; the Court must carefully engage in the balancing of many factors in determining whether an infringement is reasonable and demonstrably justified: Law Society of British Columbia et al v Andrews et al (1989) 56 DLR (4th) 1 at 25–6.

Section 38 of the Constitution provides for *locus standi* to institute legal proceedings in order to challenge the constitutionality of 'law or conduct'.[25] Section 38 states that

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;

[25] *Supra* note 10 at 22-14.

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.

Therefore, section 38 of the Constitution provides that a court can award 'appropriate relief' for the violation of constitutional rights.[26] Section 172 of the Constitution further provides that a court can make an order which is 'just and equitable' in constitutional matters.[27]

Further, as this report focuses on the powers of the Commissioner, one must take into account the TAA. Importantly, section 2 of the TAA states that the purpose of the Act 'is to ensure the effective and efficient collection of tax'.[28] As stated above, however, all Acts must be read together with the provisions contained in the Constitution.

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[26] *Supra* note 1.
[27] *Supra* note 1.
[28] *Supra* note 7.

CHAPTER 3: THE TAXPAYER'S RIGHT TO FAIR ADMINISTRATIVE ACTION

Justice should not only be done, but should manifestly and undoubtedly be seen to be done.[29]

3.1. INTRODUCTION

Prior to 1994, legislation continued to expand the executive authority and the courts' authority continued being restricted by legislation. Therefore, the courts were not motivated to exercise their remaining powers of review to constrain administrative powers.[30] Even if a person challenged the powers of administrative bodies, the courts were restrained in terms of the system of legislative authority. The courts could review the lawfulness of the administration's actions, however, the government would ultimately have the power to decide whether there in fact was any unlawfulness of their actions. Ultimately, the government could prevent the courts for reviewing certain actions by implementing ouster clauses.[31]

The Constitution seeks to protect one's right to fair administrative action by providing specific rights in order to claim relief from the effects of unlawful administrative action. The fundamental principles that the Constitution emphasizes that the administration must act in accordance with are: justice, fairness and reasonableness.[32]

Section 33 of the Constitution[33] states that

> (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 —

[29] Chief Justice Lord Hewart in *Rex v Sussex Justices* 1924 KB 131.
[30] *Supra* note 4 at 645.
[31] *Ibid*.
[32] *Ibid*.
[33] *Supra* note 1.

(*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.

The constitutional right to fair administrative action, which is lawful, reasonable and procedurally fair, entrenches the fundamental principles that the Constitution sought to achieve. The case of *Pharmaceutical Manufacturers* analysed the effect that the common law has on 'administrative action'.[34] The Constitutional Court held that the common law is still important and must be developed. The development of the common law is implicit in section 8(3) of the Constitution. The Constitutional Court also stated that the common law must be applied, or if necessary developed, to the extent that legislation does not give effect to the right contained in the Bill of Rights.[35] Therefore, according to the *Pharmaceutical Manufacturers* case, the common law principles of administrative action, as well as statutory rules must be read in unity, subject to the overriding provisions in the Constitution.[36] The Constitutional Court held that[37]

> There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control…
>
> What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them.

In the *President of the Republic of South Africa v South African Rugby Football Union*, the Constitutional Court noted that there is difficulty in deciding what amounts to 'administrative action' and each case will have to be looked at individually.[38] The Constitutional Court offered the following relevant aspects that needs to be taken into account when deciding whether a case

[34] *Supra* note 9.
[35] *Ibid* at [46].
[36] MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2019) at 27-10.
[37] *Ibid* at [44]-[50].
[38] 2000 (1) SA 1 (CC) at [143].

amounts to 'administrative action': 'the source of the power … nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is characterized as administrative action'.[39] Even if an action is taken by an executive branch of government, this does not automatically result in the action amounting to 'administrative action'. The Constitutional Court pointed out that an institutional test is insufficient:[40]

> What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks.[10][7] The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

Section 33(3) gave effect to the enactment of the Promotion of Administrative Justice Act − commonly called PAJA.[41] 'The PAJA not only gives effect to section 33 of the Constitution but is 'manifestly concerned with the control of power'.[42] Since PAJA was enacted due to the constitutional obligation giving effect to the right to just administrative action, it has to prevail wherever there is inconsistency with previous legislation.[43] In *Sidumo v Rustenburg Platinum Mines Ltd,* Willis J held that[44]

> The purpose of PAJA is plainly to give effect to the rights, constitutionally enshrined in the Bill of Rights of the Constitution, to just administrative action. It is constitutional legislation. It is triumphal legislation.. . . PAJA is not general legislation in the sense that it is some generally useful tool. It is, rather, 'universal' legislation: it confers rights upon all who live in South Africa insofar as their dealings with organs of State are concerned. To the extent that earlier legislation is inconsistent with PAJA, PAJA must prevail.

[39] Ibid at [143].
[40] Ibid at [141]. See also *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).
[41] Act 3 of 2000.
[42] C Hoexter *Administrative Law in South Africa* (2012) Juta & Co at 517.
[43] *Supra* note 10 at 22-37.
[44] 2008 (2) SA 24 (CC) at para [7] at 165H–I and 166C.

The Constitutional Court explained that all legislation must be read with PAJA, as far as possible.[45] Ngcobo J stated that '[a]ll decision-makers who are entrusted with the authority to make administrative decisions by any statue are . . . required to do so in a manner that is consistent with PAJA'.[46]

3.2. THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

Section 1 of PAJA[47] explains the terms 'administrative action' as

> **"administrative action"** means any decision taken, or any failure to take a decision, by—
> (a) an organ of state, when—
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect . . .

Therefore, in order to satisfy the elements of 'administrative action', the following requirements must be met:[48]

- there must have been a decision;
- by an organ of State;
- when exercising a public power or performing a public function;
- in terms of any legislation;
- that adversely affects rights;
- which has a direct, external, legal effect;
- that is not specifically excluded in the list in section 1 of PAJA.

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[45] *Zondi v MEC for Traditional and Local Government Affair*s 2005 (3) SA 589 (C) [101].
[46] *Ibid*. See also *Walele v City of Cape Town* 2008 (6) SA 129 (CC) [51], where the Court emphasized what was stated by the Constitutional Court in *Zondi*: that the effect of PAJA is 'that statutes that authorize administrative action must now be read together with PAJA unless, upon proper construction, the provisions of the statutes in questions are inconsistent with PAJA'.
[47] *Supra* note 41.
[48] *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC); *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA). See also *Nel v Le Roux NO* 1996 (3) SA 562 (CC).

PAJA makes reference to 'decisions' or 'failure to make a decision', rather than 'conduct'.[49] PAJA refers to 'decisions' made by an administration. Therefore, for PAJA to apply to a taxpayer, he or she must show that his or her rights have been 'adversely affected' by the Commissioner. Further, 'decisions' made by SARS must be procedurally fair, as they constitute 'administrative action'. This extends to

- issuing an assessment to tax;
- the imposition of additional tax;
- a decision to file a statement with a competent clerk or registrar of the relevant court, which has the effect of a civil judgment.[50]

SARS is an organ of state, therefore any 'decision' or failure to make a decision which adversely affects the rights of the taxpayer and has a direct, external legal effect, constituted 'administrative action' insofar as that decision entails the Commissioner exercising 'a power in terms of the Constitution' or a 'public power'. This decision would be determined to be unconstitutional, in terms of PAJA.[51]

It can be argued that only a final 'decision' made by the Commissioner can satisfy the above criteria.[52] Therefore, only after the final 'decision' has been made, the taxpayer can rely on the procedures in PAJA.[53]

PAJA's definition of a decision refers to one that is 'of an administrative nature' and that there is a requirement of an 'empowering provision', which is itself defined.[54] In *Bhugwan v JSE LTD*, the court analysed the elements of a 'decision'.[55] Claassen J pointed out that there are a series of steps

[49] *Supra* note 4 at 656.
[50] *Supra* note 10 at 22-41 and section 172(1) of the TAA.
[51] *Supra* note 10 at 22-40.
[52] I Currie and J Klaaren, *The Promotion of Administrative Justice Act Benchbook* (2001) at 82, para 2.34. See RC Williams *The Concept of a "Decision" as the Threshold Requirement for Judicial Review in Terms of the Promotion of Administrative Justice Act* (2011) 14 PER 230.
[53] *Supra* note 10 at 22-41.
[54] See *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) where Van Zyl J held that ultra vires actions of the party's constitution does not amount to administrative action as they lacked an empowering provision due to the fact that they were ultra vires in nature.
[55] 2010 (3) SA 335 (GSJ) at [10].

that 'all or at least some' have to be satisfied. Claassen J reiterated the fact that each case will have to be decided on a case-by-case basis, as the steps will depend on the relevant facts of the case. These steps can be summarised as follows:

1) Save where an authority acts of its own accord, a final application, request or claim must have been addressed to the authority to exercise those powers in relation to the factual circumstances applicable to the subject;
2) All relevant information must be gathered and placed before the authority to make its decision;
3) There must be an evaluation process where the authority considers all the relevant information;
4) A conclusion must be reached by the authority as to how the authority will exercise its powers under the circumstances; and
5) The authority must have exercised its powers based on the conclusion so reached.[56]

The full list, however, may only apply fully in certain circumstances.[57] The decision taken by the authority, as is relevant in terms of PAJA, must be of an administrative nature. In *Sokhela v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal)*, Wallis J suggested that the term 'of an administrative nature' serves two important purposes.[58] Firstly, there needs to be a positive identification of administrative action and secondly, this diagnosis is not a mechanical process and whether it falls within the list of exceptions.[59]

3.3. PROCEDURALLY FAIR ADMINISTRATIVE ACTION

3.3.1. General

Section 3 of PAJA[60], in the language of the Act, reads as follows:

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[56] Ibid at [10].
[57] See RC Williams *The Concept of a "Decision" as the Threshold Requirement for Judicial Review in Terms of the Promotion of Administrative Justice Act* (2011) 14 PER 230 at 235, 237.
[58] 2010 (5) SA 574 (KZP) at [61].
[59] Ibid.
[60] *Supra* note 41.

> Procedurally fair administrative action affecting any person —
>
> (1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
>
> (2) (a) A fair administrative procedure depends on the circumstances of each case.
>
> (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)
>
> (i) adequate notice of the nature and purpose of the proposed administrative action;
>
> (ii) a reasonable opportunity to make representations;
>
> (iii) a clear statement of the administrative action;
>
> (iv) adequate notice of any right of review or internal appeal, where applicable; and
>
> (v) adequate notice of the right to request reasons in terms of section 5.
>
> (3) . . .
>
> (4) . . .
>
> (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
>
> (b) . . .
>
> (5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

Section 3(1) of PAJA provides for the principle of procedurally fair administrative action affecting any person. The scope of section 3(1) differs from that of section 1 in terms of the definition of 'administrative action'. Section 1 applies to administrative action that adversely affects rights, whereas section 3(1) is wider in scope and applies to administrative action that adversely affects 'rights or legitimate expectations'.[61] Therefore, in order for an expectation to be valid, the expectation must be legitimate in terms of a legal sense and not just in the mind of the person.[62] Jafta AJ stated in the majority of *Walele v City of Cape Town* that[63]

> the difficulty is that administrative action is defined in section 1 of PAJA as a decision which adversely affects the rights of another person. In the definition no reference is made to a decision affecting legitimate expectations. Yet section 3 refers to administrative action that affects legitimate expectations. Applying the

[61] *Supra* note 4 at 675 and *Supra* note 10 at 22-42.
[62] *Supra* note 10 at 22-42.
[63] *Supra* note 44 at [37].

> definition to the interpretation of section 3 will lead to absurdity. Therefore, I am willing not to apply it and to assume that section 3 of PAJA confers the right to procedural fairness also on persons whose legitimate expectations are materially and adversely affected by an administrative decision. In the context of section 3, administrative action cannot mean what was intended in the definition section.

Section 3(2)(*a*) of PAJA emphasizes that procedural fairness depends on the circumstances of every case. Procedural fairness can be separated into five compulsory elements and three discretionary elements.[64] The five compulsory elements are: (1) adequate notice; (2) an opportunity to make representations; (3) a clear statement of administrative action; (4) notice of any right of review or internal appeal; and (5) notice of the right to request reasons.[65] The three discretionary elements are: (1) an opportunity to obtain assistance or legal representation; (2) to present and dispute any information and arguments; and (3) to appear in person.[66] The only exceptions from these elements are sections 3(4) and 3(5). Section 3(4) allows for an administrator to depart from the requirements of section 3(2) and section 3(5) allows for procedures which are still fair, however, they differ from section 3(2).[67] In this regard, in order for procedural fairness to still be present, the administrator must give adequate notice to the taxpayer which will state the nature and purpose of any administrative action. The taxpayer must also be given adequate opportunity to make representations.[68]

> The Constitutional Court has cautioned that, 'This court has consistently held that fairness needs to be determined in the light of the circumstances of a particular case' and that 'the overriding consideration will always be what does fairness demand in the circumstances of a particular case' and said that this cardinal principle is reiterated in s 3(2)(b) of PAJA.[69]

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[64] *Supra* note 4 at 677 and *Supra* note 10 at 22-43.
[65] *Ibid*.
[66] *Ibid*.
[67] *Ibid*.
[68] *Supra* note 10 at 22-43.
[69] *Supra* note 10 at 22-44 and *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at 75D, para [56] and *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 CC at para [114], quoted with approval in *Joseph v City of Johannesburg, Supra*, at 75E, para [56].

