




Chapter 3

Access to Courts and the South African Revenue Service's Obligation to Collect Taxes

Metcash Trading Ltd v Commissioner for South African Revenue Service¹

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“The scheme of the Act is that sections 33, 33A and 34 provide an aggrieved vendor ample opportunity for fair judicial determination in due course of any dispute with the Commissioner arising out of the exercise of the latter’s power to impose tax liability by assessment or associated impost. The Act can therefore not be said to constitute a complete bar to access to courts; at most it obliges the taxpayer to pay the disputed amount(s) subject to appropriate restitution, with interest, once the judicial dispute resolution process has run its course” (*Metcash Trading* par 58).

Abstract

The case of *Metcash Trading Ltd v Commissioner for South African Revenue Service* stands as a landmark constitutional case that examined the tension between the South African Revenue Service's imperative to collect taxes efficiently and taxpayers' constitutional right of access to courts. The Constitutional Court was tasked with determining whether provisions in the Value Added Tax (VAT) Act that allowed SARS to employ the "pay now, argue later" rule and statement procedure were constitutional. At the heart of the case was section 36(1) of the VAT Act, which provided that a taxpayer's obligation to pay assessed tax was not suspended pending an objection or appeal, alongside sections 40(2)(a) and 40(5), which permitted SARS to file a statement at court having the effect of a civil judgment while precluding challenges to its correctness. The Constitutional Court departed from the High Court's finding of unconstitutionality by adopting a contextual approach, emphasising that these provisions must be understood within the VAT system where vendors effectively act as tax collectors. The court determined that the provisions did not violate the right to access courts because multiple opportunities for judicial intervention existed, including appeals to the Tax Court and the High Court's inherent jurisdiction to hear legal matters. The court held that even if there were an infringement of rights, it would be reasonable and justifiable given the discretion afforded to SARS to suspend payment obligations. This judgment fundamentally shaped South African tax administration by endorsing the "pay now, argue later" approach and has had far-reaching implications for subsequent legislation and jurisprudence. Despite criticism that the court conflated general access to courts with access at the specific moment of dispute, the judgment established enduring principles regarding the Tax Court's status, the High Court's inherent jurisdiction in tax matters and the rescindability of filed statements. The case remains significant as it established the constitutional parameters within which tax collection powers must operate, influencing the subsequent Tax Administration Act, which codified criteria for suspending

payment obligations, demonstrating how constitutional scrutiny can lead to the refinement of administrative powers.

3.1 Introduction

With the advent of constitutional democracy in South Africa, fiscal legislation had to be scrutinised and amended to ensure that they aligned with the (interim) Constitution of the Republic of South Africa Act² and the subsequent (final) Constitution of the Republic of South Africa, 1996.³ This is because

“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.”⁴

Although the South African Revenue Service (SARS) must ensure the effective and efficient collection of taxes,⁵ SARS’ powers must be balanced with the protection of taxpayers’ rights. At the core of the tension between tax collection and taxpayers’ rights is the approach that a revenue authority takes in relation to disputed tax claims. In the matter of *Metcash Trading* the Constitutional Court had to consider whether the provisions allowing SARS to use a summary collection procedure to collect tax, despite the taxpayer disputing their tax liability, are constitutional. This chapter highlights the most significant aspects of the judgment and the impact that this judgment has had on subsequent cases and legislative developments.

In this matter the Constitutional Court was tasked with confirming the High Court’s decision that declared sections 36(1), 40(2)(a) and 40(5) of the Value Added Tax Act⁶ (VAT Act) contrary to the Constitution.⁷ Section 36(1) of the VAT Act provided that a person’s value-added tax (VAT) liability is not suspended pending an objection or appeal, unless the commissioner of SARS decided otherwise. Consequently, SARS could proceed with enforcement actions even though the taxpayer disagreed with the assessment. One such an

enforcement action was the filing of a statement at court in terms of section 40(2)(a) of the VAT Act, which had the effect of an exigible civil judgment. In terms of section 40(5) of the VAT Act, the correctness of this statement could not be challenged.