3.3.2. Audi Alteram Partem

This principle allows a person the opportunity to participate in the decision that will ultimately affect them and will give the person a chance of influencing the outcome of the decision.[70] The constitutional right to administrative action is, like all other rights, subject to the general limitation provision of the Constitution, and requires observance of the *audi alteram partem* principle (the Latin phrase for 'hear the other side'). This principle, although no more than a rebuttable presumption, allows that prior to the administrator making a decision, every person has the right to a fair hearing by the administrator.[71] According to the rule

> … a party to an administrative proceeding which may lead to action or a decision affecting his rights is entitled to present his case. … In short he must be given the opportunity to make representations. In its fullest application the rule embraces many possible facilities which, in compliance with the rule, may be afforded to the affected party, such as the right to make the said representation orally rather than in writing, the right to be represented by counsel, the right to question witnesses, etc. One such facility, which is really a corollary of the right to make representations, is that the party affected has the right to be informed of facts and information which may be detrimental to his case. The obvious reason for this is that without being informed of these matters he will not know what it is that might be held against him, and his failure to deal with such prejudicial material might render his right to make representations illusory.[72]

This principle has now been enshrined in PAJA.[73] In *Contract Support Services v C: SARS ("Contract Support Services")*, the Court held that the *audi alteram partem* principle does not need to be applied to all administrative acts, especially where the use of this principle would render the act irrelevant.[74] To emphasize, despite section 33(1) stating that all administration action must be procedurally fair, however, fairness is an elusive concept and the circumstances of each case

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[70] This principle has gained popularity since Corbett JA used it in *Attorney-General Eastern Cape v Blom* 1988 (4) SA 645 (A) at 660H.
[71] *Supra* note 4 at 673.
[72] *Supra* note 10 at 25-15B; By Galgut J, delivering the judgment of the court, in *Arepee Industries Ltd v CIR* 1993 (2) SA 216 (N), 55 SATC 139 at 144–5; see also ITC 1654 (1997) 61 SATC 131 at 142. See also *De Lange v Smuts NO* 1998 (3) SA 785 (CC) [131]: 'Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance'.
[73] *Supra* note 10 at 25-15B.
[74] 1999 (3) SA 1133 (W), 61 SATC 338; see also *Gardener v East London Transitional Local Council* 1996 (3) SA 99 (E).

must be examined in order to determine what fairness demands.[75] For example, what if the Commissioner gives notice to the taxpayer and that results in the taxpayer getting rid of the funds that the Commissioner is claiming?[76] The Supreme Court of Appeal held that by giving the taxpayer notice of an application to court for warrant of search and seizure, would defeat the object and purpose of the relevant section.[77]

In *Administrator, Transvaal v Zenzile* the court held that even though the taxpayer's argument may be weak on the merits, it cannot detract from his right in terms of the *audi alteram partem* principle.[78] Quoting with approval from Wade J *Administrative Law*[79], Hoexter JA held that 'procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly'.[80]

3.4. THE RIGHT TO REQUEST AND BE GIVEN REASONS

A reason has to be informative in order for the reason to be a real reason. The reason must explain why a specific action has been taken.[81] 'The giving of reasons is one of the fundamentals of good administration'.[82] Therefore, a reasoned decision is preferred to an unreasoned decision. It is also fair to explain to a person the reasons behind a decision that has been taken by a decision-maker. Reasons assist the people in ensuring that an authority is held accountable for its decisions.[83] Therefore officials must ensure that the public administration is governed by the values which are

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[75] *Supra* note 4 at 673.
[76] *Supra* note 10 at 22-48.
[77] *Shelton v SARS* 2002 (2) SA 9 (SCA).
[78] 1991 (1) SA 21 (A) at 37C.
[79] J Wade *Administrative Law* 6th ed.
[80] Ibid at 533-4.
[81] See *Minister for Environmental Affairs and Tourism v Phambilu Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) at [40]; *Kiva v Minister of Correctional Services* (2007) 28 ILJ 597 (E) at [38]. See *Commissioner, South African Revenue Service v Sprigg Investment 117 CC t/a Global Investment* 2011 (4) SA 551 (SCA) to understand why it is important to have reasons which provides a backdrop to the reasons that explain a decision.
[82] Lord Denning MR in *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 (CA) at [191C].
[83] *Koyabe & Others v Minister for Home Affairs* 2010 (4) SA 327 (CC) at [62]. It must be taken into account that the link between reasons and accountability was highlighted in the Constitutional Court is *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) at [12].

enshrined in the Constitution.[84] The right to be given reasons is one of the minimum requirements of fairness in terms of section 3(2)(*b*)(*v*) of PAJA. One's decision of whether to challenge a decision and how one must challenge the decision is more rationally made once one has received reasons for the decisions.[85] In some cases, however, reasons will assist a person in understanding how to proceed with an application, as is removes the need for appeal or review.

3.4.1. Right to request reasons

Prior to 1994, there was no constitutional right to reasons. Section 24(*c*) of the Interim Constitution introduced the right to reasons. Section 33(2) of the Constitution now states the right to reasons. There is a duty on the administrator to provide reasons for its actions according to the common-law principle of legality. This section provided for written reasons when a person's rights were being affected due to administration action. The Constitutional Court in *Pharmaceutical Manufacturers* held that the principle of legality also requires that decisions made by an administrator must be rational, more specifically the decision must be rationally related to the purpose of which the power was given.[86]

Section 5 of PAJA explicitly states that 'Any person whose rights have been materially and adversely affected by administrative action' is entitled to be given written reasons for the administrative action.[87] The wording in PAJA[88] follows section 33(2) of the Constitution, however on a more cautious note, as one can only request reasons in the event that one's rights are adversely and materially affected.

Section 107A of the ITA, which has now been repealed, states the rules that surround reasons for administrative action. Rule 3(1), which continues to be in force, states that[89]

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[84] Ibid.
[85] See Southwood J's remarks in *Afrisun Mpumalanga (Pty) Ltd v Kunene NO* 1999 (2) SA 599 (T) at 630F-G and Mokgoro and Sachs JJ's remarks in the minority judgment in *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) at [159].
[86] *Supra* note 9 at [67] and [72].
[87] *Supra* note 10 at 22-50.
[88] *Supra* note 41.
[89] South African Revenue Service *Regulation Number 467* (1 April 2003) at 4.

(a) Any taxpayer who is aggrieved by an assessment may, by written notice delivered to the Commissioner, within 30 days after the date of the assessment, request the Commissioner to furnish reasons for the assessment.

(b) Upon request by the taxpayer, the period prescribed in paragraph (a) may be extended by the Commissioner for a period of not more than 60 days where the Commissioner is satisfied that reasonable grounds exist for the delay in complying with that period.

The taxpayers can request the Commissioner to furnish them with 'adequate reasons' for their assessment in terms of the right contained in section 5(2) of PAJA.[90] This right, however, must be exercised within '90 days after the date on which that person became aware of the administrative action or might reasonably have been expected to have become aware of the action'.[91] As stated above, however, rule 3(1)(*a*) provides that the taxpayer must request such reasons within 30 days after the date of the assessment.[92]

3.4.2. Failure to give reasons

Section 5(3) of PAJA[93] provides for the following

> 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.

The Court stated in *Wessels v Minister of Justice and Constitutional Development* that '[t]he responsible minister's failure to furnish reasons, seen in the light of the aforegoing, cannot be seen other than proof that the administrative action was taken without good reason'.[94] The Court found

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[90] https://www.thesait.org.za/news/97474/A-Taxpayers-Right-To-Be-Given-A-Reason-For-Assessment.htm.
[91] Section 5(1) of PAJA.
[92] For an understanding of the approaches the Courts have taken see *Sikutshwa v MEC for Social Development, Eastern Cape* 2009 (3) SA 47 (TkH); *Sapepa v Member of the Executive Council for Social Development; Fetsha v Member of the Executive Council for Social Development* unreported (ECD) cases 855/2004 and 864/2004 of 17 February 2005: see *Sikutshwa* para 63-64. See also *Jikeka v South African Social Security Agency* 2011 (6) SA 628 (ECM) at [11], which follows the judgment in *Qwele v MEC for Social Development* unreported (ECD) case 861/2004 of 26 April 2005: *Jikeka* para 10.
[93] *Supra* note 41.
[94] 2010 (1) SA 128 (GNP) at Section 5 of PAJA.

that the administrative action adversely affected the plaintiff's rights and thus set aside the decision and referred the matter back to the Minister to reconsider the matter.

3.4.3. Adequate reasons

Section 5(2) of PAJA states that reasons have to be 'adequate', whereas, Rule 3(2) provides that[95]

> Where in the opinion of the Commissioner adequate reasons have already been provided, the Commissioner must, within 30 days after receipt of the notice contemplated in sub-rule (1), notify the taxpayer accordingly in writing which notice must refer to the documents wherein such reasons were provided.

Kirk-Cohen ADJP in *Rèan International Supply Company (Pty) Ltd v Mpumalanga Gaming Board* pointed out that '[i]t is impossible to lay down a general rule of what could constitute adequate or proper reasons, for each case must depend on its own facts'.[96] In *Transnet Ltd v Goodman Brothers (Pty) Ltd*, the Court stated that in Baxter *Administrative Law* (1989) at 228, the author made an important point regarding giving adequate reasons[97]

> In the first place, a duty to give reasons entails a duty to rationalize the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conducive to public confidence in the administrative decision-making process. Thirdly - and probably a major reason for the reluctance to give reasons - rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.

In the event that the Commissioner responds with reasons to a taxpayer and the taxpayer does not believe that these reasons are 'adequate', the provisions in Rule 26 come into effect. Rule 26 provides that[98]

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[95] *Supra* note 89.
[96] 1999 (8) BCLR 918 (T) at [926F].
[97] 2001 (1) SA 853 (SCA) at [5].
[98] *Supra* note 89 at 21.

(1) (a) Any decision by the Commissioner in the exercise of his or her discretion under rules 3(1)(b), 3(2), 3(3), 5(1) and 5(2)(c) will be subject to objection and appeal, and may notwithstanding the procedures contemplated in rules 6 to 18 be brought before the Court by application on notice.

(b) The Court may upon application on notice under this sub-rule and on good cause shown, in respect of a decision by the Commissioner under:

(i) rule 3(1)(b) or 5(2)(c), make an order extending the period prescribed therein;

(ii) rule 3(2) or 3(3), make an order remitting the matter for reconsideration by the Commissioner with or without directions to provide such reasons as in the opinion of the Court are adequate; or

(iii) rule 5(1), make an order declaring that any objection deemed to be invalid by the Commissioner shall be valid.

This was the situation in *X v C: SARS*[99]*,* where the Court stated that even if the Commissioner believes that they have furnished 'adequate reasons' to the taxpayer, the Court can find that the reasons are not adequate. The court can also direct the Commissioner to provide 'adequate' reasons without any directions as to what is 'adequate' according to the Court.[100]

3.5. JUDICIAL REVIEW

Section 6(1) of PAJA states the that '[a]ny person may institute proceedings in a court or a tribunal for the judicial review of an administrative action'.[101]

PAJA, however, provides that a court lower than the High Court cannot inquire into the constitutionality of any legislation.[102] All internal remedies need to be exhausted prior to approaching the court, save for the fact that PAJA provides that a court may excuse the fact that internal remedies have not be exhausted.[103] This will occur when the courts can see that the decision-maker has shown bias and there will not be a fair hearing for the person whose rights have been affected.

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[99] [2005] ZAGPHC 121.
[100] *Ibid*.
[101] *Supra* note 41.
[102] JA Arendse, RC Williams & S Klue *Silke on Tax Administration* (2019) at 3-28.
[103] *Ibid*.

Section 6(2)(*a*)(iii) of PAJA provides that despite the fact that the decision maker is reasonably suspected of bias, the court has the authority to review the administrative action.[104] As seen in *Simelane v Minister of Justice and Constitutional Development*, the decision-maker failed to apply his mind by applying the common-law instead of PAJA.[105] PAJA recognizes that a ground of review is an absence of rationality and in this matter, 'it is hard to imagine how the decision can pass the rationality test'.[106] Further, Corbett CJ in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* held that '[s]uch failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or *mala fide*…was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter… '.[107]

The concept of 'reasonable' is recognized in a restrictive manner in section 6(2)(*h*) of PAJA. Chaskalson CJ held in *Minister of Health v New Clicks SA (Pty) Ltd* that the definition should be extended to adopt a reasonable standard.[108] This was achieved by placing emphasis on rationality review in section 6(2)(*f*) instead of the literal meaning in section 6(2)(*h*).[109]

A taxpayer must follow the procedure set out in section 7 of PAJA in order to apply for judicial review in terms of PAJA. Section 7(1) of PAJA[110] provides

> (1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
> (a) subject to subsection (2) (c) , on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

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104 *Supra* note 41.
105 2009 (5) SA 485 (C) at 489I, para [11].
106 *Ibid* at 493B, para [23].
107 1988 (3) SA 132 (A) at 152A.
108 2006 (2) SA 311 S (CC). See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC).
109 *Supra* note 36 at 27-11.
110 *Supra* note 41.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others,* the court stated that '[w]hen administrative action is taken on review; it has to be reviewed on the grounds provided for in PAJA and not on the narrower grounds provided for under the common-law.'[111] Further, in *Gold Fields Ltd v Connellan NO and Others*, the court found that the administrator showed bias towards Gold Fields and thus it was not necessary to exhaust internal remedies prior to applying for review.[112]

In *Reed v Master of the High Court*, Plasket J commented on the point of exhausting all internal remedies by stating that[113]

> Section 7(2) does not … lace an obligation on a person aggrieved by a decision to exhaust all possible avenues of redress for in the political or administrative system – such as approaching a parliamentary committee or a Member of Parliament, or writing to complain to the superiors of the decision-maker. Similarly, it is not required of an aggrieved person that he or she approach one or more of the Chapter 9 institutions – such as the Public Protector or the Human Rights Commission – prior to resorting to judicial review.

Croome argues that the requirements to exhaust all internal remedies, as stipulated in section 7(2) of PAJA, may violate the taxpayers right to just administrative justice in terms of section 33, read with section 34, of the Constitution.[114]

3.6. REMEDIES

Section 8 of PAJA[115] provides for remedies that are available to the taxpayer where 'administrative action' can be reviewed by the courts. In terms of section 8(1)(*a*)(i) of PAJA, the Courts can make an order requiring SARS to provide reasons for an assessment, in the event that SARS has failed to do so after the taxpayer requested same. This was seen in *X v C: SARS* where the court held that the taxpayer was entitled to specific answers from SARS, as the taxpayers had submitted questions

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[111] *Supra* note 108 at 22 & 25. See also RC Williams *SARS & Fair Administrative Action: Quo Vadis?* (31 January 2013).
[112] [2005] 3 All SA 142 (W) at [169].
[113] [2005] ZAECHC 5; [2005] 2 All SA 429 (E) (27 January 2005) at [20].
[114] B J Croome *Taxpayer's Rights in South Africa* (2010) at 238.
[115] *Supra* note 41.

to SARS.[116] The Court directed SARS to provide reasons which clearly dealt with the exercise of its statutory powers.

The court can also order a prohibiting interdict, which prohibits SARS from acting in a particular way. This is stipulated in section 8(1)(*b*)(i) of PAJA. This obviously differs to section 8(1)(*a*)(i) where the Court directs the decision maker to act in a specific manner.

Further, section 8(1)(*c*)(ii) of PAJA, allows the courts to substitute or vary the administrative action that SARS has taken. This provision, however, can only be used in exceptional circumstances.[117] It is difficult for the Courts to give an order in terms of this section. The Courts would rather make an order directing the decision maker to re-consider that matter. Kruger AJ stated in *Noupoort Christian Care Centre v Minister of National Department of Social Development and Another* that[118]

> As a general point of departure, the court will be slow to substitute its own decision for that of a functionary. Also as a general proposition, a court should not lose sight of the distinction between its function as an appellate tribunal and as a tribunal reviewing decisions of an administrative functionary; judicial deference is called for.

Section 8(1)(*f*) of PAJA allows the court to award costs in these matters. The Court will award compensation in the event that the decision maker has been unfair and unreasonable against the taxpayer. In terms of section 8(2)(*d*), the Constitutional Court has cautioned that by courts awarding damages in cases where litigants seek to enforce their constitutional rights particularly against the State, especially where the constitutionality of a particular right is questioned, this may have an adverse effect on other cases.[119] The court may assist the taxpayer in receiving a decision from the Commissioner, as it is the taxpayer's right to receive a decision from the Commissioner.

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[116] *Supra* note 99.
[117] *Supra* note 10 at 22-61.
[118] 2005 (10) BCLR 1034 (T) at para 40. A similar view was taken by Froneman DJP in *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 ILJ 1425 (LAC) 1426 and 1435.
[119] *Supra* note 10 at 22-62.

3.7. THE DOCTRINE OF LEGITIMATE EXPECTATION

The Doctrine of Legitimate Expectation originates in the United Kingdom with the development of the law of equity.[120] Section 24(b) of the Constitution states that '[e]very person shall have the right to– procedurally fair administrative action when any of his or her rights or legitimate expectations is affected or threatened'. Furthermore, PAJA makes specific mention of the doctrine of legitimate expectation in section 3. Section 3(1) of PAJA states that '[a]dministration which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'.[121]

In *R v Inland Revenue Commissioners, Ex Parte MFK Underwriting Agents Ltd*, Bingham LJ stated that the Revenue previously published the statement which should be regarded as binding subject to the following terms: [122]

1) The taxpayer must give full details to the Revenue of the specific transaction which he seeks a ruling;
2) The taxpayer should indicate whether he intends to make use of the ruling; and
3) The ruling made by the Revenue must be as unambiguous and devoid of relevant qualification.

Bingham LJ held that[123]

> If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed, it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or is stopped from so acting, a public authority should generally be in no better position.

The taxpayer can only rely on the ruling issued by the Commissioner, if the taxpayer has made a full and proper disclosure of the facts. Bingham LJ further held that[124]

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[120] D Clegg *The Doctrine of Legitimate Expectations* (2000).
[121] *Supra* note 41.
[122] [1990] 1 All ER 91 (QBD) at page 110.
[123] *Ibid* at 107.
[124] *Ibid* at 115.

> In those cases where the taxpayer has approached the Inland Revenue for guidance the court will be unlikely to grant judicial review unless it is satisfied that the taxpayer has treated the Inland Revenue with complete frankness about his proposals. Applying private law tests the situation calls for utmost good faith on the part of the taxpayer. He should make full disclosure of all the material facts known to him.

The Commissioner should follow the ruling issued if the taxpayer has fully disclosed the facts and implemented the transaction as advised by the Commissioner.[125]

In *Administrator of Transvaal and Others v Traub and Others ("Traub")*, Corbett CJ stated that the 'doctrine of legitimate expectation is but one aspect of the 'duty to act fairly,' but its origin and development reflect many of the concerns and difficulties accompanying the broader judicial effort to promote administrative fairness'.[126] By contrast, in Zimbabwe, the Court observed that the doctrine of legitimate expectations means 'no more than that the decision-maker act fairly and apply the principles of natural justice before reaching any decision that will adversely affect the legitimate expectations of the aggrieved party'.[127] Notwithstanding the remarks made by Corbett CJ in *Traub* and Gubbay CJ in *Metsola v Public Service Commission and Another,* the President of the Court in ITC 1674 stated that the doctrine of legitimate expectations 'include the expectation that the decision-maker must act fairly'.[128]

Furthermore, the doctrine of legitimate expectation can comprise of a procedural, as well as a substantive approach.[129] In this regard, the taxpayer can expect that he will be given a hearing, which will uphold procedural fairness, and this will ultimately lead to his expectation that the decision will be in the taxpayer's favour.

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[125] C Louw *Kan die Suid-Afrikaanse Inkomstediens (SAID) Gebonde Gehou word aan sy Aanwysings?* (2003) (66) THRHR 296.
[126] [1989] ZASCA 90; [1989] 4 All SA 924 (AD) at 38-39.
[127] *Metsola v Public Service Commission and Another* 1989 (3) ZLR 147 (SC); see also D Clegg *The Doctrine of Legitimate Expectations* (2000).
[128] *Ibid*. ITC 1674 (2000) 62 SATC 116.
[129] *Supra* note 10 at 22-63.

The taxpayer can, therefore, rely on the right to administrative justice, together with the doctrine of legitimate expectation to ensure that the Commissioner follows the interpretation notes issued by him.

3.8. CONCLUSION

PAJA highlights the duty of the Commissioner to act fairly to each taxpayer. Section 33 of the Constitution and the enactment of PAJA has brought about certain rights that the taxpayer can enforce against the Commissioner. The right requires administrative action to be lawful, reasonable and procedurally fair.

Pursuant to this obligation imposed on the Commissioner, the taxpayer has the right to insist on proper reasons from the Commissioner for any decision that he has made. Any decision that the Commissioner makes results in ‘administrative action’ and is subject to PAJA.

The taxpayer, in terms of PAJA, has the right to judicial review by the court for an administrative action taken by the Commissioner. The taxpayer can only, however, approach the courts after all internal remedies are sought. The taxpayer may also have the right to remedies under PAJA, which could range from the courts ordering the Commissioner to provide a decision to the taxpayer to awarding costs against the Commissioner.

It is evident that the doctrine of legitimate expectation is relevant in a tax context and could assist taxpayers by providing relief. The taxpayer, however, will have to fulfil conditions in order to rely on this doctrine. It is submitted that if SARS does not remain bound to their decisions or rulings, which are proven to constitute administrative action, this would amount to a legitimate expectation as the taxpayers right to just administrative action is infringed.

Despite the fact that PAJA highlights the duty placed on the Commissioner and the rights afforded to the taxpayer, there is still confusion surrounding the effect that PAJA has on South Africa and the tax system. The following chapter will examine the taxpayer’s right of access to courts, which relates to the right to just administrative action.

CHAPTER 4: THE TAXPAYER'S RIGHT OF ACCESS TO THE COURTS

The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes.[130]

4.1. INTRODUCTION

The historical relevance of the constitutional right of access to courts originates from the Apartheid era, as the courts were not allowed to enquire into the legal validity of certain laws or conduct of the administration.[131] With the implementation of the Interim Constitution, section 22 was introduced which gave effect to the fact that every person has the guaranteed right 'to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum'. In *Bernstein v Bester NO*, Ackermann J stated that the purpose of section 22 was[132]

> to emphasise and protect generally, but also specifically for the protection of the individual, the separation of powers, particularly the separation of the judiciary from the other arms of the state. Section 22 achieves this by ensuring that the courts and other for a which settle justiciable disputes are independent and impartial. It is a provision fundamental to the upholding of the rule of law, the constitutional state, the 'regstaatidee', for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into 'courts' …. By constitutionalising the requirements of independence and impartiality the section places the <u>nature</u> of the courts or other adjudication for a beyond debate…

The constitutional right to access of the courts is now enshrined in section 34 of the Constitution. Section 34 of the Constitution provides that '[e]veryone 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

[130] *Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) at [22].
[131] *Supra* note 4 at 711.
[132] 1996 (2) SA 751 (CC) at [105].

appropriate, another independent and impartial tribunal or forum'.[133] This right guarantees that everyone has equal protection of the law and no person will be deprived of a right 'without due process of law'.[134]

This particular right is essential for the rule of law, and in particular for constitutional democracy.[135] The rule of law refers to the fact that no person is above the law, every person is governed by the same laws. The significant principle that emerges from the rule of law is that anyone can challenge the legal validity of any law or conduct. The rule of law seeks to prevent violence and individuals taking the law into their own hands and instead one must rely on the peaceful system and institution that is available to them.[136] Section 34 of the Constitutional will only apply in certain instances where a dispute can only be resolved through the application of law.[137] In certain circumstances, however, even where there is no dispute, the application of law is required to challenge the constitutionality of legislation which allegedly limits section 34 of the Constitution.[138]

Furthermore, section 34 of the Constitution refers to 'any dispute', therefore this could be expanded to include criminal proceedings. Section 34 of the Constitution, however, does not include criminal proceedings, as it is regulated by section 35 of the Constitution. In *S v Pennington*[139], the court stated that[140]

> …The words "any dispute" may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That section 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that section 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted.

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133 *Supra* note 1.
134 *Supra* note 36 at 28.1.
135 *Supra* note 4 at 711.
136 *Ibid*.
137 *Supra* note 4 at 712.
138 *Ibid* and *Lesapo* (*supra* note 130) at [7].
139 1997 (10) BCLR 1413 (CC).
140 *Ibid* at [46].

Therefore, as evident from the above case, in the event that criminal proceedings are instituted against a taxpayer, the taxpayer cannot rely on section 34 of the Constitution. The taxpayer can only rely on section 34 of the Constitution if the taxpayer seeks to challenge an administrative issue. This will be used in an instance such as the Commissioner decision to file a statement at Court for any taxes owed by the taxpayer and if such taxpayer received prior notice thereof.[141] This will be discussed in more detail below.