The constitutional attack was initially based on the taxpayer's right not to be arbitrarily deprived of property (section 25(1) of the Constitution) and the right to access to courts (section 34 of the Constitution).⁸ The basis for the High Court declaring the provisions invalid was that the VAT provisions infringe on the right to access to courts because SARS acts as a substitute for the court by determining every aspect of the vendor's liability and the enforcement thereof; any interlocutory relief by the court was precluded; and a possible successful appeal does not sufficiently address the infringement that a taxpayer has to tolerate until then.⁹ Turning to whether the infringement is reasonable and justifiable in terms of section 36 of the Constitution, the High Court held that a delay in paying taxes in the current matter would not have a substantial impact when considering the greater scheme of national tax. Moreover, the court held that the effect of these provisions could be detrimental to the taxpayer even though it is only temporary in nature.¹⁰

As the taxpayer did not pursue its argument pertaining to section 25(1) in the High Court,¹¹ the Constitutional Court only had to consider whether the relevant provisions in the VAT Act were indeed unconstitutional considering the right to access to courts.

3.2 Significant aspects of the judgment

3.2.1 The importance of context

The Constitutional Court stipulated that before the constitutional challenge to access to courts could be explored, a basic understanding of the VAT system and where the challenged provisions fit in are essential. VAT is concerned with calculating the value added for each stage of the production and distribution chain and levying VAT at 14% (as was the prescribed rate then).¹² As VAT is calculated on the value added at each

stage and not on the full price of the commodity, a VAT vendor needs to set off the VAT paid when acquiring the commodity against the VAT it levied for the value added when making a further supply. For practicality reasons vendors are not required to pay over the relevant VAT for each supply as it takes place. Instead, the vendor needs to calculate the output tax (the VAT for the onward supply) and the input tax (VAT that was included in acquiring the commodity) and submit returns and pay over the VAT in line with the vendor's allocated tax period.¹³ Thus, VAT requires continuous self-assessment and the VAT liability, unlike income tax, not only arises when an assessment is issued.¹⁴ VAT vendors, unlike taxpayers for income tax, in essence become involuntary tax collectors that some exploit.¹⁵ Section 31 of the VAT Act provides "a valuable weapon in the hands of the Commissioner" in that the commissioner is empowered to assess the vendor's VAT liability in the absence of a return from the vendor, when a return is unsatisfactory or if the VAT due has not been paid.¹⁶ A vendor could then object, which requires the commissioner to reconsider the assessment, and thereafter appeal where an independent forum, the Tax Court, can consider the matter anew.¹⁷ It is at this stage where the "pay now, argue later" approach and filing of a certificate at court come into play.

The court's emphasis on the textual context within which these provisions function in the VAT Act points to classical contextualism where provisions must be "understood as part of the more encompassing legislative instrument in which it has been included".¹⁸ Although this approach was endorsed by the Constitutional Court in various cases before the *Metcash Trading* judgment,¹⁹ the *Metcash Trading* judgment has emphasised how this approach should be used for fiscal legislation. This emphasis is important, as provisions dealing with tax administration are not used in isolation and, therefore, the context within which provisions function must be understood.

However, in outlining the relevant context, the Constitutional Court made a point of distinguishing the VAT context from that of income tax. Does this mean that the court may have reached a different conclusion if *Metcash*

Trading involved income tax? Croome and Van Zyl do not think so.²⁰ Croome reasons that the Income Tax Act,²¹ like the VAT Act, is a law of general application that applies to everyone. Furthermore, Croome indicated that as the collection of income tax by way of the “pay now, argue later” approach, together with filing a certificate ensures that government has revenue to realise socio-economic objectives, it is a reasonable and justifiable limitation of a taxpayer’s right.²²

Williams asserts that it is not necessarily that the court would have reached the same conclusion.²³ Based on the emphasis that the court placed on VAT and how it functions to determine the constitutionality of the “pay now, argue later” approach and filing a certificate, one would need to carefully consider the operation of these provisions in context of the specific types of tax. If the VAT context was not relevant, the court would not have deemed it important to point out how VAT differs from income tax.²⁴