Section 34 of the Constitution brings about three different rights:[142]

1) Access – the right of access to a court or another tribunal or forum;
2) Independence and impartiality – the section requires tribunals and forums to be impartial when or if they are involved in a matter; and
3) Fairness – there is a process that needs to be followed which requires legal disputes to be applied in a fair and public hearing.

The right of access to courts is, however, subject to section 7(2) of PAJA[143], which states that

> (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
> (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
> (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

This chapter will examine the extraordinary powers of the Commissioner that has been conferred upon him by legislation, in particular the following will be examined for the purposes of this report:

1) The statement procedure;

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[141] Section 91(1)(b) of the ITA; section 40(2)(a) of the VAT Act.
[142] *Supra* note 1. See also *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) at [211].
[143] *Supra* note 41.

2) The appointment of an agent; and
3) The 'pay now, argue later' rule.

In order to deal with the above powers, locus standi to approach a court and the prohibition of self-help will also be dealt with below.

4.2. *LOCUS STANDI* TO APPROACH A COURT TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE OR THE 'CONDUCT' OF AN ADMINISTRATOR

Section 38 of the Constitution[144], above, states which persons have *locus standi* to approach a court. For ease of reference, section 38 states that

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members.

Section 38 of the Constitution refers to *locus standi* to inquire into the constitutionality of any legislation and asking the court to make a ruling on same. Section 172(2)(*a*)-(*b*) of the Constitution states that[145]

> (a) The Supreme Court of Appeal, a High Court, or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[144] *Supra* note 1.
[145] *Ibid*.

(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

Section 38 of the Constitution is important as it has allowed the Minister, in terms of section 14 of the TAA, to appoint a Tax Ombud. The is of particular importance because the tax ombudsman can intercede between the taxpayer and the Commissioner in the event that the taxpayer is of the opinion that the Commissioner has infringed his or her constitutional rights or there has been an administration action that has infringed his or her constitutional rights.[146]

The Tax Court is a lower court, as well as a 'creature of statute'. The Tax Court cannot make any ruling adjudicating the administrative action made by SARS, which in the eyes of the taxpayer is unconstitutional in terms of PAJA. Section 172(1)(*a*) bars the Tax Court from making any rulings or hearing matters that deal with the constitutionality of the 'conduct' of SARS.

The Tax Court is not a court of law and therefore cannot make the same type of rulings as the High Court.[147] Consequently, PAJA states that matters which seek a judicial review must be brought to the High Court.[148] The taxpayer, however, has to note that the issue of constitutionality is being raised in the matter prior to the matter being heard in court.[149] If there is another way of raising this issue, then that process must be followed in the High Court instead of having the matter referred straight to the Constitutional.[150] The constitutionality of the conduct on the part of SARS lies outside the jurisdiction of the Tax Court and must be brought before the High Court in the event that the taxpayer is questioning the constitutionality of SARS's conduct.

[146] *Supra* note 102 at 3-8. See also section 16 of the TAA.
[147] Section 172(1)(*a*) of the Constitution. See also *CIR v City Deep Ltd* 1924 AD 298, 6 SATC 69; *Estate H M Brownson* (*deceased*) *v President and Members of the Income Tax Special Court and CIR* 1933 WLD 116, 6 SATC 166.
[148] *Supra* note 10 at 22-65.
[149] *Ibid* and *Motsepe v CIR* 1997 (2) SA, 898 (CC), 59 SATC 245 at 256.
[150] *Ibid* at para [21], 908D–E/F.

Further, a matter must only be referred to the Constitutional Court in the event that the issue of constitutionality is crucial to the matter.[151] The Tax Court does, however, have the jurisdiction to adjudicate on appeals in terms of section 117 of the Tax Administration Act.[152]

In *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*, the Supreme Court of Appeal held that 'a party has the right to raise a collateral challenge to the validity of an administrative Act where he is threatened by a public authority with coercive action because the legal force of such action will most often depend upon the legal validity of the administrative Act in question'.[153] One must also note, however, that

> The right to challenge the validity of an administrative Act collaterally arises because the validity of the administrative Act constitutes the essential prerequisite for the legal force of the action that follows and ex hypothesi the subject may not then be precluded from challenging its validity. On the other hand, a court that is asked to set aside an invalid administrative Act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide. Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.[154]

Generally, the Constitutional Court has to confirm the judgment of the High Court or Supreme Court of Appeal in terms of the constitutional invalidity in respect of any Act of Parliament, in terms of section 172(2)(*a*) of the Constitution. This does not apply, however, when an order is made in terms of the constructional invalidity of 'conduct' by an administrator, such as SARS.[155] This is particularly relevant in matters where the High Court delivers an order where SARS's conduct to carry out a search and seizure operation is constitutionally invalid. This order would be effective and would not be subject to the Constitutional Courts verification of such order.[156]

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151 *Supra* note 102 at 3-31.
152 *Ibid*.
153 2010 (3) SA 589 (SCA) at 599D-F, para [15].
154 *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at 235G-H.
155 *Supra* note 10 at 22-9.
156 *Ibid*.

4.3. THE PROHIBITION OF SELF-HELP

Section 34 obliges the State to promote that one must reach a resolution to disputes through legal means. In *S v Makwanyane*, Ackermann J stated that[157]

> [I]n a constitutional state individuals agree (in principle at least) to abandon their right to self-help for the protection of their rights only because the State, in a constitutional state compact, assumes the obligation to protect these rights. If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights.

Therefore, as stated above and reiterated, no one is permitted to take the law into their own hands. In *Lesapo v North West Agricultural Bank and Another (“Lesapo”)*, the court found that ‘self-help’ is invalid and cannot be relied upon.[158] The court stressed that there is need for ‘institutionalising the resolution of disputes, and preventing remedies being sought through self-help’.[159] Furthermore, the ‘rule against self-help is necessary for the protection of the individual against arbitrary and subjective decision and conduct of an adversary’.[160] The court further held that the idea of ‘self-help’ undoubtedly contravenes section 34 of the Constitution, as the purpose of section 34 is to ensure a peaceful and orderly society. In order for individuals to not utilise the rule of ‘self-help’, it is necessary for courts, tribunals or the like, to ensure that decisions are given as soon as possible.[161]

The question that arises from the above is whether the statement procedure constitutes ‘self-help’.

4.4. THE STATEMENT PROCEDURE

The VAT system works on an understanding between the taxpayer and SARS. It is a self-assessing system and SARS will rely on the taxpayer’s honesty in respect of their assessments. SARS can, however, conduct their own independent assessment, in terms of section 31 of the Value-Added

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[157] 1995 (3) SA 391 (CC) at [168].
[158] *Supra* note 130.
[159] *Ibid* at [11]-[12] and [22].
[160] *Ibid* at [18].
[161] *Road Accident Fund v Mdeyide* 2011 (2)SA 26 (CC) at [8].

Tax Act ("VAT Act").[162] The Commissioner has certain powers, in terms of the VAT Act and the ITA, in order to ensure that the relevant provisions are complied with when paying the correct amount of VAT.

In terms of section 91(1)(*b*) of the ITA and section 40(2)(*a*) of the VAT Act, the Commissioner is empowered to file a statement with a clerk or registrar of a competent court for the recovery of taxes due and interest thereon. It is not necessary for the Commissioner to give the taxpayer prior notice before filing the statement. Section 62(1) of the Tax Administration Laws Amendment Act ("TALAA"),[163] however contradicts the above, as the section stipulates that the Commissioner can only file the statement 10 (ten) days after the taxpayer has received notice thereof. This section will be overlooked in the event that the Commissioner is of the opinion that the collection of tax will be prejudiced if the taxpayers receives prior notice.[164]

Further, according to section 92 of the ITA and section 40(5) of the VAT Act, no one can question the correctness of the assessment on which the statement is based on, which has been subsequently filed with the court. Notwithstanding the fact that an objection or an appeal can be lodged. This objection or appeal does not suspend the obligation for the person to pay the tax, unless the Commissioner so directs.[165]

In addition, Section 47 of the VAT Act states that the Commissioner may appoint a third party agent, who is any person that holds money on behalf of the taxpayer, and instruct the agent to pay the outstanding tax and interest if necessary. The agent will have to pay the monies over to SARS, otherwise he will be in position that he is personally liable for the outstanding amount.[166]

An important, yet conflicting, case that surrounds the argument of whether the above sections are constitutionally valid is the case of *Metcash Trading Ltd v Commissioner for the South African Revenue Services and Another ("Metcash Trading").*[167] Briefly, the facts of the case are that

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[162] L Olivier *Tax Collection and the Bill of Rights* (2001) TSAR 193 at 193 and Act 89 of 1991.
[163] Act 39 of 2013.
[164] Section 172(3) of the TAA.
[165] Section 88(1) of the ITA and section 36(1) of the VAT Act.
[166] *Supra* note 162 at 194.
[167] 2001 (1) BCLR 1 (CC).

Metcash (the applicant), a registered VAT vendor, rendered VAT returns and a tax credit in the amount of R77 667 722.27 was claimed for their alleged operation with Metro International for the period of July 1996 to June 1997. SARS (the respondent) conducted an investigation into the amount and came to the conclusion that the transactions never occurred between the applicant and Metro International. The Commissioner filed their own assessment for the amount of R226 million. The objection that the applicant applied for was dismissed and SARS demanded payment. In the event that the applicant did not pay the outstanding amount, SARS would use its summary enforcement procedure. Metcash approached the High Court on an urgent basis with the argument that the sections (being sections 36, 40(2)(a) and 40(5) of the VAT Act) were constitutionally invalid, as they infringe upon the right of access to courts guaranteed under section 34 of the Constitution. The applicant further argued that it could not be justifiable to limit this right under section 36 of the Constitution.

The *court a quo* (the High Court) found that the sections were in fact unconstitutional and in fact infringed upon the rights of the taxpayer in terms of section 34 of the Constitution. Snyders J granted an interdict preventing SARS from enforcing the payment of the outstanding amount. Due to the fact that this case dealt with the constitutionality of provisions in legislation, the matter had to be referred to the Constitutional Court to confirm the order.

The Constitutional Court did not agree with the *court a quo's* order and held that all the sections in question were constitutionally valid, as they do not infringe a taxpayer's right to access the court. Furthermore, even if it was accepted that there was such an infringement, it would be justifiable under the limitation clause. For example, the taxpayer could call upon the Commission to justify the decision taken in review proceedings.[168] Kriegler J stated that[169]

> I cannot agree with Snyders J to the extent that she considered the exercise of the discretion conferred upon the Commissioner in s 36 of the Act not to be reviewable. The Act gives the Commissioner the discretion to suspend an obligation to pay.
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> …

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[168] *Ibid* at [33].
[169] *Ibid* at [42].

> The action must also constitute "just administrative action" as required by s 33 of the Constitution and be in compliance with any legislation governing the review of administrative action.

The Constitutional Court, with approval, referred to the dicta in the matter of *Kruger v SBI*[170]. The Appellant Division stated that in the context of the ITA, there remains a wide scope for the court to set aside a decision obtained by the Commissioner and filed in a statement.[171] Furthermore, the statement that can be filed by the Commissioner, has the same effect as an 'exigible civil judgment for a liquid debt and the correctness of an assessment on which the statement is based is beyond challenge by the taxpayer in any proceedings connected with the summary enforcement procedure'.[172] Kriegler J found that[173]

> Filing the statement sets in train the ordinary execution processes of the particular court . . . The substance of the matter is that the ordinary civil process of execution is employed; and the Commissioner is not authorized to usurp any judicial functions. Manifestly section 40(2) is a far cry from the kind of open ticket to self-help condemned in the Lesapo and kindred cases.

Metcash Trading will also be examined further below in respect of the 'pay now, argue later' rule.

4.5. THE APPOINTMENT OF AN AGENT

Section 99 of the ITA[174], section 179(1) of the TAA, read with section 66(1) of the TALAA, as well as section 47 of the VAT Act confers the power on the Commissioner to appoint a third party as the taxpayer's agent to pay outstanding tax, including interest or penalties, on behalf of the taxpayer. In the event that the agent refuses to pay the taxes over to SARS, the agent will be personally liable to pay the outstanding amount.[175] In practice, however, the Commissioner will only resort to using these drastic measures if the taxpayer has failed to respond to written or telephonic demands that have been made for payment of outstanding amounts.[176]

[170] 1973 (1) SA 394 (A), 34 SATC 119.
[171] *Supra* note 10 at 22-69.
[172] *Supra* note 4 at 719.
[173] *Supra* note 167 at [51].
[174] Now repealed as the TAA has replaced all the procedural provision of the ITA.
[175] *Supra* note 162 at 194.
[176] *Supra* note 118 at 42.

This power extends to the Commissioner being able to utilise the taxpayer's overdraft facility to pay outstanding taxes.[177] The Commissioner, however, cannot attach the taxpayer's pension in an insolvent estate.[178]

In *Smartphone SP (Pty) Ltd v ABSA Bank Ltd ("Smartphone")*, SARS found that Smartphone's predecessors were involved with a fraudulent tax scheme and issued an additional assessment, including penalties and interest.[179] The court held that the money was owed by Smartphone's predecessor and not Smartphone, thus the appointment of an agent was invalid.[180] In terms of the wording of section 99 of the ITA, the Commissioner has the power to freeze a taxpayer's bank account in order to collect outstanding taxes.[181]

In *Contract Support Services*, the applicant approached the court for section 47 of the VAT Act to be reviewed and set aside, due to the fact that the *audi alteram* principle had not been applied.[182] Brett AJ did not find that the section was unconstitutional as in the event that the Commissioner allowed a hearing or gave the taxpayer prior notice, this would defeat the purpose of the collection of taxes, as the taxpayer could move such funds. Brett AJ held that[183]

> I agree with the submission made by Mr Du Toit that not all administrative acts require the application of the audi alteram parten rule before they are given effect to. Indeed, s 47 itself requires no such prior hearing. I also agree with Mr Du Toit that to require a prior hearing would defeat the very purpose of the notice. It would alert the defaulting vatpayer to the intention to require payment from the latter's debtor and to enable the taxpayer to spirit such funds away. Where prior notice and a hearing would render the proposed act nugatory, no such prior notice or hearing is required.

The court criticized the judgment of *Contract Support Services* in *Mpande Foodliner CC v C: SARS ("Mpande")*.[184] Patel AJ rather set aside notices issued in terms of section 47 of the VAT

[177] *Hunting Industries Ltd v Barclays Bank of Zimbabwe* (68 SATC 91).
[178] *Matanzima v Minister of Welfare and Pensions* 52 SATC 330.
[179] 2004 (3) SA 65 (W) 72.
[180] L Olivier *Constitutional Review of SARS's Power to Collect Outstanding Income Tax* (2010) De Jure 157 at 165.
[181] *Ibid*.
[182] *Supra* note 74.
[183] *Ibid* at page 350.
[184] 2000 (4) SA 1048 (T).

Act. Patel AJ found that the '*audi alteram partem* rule was too fundamental a right to be excluded by necessary implication'.[185] Therefore the taxpayer should have been granted a hearing prior to the issuing of the notice.

In *Lesapo*, the court stated that in order to determine whether a statutory provision is constitutional, one must examine it objectively.[186] Furthermore, the court in *Smartphone*[187], referred to the judgment of *Contract Support Service*[188] with approval, whereas commented on *Mpande*[189] by saying that[190]

> [A] conclusion, which in my view, lost sight of a fundamental principle, namely that the fairness of administrative procedure depends on the circumstances of each case. I thus regret that I am unable to lend my support to his lone voice.

Furthermore, the court in *Smartphone*[191] stated that the taxpayer had not utilised its right, such as appeal and objection, nor did the taxpayer utilise any legal remedies available.

In *Hindry v Nedcor Bank Ltd and Another*, the court was approached to determine whether section 99 of the ITA is constitutionally valid and whether section 99 of the ITA infringes on a person's right to just administrative action, in terms of section 33 of the Constitution, as a taxpayer is not allowed the opportunity of a hearing prior to SARS appointing an agent.[192] Wunsh J held that section 99 was a legitimate limitation on the taxpayer's rights, for the following reasons:[193]

- The section was an example of summary proceedings to secure prompt performance of pecuniary obligations to the government, the purpose of which was to avoid assets of the taxpayer being placed beyond SARS's reach and, as such, was a weapon of great importance to the State in a situation where there was no suggestion of an equally effective alternative to achieve the desired result.

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[185] *Supra* note 180 at 166.
[186] *Supra* note 162.
[187] *Supra* note 179.
[188] *Supra* note 74.
[189] *Supra* note 184.
[190] *Supra* note 179 at 72.
[191] *Ibid*.
[192] 1999 (2) SA 757 (W).
[193] *Supra* note 10 at 13-14.

- The taxpayer had ample opportunity for a later judicial determination of his legal rights.

- The bank could not be regarded as being in a different position to any other debtor of the taxpayer solely on the basis of the contractual duty to keep the taxpayer's affairs confidential.

- In this particular case, the claim had been the subject of considerable correspondence between the taxpayer and SARS in which the latter had explained how the claim had been arrived at. There could therefore be no complaint of unfairness, or failure to give reasons, nor a complaint that the principle of audi alteram partem had not been applied, even though the applicant was given the opportunity of being heard only after the decision had been taken.

Therefore, this power that the Commissioner has been empowered with is constitutionally valid.

4.6. THE 'PAY NOW, ARGUE LATER' RULE

4.6.1. Section 36 and the *Metcash Trading* Case

The purpose of the 'pay now, argue later' rule is to speedily collect taxes. The 'pay now, argue later' rule was contained in section 36 of the VAT Act and section 88 of the ITA. Both sections, however, expressed the same material aspects. Section 36 of the VAT Act provides that the obligation to pay tax and the right to receive and recover tax shall not be suspended pending the decision of an appeal or objection unless the Commissioner so directs.[194] The effect of section 36 of the VAT Act is that under the common-law practice where the execution of a judgement would usually be suspended pending the outcome of an appeal or objection, this does not apply to a tax debt.[195]

This was evident in the matter of *Commissioner of Inland Revenue v NCR Corporation of SA (Pty) Ltd* before the Supreme Court of Appeal, where the court was tasked with interpreting the wording of section 88 of the ITA.[196] The Court stated that there were two elements to section 88:[197]

[194] *Supra* note 10 at 22-70.
[195] See *Commissioner of Inland Revenue v NCR Corporation of SA (Pty) Ltd* 1998 2 SA 765 (A).
[196] *Ibid*.
[197] *Ibid* at 16.

> The first enacts that the obligation to pay and the right to receive and recover any tax chargeable under the Act is not suspended, unless the Commissioner so directs, by "any appeal" or "pending the decision of a court law under sec 86 or 86A". The second portion provides for the refunding of excess tax paid, together with interest thereon, whenever an assessment is altered "on appeal" or "in conformity with any such decision".

The 'pay now, argue later' rule is not governed by the usual civil procedures. This is seen below, as Corbett JA held in regard to the first portion, which is giving effect to the 'pay now, argue later' rule, that[198]

> The common law rule of practice that generally the execution of a judgment 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 of the Constitution, as discussed above, provides factors that the court must take into consideration in determining whether a limitation is justifiable. The following *dictum* in *S v Bhulwana* must be referred to, where the court stated that[199]

> [T]he Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other.

The Constitutional Court in *Metcash Trading*[200] came to a similar conclusion as *CIR v NCR*[201]. The decision in *Metcash Trading* is seen as a very disappointing ruling in the eyes of most taxpayers.

As discussed above, the Constitutional Court in *Metcash Trading* had the opportunity to decide whether to confirm the *court a quo's* decision in which the High Court found that the 'pay now, argue later' rule in terms of section 36 of the VAT Act was unconstitutional. The Constitutional Court came to the decision that section 36 (together with sections 40(2)(a) and 40(5)) is

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198 *Ibid* at 16-17.
199 1995 ZACC 11 at [18].
200 *Supra* note 167.
201 *Supra* note 195.

constitutionally valid. Even though there was a limitation on the right of access to court, it is justifiable as there is no infringement on the right itself and the taxpayer can make use of the judicial review procedures. Therefore, the order that was awarded in the court a quo was therefore in correct and the Constitutional Court passed the ruling that all the sections were constitutionally valid. Kriegler J stated that[202]

> The Commissioner, in exercising the power under s 36, is clearly implementing legislation and as such the exercise of the s 36 power constitutes administrative action and falls within the administrative justice clause of the Constitution. I cannot agree with Snyders J to the extent that she considered the exercise of the discretion conferred upon the Commissioner in s 36 of the Act not to be reviewable. The Act gives the Commissioner the discretion to suspend an obligation to pay. It contemplates, therefore that notwithstanding the 'pay now, argue later' rule, there will be circumstances in which it would be just for the Commissioner to suspend the obligation to make payment of the tax pending the determination of the appeal. What those circumstances are will depend on the facts of each particular case. The Commissioner must, however, be able to justify his decision as being rational. The action must also constitute 'just administrative action' as required by s 33 of the Constitution and be in compliance with any legislation governing the review of administrative action.

The Constitutional Court further pointed out that the 'pay now, argue later' rule 'is one which is adopted in many open and democratic societies'.[203] Furthermore, the court stated that it is acceptable in open and democratic societies, as it based on the principles of freedom, dignity and equality. A balance must also be achieved between the powers of the Commissioner and the taxpayer's right of access to court.[204]

4.6.2. Criticisms of the *Metcash Trading* Case

There have been many criticisms of the *Metcash Trading* case over the years. The authors of the criticisms that will be focused on in this report are Olivier, Williams and Keulder, which are dealt with below.

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[202] *Supra* note 167 at [42].
[203] *Ibid* at [61].
[204] C Keulder *"Pay Now, Argue Later" Rule – Before and After the Tax Administration Act* (2013) Volume 16 No 4 at 151.

4.6.2.1. Olivier's Criticisms

Olivier's article, entitled 'Tax Collection and the Bill of Rights', deals with the *Metcash Trading* Case and Olivier's thoughts of the Constitutional Court's ruling.[205]

Olivier states that the judgment itself was difficult to reconcile with other judgments from the Constitutional Court. The Court referred to other cases which was incomprehensible as the jurisdiction in those cases were accepted by the court and it was never the argument of the taxpayer that[206]

> [U]nder the scheme of the act the jurisdiction of the courts had been excluded. The argument was that the "pay now, argue later" rule excludes the jurisdiction of the courts at the time it is invoked.

Olivier further points out that the taxpayer has no access to a court apart from the narrow review ground when the taxpayers is obliged to pay the tax. The Court also did not take into consideration in respect of the 'pay now, argue later' rule whether the taxpayer would be in a financial position to make use of other avenues at his disposal.[207]

Olivier submits that the review proceedings that are available to a taxpayer are limited and the possible review proceedings of appeal or objection does not allow the taxpayer to access the courts.[208] The matter of *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*[209] laid down the administration decisions that may be reviewed: [210]

> 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

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[205] *Supra* note 162.
[206] *Ibid* at 196.
[207] *Ibid*.
[208] *Ibid* at 197.
[209] *Supra* note 107.
[210] *Ibid* at 43-44.

> 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.

Furthermore, with the implementation of the Interim Constitution brought about the shift in administrative law. This was clearly seen in *Pharmaceutical Manufacturers*.[211] The court stated that[212]

> Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution (and that need not be decided in this case), the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it and subject to constitutional control.

Olivier expresses the concern that how can the review procedure be worth anything if a taxpayer cannot rightfully question the validity of the assessment on which the statement that has been filed by the Commissioner has been based.[213]

Furthermore, a point that was not dealt with by the Constitutional Court was the fact that even though the Commissioner has to notify a taxpayer about an assessment in terms of section 31, there is nothing that stops the Commissioner from utilizing the summary collection prior to notifying the taxpayer. In many cases, the Commissioner will use this procedure when he does not agree with the taxpayer's VAT returns.[214]

Olivier submits the concern that the recent decision in matter of *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* was not taken into

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[211] *Supra* note 9.
[212] *Ibid* at [45].
[213] *Supra* note 162 at 197.
[214] *Ibid*.

consideration, even though the matter was decided in the same court.[215] Importantly, the 'court struck down certain sections in the Aliens Control Act 96 of 1991 inter alia on the basis of a wide discretion given to an official'.[216] Furthermore, the court held that even though the discretion exercised is subject to judicial review, 'relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights'.[217] Olivier points out that this should surely be extended to the decisions made by the Commissioner. The Constitutional Court in the *Metcash Trading* Case held a completely contradictory ruling stating that

> The Commissioner must, however, be able to justify his decision as being rational. The action must also constitute "just administrative action" as required by section 33 of the Constitution and be in compliance with any legislation governing the review of administrative action.[218]

In respect of the statement procedure, Olivier states that nowhere in the VAT Act does it specifically state that the taxpayer has to be notified prior to the Commissioner intention to file a statement at court. In this regard, a judgment in terms of the default judgment procedure is not to be awarded. The grounds on which the taxpayer can dispute the filing of the statement is unclear.[219] The court only stated the following in respect of this issue

> [I]t is notorious that the field of tax law can and often does raise a whole panoply of procedural or substantive issues derived from one or more of the individually complex and usually interlocking fields of law involved in tax disputes.[220]

Olivier further submits that[221]

> The point may be made that the mere fact that the judgment obtained may be rescinded is no guarantee that at the time the statement is filed, a taxpayer has access to the court with which it is filed. In practice, an order to rescind the judgment is often made precisely because it was obtained without the taxpayer having knowledge that a statement has been filed.