Nonetheless, the distinctions that the court drew in *Metcash Trading* is flawed and do not show how the context within which VAT functions is different from that of income tax as it pertains to the right to access to courts. When dealing with a tax debt there are three stages: A taxable event that creates an obligation, the determination of tax liability and then when the tax liability becomes payable.²⁵ The first stage requires a specific activity or scenario that falls within the levying provisions of the specific tax Act. For VAT, this is when a vendor²⁶ supplies goods or services in the course or furtherance of any enterprise,²⁷ when a person imports goods into South Africa²⁸ or when a person imports services.²⁹ In turn, this event for income tax purposes is when a receipt or accrual that is revenue in nature occurs in a period of assessment.³⁰

The second stage requires an assessment, which determines the amount of the liability.³¹ For VAT, a taxpayer must submit a tax return that includes “a determination of a tax liability,” which then constitutes a self-assessment by the taxpayer.³² If a taxpayer fails to make such a determination, SARS should then issue an assessment.³³ Only after the amount of the tax liability is determined by way of an assessment can

the third stage commence, in terms of which the taxpayer is obliged to pay the assessed amount of tax on the date indicated in the assessment, being “by the day and at the place notified by SARS, the commissioner by public notice, or as specified in a tax Act”.³⁴ When the date specified has arrived, the taxpayer is in *mora ex lege* and an enforceable tax liability is established.³⁵

Contrary to the court’s view in *Metcash Trading* in relation to income tax, the recent Supreme Court of Appeal case of *Wiese v C: SARS* confirms that an income tax debt also arises when it becomes chargeable in terms of the relevant provisions³⁶ Another recent Supreme Court of Appeal case, *Henque 3935 CC t/a PQ Clothing Outlet v C:SARS (Henque)*, further clarifies this point by indicating that, since income tax is concerned with taxable income received by or accrued to a taxpayer during a year of assessment, an income tax liability becomes due “immediately after the end of the year, or shorter period”.³⁷ In a similar vein, the Constitutional Court in *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and four other cases* held that an assessment does not create a tax liability; it already exists beforehand.³⁸

Whilst these cases depart from *Metcash Trading*’s dictum on when an income tax liability is established, *Henque* confirmed, in line with *Metcash Trading*, that the VAT liability is created “at the time of a relevant supply”.³⁹ It appears that the court in *Henque* drew the distinction between when a tax liability arises for VAT and income tax respectively, based on the wording of the relevant charging provisions. In this respect, section 5 of the Income Tax Act specifically provides for tax to be levied per year of assessment, whereas section 7 of the VAT Act, the charging provision for VAT, identifies only the event that triggers liability. When considering the context within which both these taxes function, such a basis of distinction makes little sense, as both taxes involve triggering events that are aggregated within a tax period.

From this discussion of the recent court cases on when a tax debt is established, it becomes evident that drawing a distinction between VAT and income tax in relation to the establishment of a tax debt liability is tenuous. Even if one

were to accept such a distinction, it remains unclear how this distinction would influence the impact that the “pay now, argue later” approach has on the right of access to courts.

The court’s view that, with VAT, the vendor becomes an involuntary tax collector must also be considered further. The incidence of VAT is not on the vendor, but on the ultimate consumer. Consequently, the VAT that the vendor must pay over is not the vendor’s money; they merely act as a collection agent. Contrariwise, with income tax, the taxpayer is the person on whom the tax is levied and who is assessed. However, because of the set off that takes place when determining a VAT liability, the output tax that is received by the vendor does not necessarily constitute the entire VAT liability. In this respect it was found in *Director of Public Prosecutions, Western Cape v Parker* that the relationship between SARS and a vendor is not a relationship of trust.⁴⁰ Therefore, the nature of the relationship between the taxpayer and SARS, as with income tax, is one of debtor and creditor.

Returning to the discussion of the Constitutional Court’s approach of considering context, the court did not follow the same approach when it referred to other jurisdictions. Although the court held that the “pay now, argue later” approach and a form of immediate execution are found in many other open and democratic societies,⁴¹ the Constitutional Court failed to discuss any of the comparable sections in other jurisdictions on which it based its claim. The court merely listed the United States of America, Canada and Australia as examples.⁴²

If one reads sections 36 and 39 of the Constitution together it is prudent to consider the approaches in other open and democratic societies. Firstly, section 36 provides that “[t]he 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*” (own emphasis). Secondly, section 39(1) of the Constitution provides that when interpreting the Bill of Rights, which includes the right to access to courts, foreign law may be considered. Consequently, one could consider the positions in other open

and democratic societies when determining whether a limitation on a right in the Bill of Rights is reasonable and justifiable.