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[215] *Ibid* and 2000 8 BCLR 837 (CC).
[216] *Ibid* at 197-198.
[217] *Supra* note 167 at [48].
[218] *Supra* note 167 at [42].
[219] *Supra* note 162 at 199.
[220] *Supra* note 167 at [56].
[221] *Supra* note 162 at 199.

Additionally, the court submitted that there are three reasons as to why the infringement on the taxpayer's right would be justifiable under the limitation clause:[222]

> Firstly, the public interest in obtaining full and speedy settlement of tax debts in the overall context of the act was found to be significant. The "pay now, argue later" rule reduces the number of frivolous objections and ensures that the fiscus is not prejudiced by the delay in obtaining finality. For the rule to work, it is of the utmost importance that the commissioner is able to obtain execution against a taxpayer without having first to air the subject matter of the objection that will be adjudicated upon by the special court in due course (par 60). Secondly, it can be accepted that the "pay now, argue later" principle is one that is acceptable as reasonable in open and democratic societies based on freedom, dignity and equality, since it is accepted in many such societies (par 61). Thirdly, the operation of the principle may be suspended by the commissioner, whose decision is subject to judicial review (par 62).

Due to the fact that the Court found that the sections were constitutional, it did not deem it necessary to deal with Metcash's argument dealing with the fact that less invasive ways are available to deal with the speedy collection of VAT.[223] The court also found it unnecessary to deal with the taxpayer's argument that the Commissioner could impose criminal punishment without recourse to approach the courts.

Olivier submits the concern that the taxpayer can feel that the important right of access to courts has been watered down by the institution that has to protect the right. Furthermore, Olivier is of the opinion that the court erred in its judgment and had the court come to the conclusion finding the section unconstitutional, it would have been so much more acceptable.

4.6.2.2. Williams's Criticism

Williams submits that[224]

> The fact is that, in Metcash, the Constitutional Court pronounced on the constitutionality of the pay-now-argue-later rule in the context of the Value-added Tax Act, but said nothing at all about its constitutionality in the context

[222] *Ibid*.
[223] *Ibid*.
[224] RC Williams *Unresolved aspects of the "pay now argue later" rule* (January 2012) PWC Synopsis 4.

> of the Income Tax Act. It is by no means a foregone conclusion that the court would have reached the same conclusion if income tax had been an issue, for there are many significant differences between the two taxes, not the least being that there is far more scope for genuine disputation about income tax liability than for VAT.

Williams further points out that there is confusing and misunderstanding surrounding the 'pay now, argue later' rule. This is clear from the following statement[225]

> The pay-now-argue-later rule is, perhaps, the most painful invasion of taxpayers' rights imposed by our tax system, in that it compels the taxpayer to pay a disputed amount of tax before a court has determined the extent, if any, of his liability.

Williams submits that confusion continues in the High Court judgments of the same judge needs to be examined as both matters came to different conclusions. These are the matters of *Mokoena v C:SARS* and *Capstone 556 (Pty) Ltd v C:SARS*.[226] Williams believes that the decision in *Capstone* is more persuasive than that of *Mokoena*. He submits concern, however, that neither judgment has provided any guidance in relation to interpretation of section 88 (3) factors of the ITA and section 164(3) factors of the TAA read with section 58 of the TALAA.[227]

Williams submits that he believes that the court would not have come to the same conclusion if it had been an income tax matter.[228] This is evident from the fact that the court made a clear distinction between VAT and income tax. The court also emphasized that the matter dealt with a VAT issue and no other fiscal statute.[229]

Furthermore, Williams states that if the Commissioner makes a decision which is adverse to the taxpayer, the taxpayer can take the decision on review in terms of PAJA.

Williams thus concludes with the following:[230]

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[225] *Ibid* at 4.
[226] 2011 (2) SA 556 (GSJ) and [2011] ZAWCHC 297.
[227] *Supra* note 224 at 5.
[228] *Ibid* at 4.
[229] *Supra* note 167 at [9], [10] and [13].
[230] *Supra* note 224 at 6.

> If the general rule were that a request for suspension of the obligation to pay a disputed amount of income tax should be granted, many taxpayers would probably leap on the bandwagon and procure the postponement of the obligation to pay months or years until judgment had been given in the final appeal against the assessment.
>
> The detrimental impact on tax collections if a postponement of the obligation to pay disputed tax was, in effect, there for the asking, is beyond doubt, and this is a factor that is likely to weigh heavily with a court.

4.6.2.3. Keulder's Criticism

Keulder's criticism of the *Metcash Trading* case mostly takes its cue from Olivier's criticism.

Keulder submits that the judgment of *Metcash Trading* is only concerned with the issue of how the 'pay now, argue later' rule is dealt with in terms of VAT and does not cover the issue of income tax. The factors that the court took into consideration in respect of VAT, would not necessarily lead to the same conclusion in respect of income tax matters.[231]

In respect of the issue with whether the taxpayer has the right of access to courts, Keulder submits that the court should have examined whether the rule results in the Commissioner helping itself and being the judge in its own cases.[232]

Even though PAJA affords the taxpayer the right to just administrative action and the court can grant an order directing the Commissioner to provide adequate reasons for his decisions. The court does not have the power to overturn the decision that the Commissioner has made.[233] Therefore the review procedure that is available to the taxpayer is undermined.

Furthermore, in terms of section 40(2)(*a*) of the VAT Act, the taxpayer may not 'challenge the correctness of the statement in legal proceedings.[234] Keulder, as well as Olivier, makes reference to the court's judgment, where it held that[235]

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[231] *Supra* note 204 at 139.
[232] *Ibid* at 140.
[233] *Ibid*.
[234] *Ibid*.
[235] *Ibid* at 141.

> the exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example that it was not reasonable, does not relieve the legislature of its constitutional obligation to promote, protect and fulfil the rights entrenched in the Bill of Rights.

Keudler further submits that there is 'still a duty on the legislature to ensure that provisions are constitutional, even though a decision can be taken on review'.[236]

Keudler also points out that the court relied on the argument that the respondent's practice has been implemented in other countries. The court failed, however, to give examples in other countries of this practice.[237]

In terms of the *Mokoena* and *Capstone* cases, Keulder submits that the same court came to entirely different conclusions.[238] Keulder states that[239]

> In the former case the court held that while SARS is competent to demand payment of tax pending an objection or appeal based on the "pay now, argue later" rule it may not obtain judgment in the interim.139 This decision was criticised in Capstone, as the filing of a statement does not amount to a judgment.140 Binns-Ward J conceded that, even though it is not a judgment in the ordinary sense, it has the effect of a judgment, as SARS is able to obtain a writ of execution.

4.6.3. Section 164 Rule

The TAA came into effect on 1 October 2012,. The purpose of the Act was to 'provide for the effective and efficient collection of tax'.[240] The Act aims to achieve this by 'aligning the administration of the tax Acts'.[241]

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[236] *Ibid*.
[237] *Ibid*.
[238] *Ibid* at 144.
[239] *Ibid*.
[240] Section 2 of the TAA.
[241] Section 2(*a*) of the TAA.

Section 164 of the TAA was introduced to deal with the 'pay now, argue later' rule from 1 October 2012. With its implementation, it brought about a sense of relief to taxpayers vis-à-vis the 'pay now, argue later' rule in respect of certain factors that have to be considered by a senior SARS official when a taxpayer has requested a suspension of his payment of a disputed tax debt. Therefore, the 'pay now, argue later' rule will still be utilised by SARS.

Section 164(1) of the TAA provides that the obligation for a taxpayer to pay tax will not be suspended unless the Commissioner directs so. The taxpayer will have to request a senior official at SARS to do so.[242] Certain factors will have to be taken into consideration by SARS in order to direct the suspension of the obligation for the taxpayer to pay the outstanding amount. Section 164(3) of the TAA[243] provides that the factors that need to be considered are

> (a) the compliance history of the taxpayer;
> (b) the amount of tax involved;
> (c) the risk of dissipation of assets by the taxpayer concerned during the period of suspension;
> (d) whether the taxpayer is able to provide adequate security for the payment of the amount involved;
> (e) whether payment of the amount involved would result in irreparable financial hardship to the taxpayer;
> (f) whether sequestration or liquidation proceedings are imminent;
> (g) whether fraud is involved in the origin of the dispute; or
> (h) whether the taxpayer has failed to furnish information requested under this Act for purposes of a decision under this section.

A senior SARS official may revoke the suspension with immediate effect if in terms of section 164(5) of the TAA[244] that

> (a) after the lodging of the objection or appeal, the objection or appeal is frivolous or vexatious;
> (b) the taxpayer is employing dilatory tactics in conducting the objection or appeal;
> (c) on further consideration of the factors referred to in subsection (3), the suspension should not have been given; or
> (d) there is a material change in any of the factors referred to in subsection (3),upon which the decision to suspend the amount involved was based.

[242] Section 164(2) of the TAA.
[243] *Supra* note 7.
[244] *Supra* note 7.

Furthermore, SARS is prohibited from invoking recovery proceedings until ten days after the taxpayer has requested a suspension or revocation and SARS has delivered same. SARS is, however, allowed to proceed if there is a 'reasonable belief that there is a risk of dissipation of assets' by the taxpayer.[245] In the event that the assessment has to be amended, SARS will make a due adjustment.[246]

Section 164 of the TAA still affords SARS will powers to enforce the speedy collection of taxes. This includes the statement procedure, the power to appoint a third party agent and the 'pay now, argue later' rule.

4.7. REMEDIES

As discussed above, there are remedies available to the taxpayer against the Commissioner's powers. The taxpayer's remedies include:

1) Lodging an objection against an assessment in terms of section 133 of the TAA;

2) Noting an appeal against an assessment in terms of section 133 of the TAA;

3) Applying for the suspension of payment subject to the outcome of an objection or appeal in terms of section 164(2) of the TAA;

4) Applying for the review of the Commissioner's decision in terms of PAJA in terms of sections 6 and 7 of the PAJA; and

5) Applying directly to the Constitutional Court in terms of section 167 of the Constitution.

[245] Section 164(6) of the TAA.
[246] Section 164(7) of the TAA.

4.8. CONCLUSION

The right of access to courts is an important right for all taxpayers, which can be utilised in conjunction with the right to just administrative action. Regarding the Commissioner's powers, the courts are still bound by the *Metcash Trading* ruling, unless another matter is referred to the Constitutional Court and a contrasting decision is made. According to the *Metcash Trading* judgment, the statement procedure and the 'pay now, argue later' rule are constitutional and can be utilised by SARS in order to collect outstanding taxes.

It is respectfully submitted that the *Metcash Trading* judgment would have been more welcoming to taxpayers if the court decided that the specific statutory provisions were found to be unconstitutional. It is clear from the above criticisms from Olivier, Williams and Keudler that the court's decision can be considered controversial. It is respectfully argued that relevant case law was purposefully ignored in order for the court to rule in the Commissioner's favour. These previous rulings by the same judges came to completely different conclusions, which contradicts the *Metcash Trading* judgment. The courts have the duty to protect the rights of individuals and taxpayers. This judgment, however, has watered down the right by ruling in favour of the Commissioner.

The challenge is to optimally balance the taxpayer's right with the Commissioner's obligation to speedily collect taxes. In the event that the court awarded in favour of Metcash and ruled that the statutory provisions were in fact unconstitutional, this would bring about further issues of taxpayers suspending their payment of outstanding taxes by filing a review of the statement filed. This would, in itself, lead to chaos and a detrimental impact on the collection of taxes. The nature and extent of the limitation on the taxpayer's rights is severe and intrusive, however, the taxpayer still has the right to seek remedies elsewhere, such as through PAJA.

It is unclear whether these statutory provisions will ever be challenged again as a taxpayer can be weary of utilizing the court system. This is due to the fact that the court system is lengthy and costly with the possibility that the taxpayer would not be victorious, as evident in the *Metcash Trading* case. It is evident that the taxpayer could be more successful if an administrative attack is utilized against certain tax legislation. In the interim, the taxpayers will have to follow the *Metcash Trading* judgment even if one cannot agree with it. The taxpayer must be aware that they can utilize the procedure that is available through PAJA.

Even though section 36 of the VAT Act has been replaced by section 164 of the TAA, the procedural elements of the statement procedure and the ‘pay now, argue later’ rule can still be utilised by SARS. Section 164 of the TAA still empowers the Commissioner to utilise these procedural elements in order to speedily collect outstanding taxes. The right of access to courts, however, remains valuable to everyone in South Africa, not only the taxpayers. Taxpayers must never underestimate the efficiency of the right and the procedure when challenging the Commissioner.

CHAPTER 5: THE TAXPAYER'S RIGHT TO PRIVACY

The constitutional right of privacy is "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men".[247]

5.1. INTRODUCTION

The right to privacy is enshrined in section 14 of the Constitution.[248] Section 14 provides that

> Everyone has the right to privacy, which includes the right not to have—
> (a) their person or home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed.

This right which is provided for in the Constitution aims to protect a person's dignity as well as ensures that people can enjoy their space without undue interference by the State and other.[249] In *Mistry v Interim National Medical and Dental Council of South Africa ("Mistry")*, Sachs J commented that the purpose of section 14 of the Constitution is to protect 'people, not places'.[250] Therefore, section 14 of the Constitution's purpose is to 'safeguard personal property and not private property'.[251]

The right to privacy is also recognized by the common law in South Africa. Currie and De Waal describes this as follows[252]

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[247] Justice Louis Brandeis in Olmstead v. United States, 277 U.S. 438 (1928).
[248] *Supra* note 1.
[249] B J Croome *Taxpayer's Rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the Constitutional rights to property, privacy, administrative justice, access to information and access to courts* (Unpublished PhD Thesis 2008) at 68.
[250] [1998] ZACC 10; 1998 (4) SA 1127; 1998 (7) BCLR 880 (29 May 1998) at [28].
[251] *Supra* note 4 at 304.
[252] *Supra* note 4 at 296. See also M Chaskalson *Constitutional Law of South Africa* (1994) at 18.

> The common law recognizes the right to privacy as an independent personality right that is component of the concept of "*dignitas*." At common law, the breach of a person's privacy constitutes an *iniuria*. It occurs when there is an unlawful and intentional acquaintance with private facts by outsiders contrary to the determination and will of the person whose right is infringed, such acquaintance taking place by intrusion or by disclosure.

In *Bernstein v Bester NO*, Ackermann J gives some examples of breaches to privacy under the common law, including the

> [E]ntry into a private residence, the reading of private documents, listening in to private conversations, the shadowing of a person, the disclosure of private facts which have been acquired by a wrongful act of intrusion, and the disclosure of private facts contrary to the existence of a confidential relationship.[253]

Therefore, in terms of the common law, one must determine whether an invasion of the common law right to privacy has taken place and whether it is unlawful.[254]

Section 4 of the ITA provides that SARS officials must ensure that they observe their statutory duty to preserve the secrecy of any information that they have obtained in the ordinary course of their duties.[255] As discussed above, any matter that is adjudicated in the Tax Court ensures that the taxpayer's privacy is upheld as all sittings are not open to the public. The taxpayer can always make an application to the court in order to ensure that certain people are excluded from the hearing. The taxpayer also has the right to waive the right to privacy and request that the public can be present at a hearing.[256]

According to section 8(1) of the Constitution, juristic persons are also included under the Bill of Rights and therefore the right to privacy extends to juristic persons. The Constitutional Court, however, has recognized that the right which extends to a juristic person may have a narrower approach than it has to individuals:[257]

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[253] *Supra* note 132 at [69]. The court also made reference to *Financial Mail (Pty) Ltd v Sage Holdings Ltd* (1993) 2 SA 451 (A).
[254] *Supra* note 4 at 295.
[255] *Supra* note 10 at 22-16.
[256] *Ibid*.
[257] *Ibid* and Per Ackermann J in *Bernstein v Bester* (*supra* note 132) at 789.

> Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.

The Constitution, in contrast to the common law, brings about a two stage approach to determine whether the right to privacy has been violated. Firstly, it must be determined under the scope of the right whether law or conduct has infringed the right. If so, then secondly, it must be determined whether the infringement was justifiable in terms of section 36 of the Constitution (the limitation clause).[258] In order to determine whether the infringement was justifiable, the circumstance of each case must be taken into consideration.

In the context of tax, SARS has to follow the powers conferred to it by legislation. SARS cannot go beyond these powers and for instance enter a person's dwelling without a letter authorizing him to do so.[259] The Commissioner's power to conduct search and seizure operations, as well as establish inquiries into the taxpayer's affairs will be examined below to determine whether these powers infringe upon the taxpayer's right to privacy.

5.2. SARS'S POWER TO CONDUCT SEARCH AND SEIZURE OPERATIONS

SARS is empowered by the ITA and the TAA to conduct search and seizures. Even though the provisions under the ITA that deal with search and seizures have been repealed, it is still important to examine the provision in order to discuss the provisions under the TAA. This power that is conferred upon the Commissioner can be seen as possibly the most invasive powers that the Commission hold in respect of the taxpayer's right to privacy.

It has been indicated that search and seizure warrant impact two rights, being the right to privacy, as well as the right to dignity.[260] Under the Interim Constitution, the Constitutional Court in *Bernstein v Bester NO* stated that[261]

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[258] *Supra* note 4 at 295.
[259] Section 74B(3) of the ITA (now repealed).
[260] *Minister for Safety & Security v Van der Merwe & Others* [2011] ZACC 19.
[261] *Supra* note 132 at 493.

> In South Africa, the right not to be subjected to seizure of private possessions forms part of every person's right of personal privacy. The right against seizure must therefore be interpreted in the light of the general right to personal privacy.

Even if the power conferred upon the Commissioner to conduct search and seizure operations infringes on a taxpayer's right to privacy. This right can be limited in terms of section 36 of the Constitution. It is therefore relevant to question whether this limitation of the taxpayer's right is justifiable and reasonable. For ease of reference, section 36(1) of the Constitution[262] provides

> 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.

Section 74D of the ITA (now repealed) confers the power to the Commissioner to conduct search and seizure operations. This power is now contained in Part D of Chapter 5 of the TAA. In this regard, the Commissioner's power to conduct search and seizure operations will be discussed below and whether the limitation on the taxpayer's right is justifiable.

5.2.1. Section 74D of the ITA

Section 74 of the ITA was amended due to the judgments in the following cases:

In *Park-Ross and Another v The Director, Office for Serious Economic Offences ("Park-Ross")*, the court was approached to determine whether section 6 of the Investigation of Serious Economic Offences Act 117 of 1991 was constitutionally valid.[263] Section 6 empowered the Director of the Office for Serious Economic Offences to authorize entry, as well as search and seizure. Tebbutt J

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[262] *Supra* note 1.
[263] 1995 (2) SA 148 (C).

held that section 6 constituted a violation of the right to privacy, in terms of section 13 of the Interim Constitution.

Further, in *Mistry*, the Constitutional Court endorsed the judgment of *Park-Ross* and struck down the provisions allowing search and seizures under the Medicines and Related Substances Act 101 of 1965.[264]

Section 74D of the ITA[265] replaced the now repealed section 74. In terms of section 74D(1) of the ITA, a judge must issue a warrant authorizing an officer, named therein, to enter and search the premises. The issue, however, is raised in section 74D(6) of the ITA, as it provides that the officer of SARS can exercise discretion as it extends the ambit of the warrant on the pretext that the taxpayer can destroy any documents. In order for the Commissioner to not abuse sections 74D(5) and (6), the officer should rather apply for another warrant to cover further items or premises not contained in the warrant. It can be argued that the power that the Commissioner holds to extend the ambit of the warrant results in an undue violation of the taxpayer's right to privacy.

The decision of a judge as to whether he decides to issue a warrant is based on the facts that the Commissioner put before the judge. Problems arise, under section 74D, as the Commissioner can present incorrect facts to the judge in order to attain the warrant. The taxpayer can, however, challenge the warrant under section 74D(9) of the ITA. Section 74D(9) of the ITA[266] provides

> (a) Any person may apply to the relevant division of the High Court for the return of any information, documents or things seized under this section.
>
> (b) The court hearing such application may, on good cause shown, make such order as it deems fit.

In *Ferela & Others v Commissioner for Inland Revenue*, Botha J stated that[267]

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[264] *Supra* note 252.
[265] *Supra* note 7.
[266] *Ibid*.
[267] 1998 (4) SA 276 (T) at 524.

> It confers on the Court, not Judge, a wide discretion to order the return of any information, documents or things seized under a warrant. In effect it empowers the Court to reverse the effect of a warrant *in toto*. It also empowers the Court on hearing such an application to make such an order as it deems fit. It therefore empowers the Court to grant such further relief as may be appropriate, which would obviously include an order for costs. It could of course order other relief as well, such as the retention of copies by the Commissioner. It is not necessary for me to speculate on all the types of grounds on which section 74D(9) could be invoked. Grounds that spring to mind are: if a party concerned needs any documents that have been seized; if the documents seized do not have any bearing on the affairs of a taxpayer; if the documents seized are not covered by the warrant and also if the warrant is deficient or if it should not have been obtained.

Therefore, the court found that the warrants that the Commissioner had issued were invalid and all documents that were seized had to be returned to the taxpayer. The court in *Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO ("Hyundai")* found that search and seizure warrants in terms of the National Prosecuting Authority Act 32 of 1998 were constitutionally invalid and infringed upon the right of privacy.[268]

In *Ferucci v C: SARS ("Ferucci")*, the court was in agreement with the above statement and expanded on it by stating that' in appropriate circumstances, be set aside on the grounds that it should not have been obtained'.[269] Further, Oosthuizen A J commented on the factors that the court should take into account when considering whether to issue a warrant was valid:[270]

> The Court dealing with an application under section 74D(9) need do no more than satisfy itself, as does the judge issuing the warrant, that there are reasonable grounds for believing that there has been a non-compliance by any person of his obligations or an offence committed under the Act, and that information, documents or things affording evidence of such non-compliance or offence are likely to be found at the premises specified in the warrant. If it is not so satisfied, that may constitute a ground for setting aside the warrant.

Furthermore, the court stated that '[t]he warrant should moreover indicate some nexus between the documents to be seized and the offence or non-compliance in respect whereof the warrant was issued'.[271] The court held that the warrant did not specifically detail the documents that were

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[268] 2001 (1) SA 545 (CC); *Supra* note 3 at 300.
[269] 2002 (6) SA 210 (C); 65 SATC 47.
[270] *Ibid* at page 11.
[271] *Ibid* at page 19.

subject to the search and seizure and therefore was not constitutionally justifiable.[272] Therefore the warrant was set aside and all documents that were seized had to be returned to the taxpayer.

Section 74D provides that the officer can execute the warrant without giving the taxpayer prior notice. In *Shelton v C: SARS*, Streicher JA stated that[273]

> The appellant submitted that the respondent had to give notice to him of the application for a warrant unless a case could be made out that notice should be dispensed with; that the respondent failed to make out such a case; and that the respondent's application for a warrant should, therefore, have been refused…
>
> … In these circumstances the giving of prior notice of the application for a warrant would have defeated the object and purpose of the section which is, among other, to enable the respondent to enter premises to search for information intentionally concealed from him. In the circumstances the section, by necessary implication, did not require the giving of notice.

Section 74D does not explicitly give the taxpayer the right to approach the court to have a warrant set aside. The taxpayer, however, does have this right in terms of section 32(1) of the Constitution.[274]

The Supreme Court of Appeal, in *Powell NO & Others v Van Der Merwe & Others*, struck down search and seizure warrants issued in terms of the National Prosecuting Authority Act. Cameron JA commented[275]

> The search warrants Van der Merwe J signed were breath-taking in their scope. They authorised the investigating director or his delegees to examine 'any object' and to seize 'anything' at Powell's premises relevant to or that could be relevant to 'the preparatory investigation concerned. No offence is mentioned. The investigation in question is identified solely by reference to an annexure to the warrant. That annexure mentions no offence. It does not even refer to 'alleged irregularities'. Its recipient is not informed of the nature and ambit of 'the preparatory investigation concerned'.

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[272] *Ibid*.
[273] *Supra* note 77 at page 186 and 187.
[274] *Supra* note 10 at 20-22.
[275] 2005 (7) BCLR 675 (SCA); [2004] ZASCA 25 at [45] and [62].

> Instead, those carrying out the search were given virtually untrammelled power to carry out what Mr Slomowitz in his argument justly called 'a general ransacking' of Powell's premises. That has not been the law in this country since at least 1891, and it is not the law under our Constitution, which preserved and enhanced what was best in our legal traditions. The diligent scrutiny of warrants for search and seizure survives as part of the best of that legacy, constitutionally entrenched in our new democracy. The warrants must be set aside as unlawful.

Further, Cameron JA took into consideration other cases and stated:[276]

> These cases establish this:
>
> a) Because of the great danger of misuse in the exercise of authority under search warrants, the courts examine their validity with a jealous regard for the liberty of the subject and his or her rights to privacy and property.
> b) This applies to both the authority under which a warrant is issued, and the ambit of its terms.
> c) The terms of a search warrant must be construed with reasonable strictness. Ordinarily there is no reason why it should be read otherwise than in the terms in which it is expressed.
> d) A warrant must convey intelligibly to both searcher and searched the ambit of the search it authorises.
> e) If a warrant is too general, or if its terms go beyond those the authorising statute permits, the Courts will refuse to recognise it as valid, and it will be set aside.
> f) It is no cure for an over-broad warrant to say that the subject of the search knew or ought to have known what was being looked for: the warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute.

In this regard, a warrant must clearly identify the person carrying out its execution, the premises, as well as the documents sought. The warrant must further state clear details of the offence that the taxpayer has allegedly committed under the fiscal statutes.

5.2.2. Sections 59 – 66 of the TAA

Sections 59 – 66 of the TAA now contain the Commissioner's powers to conduct search and seizure operations.

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[276] *Ibid* at [59].

SARS still has extensive powers in terms of the TAA, however, a warrant still has to be issued by a judge or magistrate. Section 59(2) of the TAA provides that 'SARS must apply *ex parte* to a judge for the warrant, which application must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based'.[277]

One of the major differences between the provisions of the ITA and the TAA dealing with search and seizures is that unlike the ITA, the TAA makes specific mention that the taxpayer can make application for the return of seized relevant material or costs of damages. Section 66(4) of the TAA provides 'if the court sets aside the warrant issued in terms of section 60(1) or orders the re-turn of the seized material, the court may nevertheless authorise SARS to retain the original or a copy of any relevant material in the interests of justice'.[278] In *Ivanov v North West Gambling Board and Others*, Mhlantlaja JA held that when a search warrant is declared invalid, it operates retrospectively.[279] Mhlantlaja JA further agreed with *Cadac (Pty) Ltd v Weber-Stephen Products Co*[280], where Harms DP stated that[281]

> The declaration of invalidity operates retrospectively and not prospectively. This means that once a warrant is set aside it is assumed that it never existed, and everything done pursuant thereto was consequently unlawful.

Section 63 of the TAA provides for searches without a warrant. This section was not provided for under the ITA. Section 63 of the ITA[282] provides

> (1) A senior SARS official may without a warrant exercise the powers referred to in section 61(3)—
> (a) if the owner or person in control of the premises so consents in writing; or
> (b) if the senior SARS official on reasonable grounds is satisfied that—
> (i) there may be an imminent removal or destruction of relevant material likely to be found on the premises;
> (ii) if SARS applies for a search warrant under section 59, a search warrant will be issued; and
> (iii) the delay in obtaining a warrant would defeat the object of the search and seizure.

[277] *Supra* note 7.
[278] *Ibid*.
[279] [2012] ZASCA 92; 2012 (6) SA 67 (SCA); 2012 (2) SACR 408 (SCA); [2012] 4 All SA 1 (SCA) (31 May 2012).
[280] 2011 (3) SA 570 (SCA) para 18.
[281] Supra note 279 at [14].
[282] *Supra* note 7.

(2) A SARS official must, before carrying out the search, inform the owner or person in control of the premises—

(a) that the search is being conducted under this section; and

(b) of the alleged failure to comply with an obligation imposed under a tax Act or tax offence that is the basis for the search.

(3) Section 61 (4) to (8) applies to a search conducted under this section.

(4) A SARS official may not enter a dwelling-house or domestic premises, except any part thereof used for purposes of trade, under this section without the consent of the occupant.

It is clear from the above that there are specific instances where this section can be implemented by a SARS official.

In the recent case of *Gaertner & Others v Minister of Finance & Others* SARS must be examined.[283] The facts are briefly that SARS became aware that the taxpayer had under-declared the value of imported milk-powder, as the Canadian company sent SARS all invoices relating to the sale, which were attached to their summons claiming money from non-payment. SARS therefore conducted certain searches at the taxpayer's business premises, as well at his private residence in terms of section 4(4) of the Customs and Excise Act.[284] SARS officials conducted a search and seizure at the taxpayer's business premises. When the taxpayer asked if SARS had a warrant, the taxpayer was informed that no warrant was required in terms of section 4(4) of the Customs and Excise Act. The SARS officials made copies of documents and data on computers but no inventory was given to the taxpayer.

The SARS officials also conducted a search and seizure at the taxpayer's residence and refused to define the parameters of the search to the taxpayer. The SARS officials never told the taxpayer what they were searching for, nor did they provide any reasons to the taxpayer for the search.

The taxpayer made an application to the High Court for relief and an order declaring section 4 of the Customs and Excise Act unconstitutional on the basis that the searches were unlawful and all documents and data copied be returned.

[283] [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) (14 November 2013).
[284] Act 91 of 1964.

Section 4 of the Customs and Excise Act[285] grants SARS unrestricted powers to enter any premises without a warrant and conduct a search and seizure without consent. Louw submits that for instance, 'they allow for a SARS official to enter a taxpayer's private home in the middle of the night, without a warrant and without prior notice, and if a police officer is present, to enter the premises by force'.[286]

The court unfortunately did not make an ruling as to the unlawfulness of the searches conducted at the taxpayer's business and residence. The court, however, held that sections 4(*a*)(i) and (ii), 4(4)(*b*), 4(5) and 4(6) of the Act are inconsistent with the Constitution and invalid. The taxpayer's right to privacy therefore, had been violated.

5.3. INQUIRY INTO THE TAXPAYER'S AFFAIRS

The Commissioner or 'any officer' is empowered in terms of section 74C of the ITA (now repealed) to conduct an inquiry into the taxpayer's affairs. This power is now contained in section 50 of the TAA.

Oosthuizen AJ, in *Ferucci,* summarized section 74C of the ITA as follows[287]

> Section 74C vests in the Commissioner even more comprehensive investigatory powers. Under that section the Commissioner or his authorised representative may apply to a judge for an order designating a presiding officer before whom an enquiry is to be held. The application to such judge must be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based. The judge is entitled to grant the order if satisfied that there are reasonable grounds to believe:
>
> (a) that there has been non-compliance by any person of his obligations in terms of the Income Tax Act or that an offence in terms of the Income Tax Act has been committed by any person.
>
> (b) that information, documents or things are likely to be revealed which may afford proof of such non-compliance or of the commission of such offence;

[285] *Ibid*.
[286] H Louw *Search and Seizure: With or Without a Warrant?* (2 May 2013) News & Press.
[287] *Supra* note 269.

> (c) that the enquiry which is sought is likely to reveal such information, documents and things.
>
> The order issued by the judge must name the presiding officer, refer to the alleged non-compliance or offence, identify the perpetrator thereof and be reasonably specific as to the ambit of the enquiry. The presiding officer thus appointed thereafter conducts the enquiry, utilising such procedure as he thinks fit.

As with search and seizures, an inquiry can only be granted if the Commissioner makes an *ex parte* application to a judge. The application must be supported by information supplied under oath. Therefore, the same comments made above regarding the judiciary's involvement about search and seizures, can equally apply here in terms of establishing an inquiry.

In the unreported matter of *The Commissioner for the South African Revenue Service v D King & Others*, the Commissioner obtained information about King in terms of section 74C of ITA.[288] The Commissioner, however, seldomly utilises this procedure.

The constitutionality of an inquiry in terms of the above sections has not been challenged as yet. Therefore, the procedure is constitutionally sound. Furthermore, the inquiry can be seen as reasonable and justifiable, particularly as the Commissioner has to apply to a judge, in terms of section 74C of the ITA and section 50(1) of the TAA, in order for the inquiry to commence.

5.4. CONCLUSION

It is evident from the above, that sections 74C and 74D of the ITA (now repealed) and sections 50 and 59 – 66 of the TAA violate the taxpayers right to privacy in terms of section 14 of the Constitution. It is understandable, however, that the Commissioner has to call upon certain information for the taxpayer. Therefore, there needs to be a valid limitation on the right in terms of section 36 of the Constitution.

The requirement in terms of section 74D of the ITA and section 59 of the TAA that judicial authority must be sought in order to issue a search and seizure warrant ensures that the warrant is

[288] Case No. 4745/2002.

issued correctly. In this regard, it is submitted that this requirement shows that the limitation of the right to privacy is justifiable and reasonable in order for the Commissioner to attain certain information. Judges must, however, decide on the circumstances of each particular case.

Regardless of the fact that the Commissioner does not conduct many inquiries in terms of section 74C of the ITA (now repealed) and section 50 of the TAA, the Commissioner has to seek judicial authority in order to establish an inquiry. Therefore, it is contended that this is a justifiable and reasonable limitation of the right to privacy.

Furthermore, there is a remedy available to the taxpayer in terms of the TAA, if they believe their right has been unjustifiably infringed. The taxpayer has the right to approach the courts for relief in the event that they believe that the Commissioner has abused his power.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

The Constitution is the supreme law of the land. All legislation must be read in conjunction with the Constitution. The Constitution has to uphold all the rights contained therein, however not every right is absolute and can be limited in terms of section 36 of the Constitution, read with section 7(3). In the event that a right is infringed, it will have to be determined whether the limitation is reasonable and justifiable.

This research report has critically analysed the rights of the taxpayer, specifically (*a*) the right to fair administrative action, (*b*) the right to access to the courts and (*c*) the right to the illusive concept of privacy and the remedies available to the taxpayer in the event that these rights have been infringed upon.

The right to fair administrative action, enshrined in the Constitution as well as in the Promotion of Administrative Justice Act (PAJA), requires administrative action to be lawful, reasonable and procedurally fair. Inasmuch as PAJA provides fundamental rights and the means for upholding them, it is to be interpreted generously and purposively;[289] and it empowers the taxpayer to be allowed to request a decision from the Commissioner, which include adequate reasons. The taxpayer has the right to judicial review, once all internal remedies are exhausted, in order to seek a remedy to any decision which amount to 'administrative action'.

It is submitted that one of the downfalls of PAJA is that the taxpayer can approach the courts only after all internal remedies are sought.[290] In certain circumstances, the taxpayer may not be aware that there are internal remedies that can be followed. The court can however overlook the fact that the taxpayer did not follow internal remedies, in the event that the Commissioner showed bias towards the taxpayer and a fair hearing will not be followed.

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[289] JR De Ville *Judicial Review of Administrative Action in South Africa* (1 ed) (2005) at 5.
[290] See, for example, *Rampersadh and Another v C:SARS* (2018) 81 SATC 163.

The constitutional right of access to courts is valuable to all taxpayers. This right can be utilized by the taxpayer in conjunction with the right to just administrative action. The Commissioner's powers in terms of the statement procedure and the 'pay now, argue later' rule are still constitutionally sound in terms of the *Metcash Trading* judgment. It is respectfully submitted that the *Metcash Trading* judgment would have been more welcoming to taxpayers if the court decided that the specific statutory provisions were found to be unconstitutional. The challenge is to optimally balance the taxpayer's right with the Commissioner's obligation to speedily collect taxes. If the taxpayer was allowed to suspend payment of outstanding taxes by objecting to the statement filed by the Commissioner, this would lead to complete chaos and a detrimental impact on the collection of taxes. Tax cannot be avoided and it is necessary for society to function coherently. The Commissioner will always utilise these powers in order to speedily collect outstanding taxes from taxpayers. Even though, the nature and extent of the limitation on the taxpayer's rights is severe and intrusive, the taxpayer still has the right to seek remedies elsewhere, such as through PAJA.

The Commissioner's power to conduct search and seizure operations, as well as establish an inquiry into the taxpayer's affairs, is a justifiable and reasonable limitation on the taxpayer's constitutional right to privacy. The constitutionality of the amended sections under the TAA has not been challenged as yet. The justifiability and reasonableness, however, depends on each case and whether the Commissioner has abused his powers. There are remedies available to the taxpayer in the event that the Commissioner has abused his powers.

It could be argued that there are no cost effective or timeous remedies available to taxpayers when dealing with SARS. Taxpayers have to be made aware of the implications of this issue. More importantly, however, taxpayers need to be made aware of the fact that they do have rights against the draconian powers of the Commissioner and that there are legal remedies in place to assist them.

Silke submits that

> [O]ur courts have, as yet, been unwilling to rule against the constitutionality of any of the fiscal provisions with which they have been confronted, and these include some of the most draconian on the statute book…our courts have, up to now, taken the view, when confronted with a constitutional attack on a particular fiscal provision, that

> the relevant provisions of the Income Tax Act represent a legitimate expectation of a taxpayer's constitutional rights. The balance between the need of the Commissioner to recover taxes promptly and prevent a taxpayer's assets being put beyond his reach and the taxpayer's right to protection under the Constitution is a very fine one.[291]

Further Chaskalson CJ states that

> [A]ny power vested in a functionary by the law (or indeed by the Constitution itself) is capable of being abused. That possibility has no bearing on the constitutionality of the law concerned. The exercise of the power is subject to constitutional control and should the power be abused the remedy lies there and not in invalidating the empowering statute.[292]

The taxpayer still needs to be aware of their rights and remedies available in terms of the Constitution and any other legislation. Even though it will be a long and costly procedure there are still remedies available to the taxpayer if the Commissioner abuses his powers. It is, however, recommended that the Tax Ombud creates a more cost-effective and timeous procedure, independent from SARS, for the taxpayer to follow in the event that the Commissioner has abused his powers. Furthermore, SARS has a duty to ensure that all taxpayers understand that they do have rights against the Commissioner and there are currently remedies to follow.

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[291] J Silke *Taxpayers and the Constitution: A Battle Already Lost* (Juta 2002) Acta Juridica 'Revenue Law' 334.
[292] *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa Intervening)* (CCT21/01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002) at [37].

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