The criticism is not that the Constitutional Court relied on other jurisdictions to reach its decision, rather that the court did not adequately consider the position in the other jurisdictions. An adequate consideration is essential as an earlier Constitutional Court judgment held that “the use of foreign precedent requires circumspection”⁴³ and one cannot rely on other jurisdictions without due consideration of the appropriate context.⁴⁴

The Canadian position serves as an example of the importance of adequately considering the context of provisions in *Metcash Trading*. In Canada, when an assessment is made, the Canadian Revenue Authority is not allowed to proceed with enforcement of this tax debt within a period of ninety days since the notice of assessment had been sent.⁴⁵ Likewise, if the taxpayer objects to the assessment or if the matter is subsequently taken on appeal to the Tax Court of Canada, the enforcement of the tax debt is prohibited until the taxpayer has been informed of the outcome or have withdrawn their case.⁴⁶ It is only when the matter proceeds on further appeal to the Supreme Court of Canada that the outstanding disputed tax debt is payable and the Canadian Revenue Authority can proceed with enforcement thereof. Fritz indicates that the payment obligation may possibly not be suspended at this phase of the dispute as the matter had then already been adjudicated by an impartial forum, the Tax Court of Canada, as envisaged in article 7 of the Taxpayer Bill of Rights.⁴⁷

There are some exceptions in terms whereof the “pay now, argue later” approach is invoked before the matter has been adjudicated by any impartial forum. These exceptions are when it relates to a withholding tax,⁴⁸ if the taxpayer is a large corporation⁴⁹ or when a court has made an order to the effect because there are reasonable grounds that the delay in collecting the disputed amount could place collection in jeopardy.⁵⁰ In terms of the latter, when a court order has been granted, the order must generally be served on the taxpayer within 72

hours.⁵¹ The taxpayer may then apply for a review,⁵² which affords the taxpayer the opportunity to make representations.⁵³

From this brief discussion of the Canadian position, it is apparent that the Constitutional Court erred in using Canada as an example to justify South Africa's approach to payment obligations pending dispute resolution for two reasons. One, in Canada the rule is generally only invoked once an impartial forum has adjudicated the matter. Two, most of the exceptions can be objectively determined; for example, does it meet the large corporation threshold or is it a withholding tax? Regarding the subjective exception, reasonable grounds of jeopardy when collection is delayed, it is determined by an impartial person, a judge.⁵⁴ This is distinguishable from the provisions considered in *Metcash Trading* where the commissioner has the discretion to suspend a payment obligation without clear criteria.

A thorough analysis of other jurisdictions could have also pointed the court to less invasive means available to achieve the purpose envisaged by the provisions, which is one of the factors that needs to be considered when determining whether an infringement is reasonable and justifiable in terms of section 36 of the Constitution. Again, if Canada's context was adequately considered instead of just listing it as an example, the court would have established that in Canada, most taxpayers tend to pay their disputed taxes because of the fact that interest continues to accrue, even though the payment obligation is initially suspended.⁵⁵ Additionally, the Tax Court of Canada may impose a penalty on the taxpayer (not exceeding 10 per cent of the disputed amount) if it dismisses a taxpayer's appeal regarding an assessment, or if the appeal was withdrawn, and there were no reasonable grounds for the appeal or if the purpose of appealing was to defer the payment obligation.⁵⁶

3.2.2 Opportunity for judicial intervention

Perhaps the most significant aspect of the *Metcash Trading* judgment at the time of the *Metcash Trading* judgment, was that the court interpreted the right to access to courts to mean the right to an opportunity of judicial intervention. The court highlighted various opportunities for judicial intervention in the

dispute resolution process to reach the conclusion that the right to access to courts was not infringed.

(a) *Tax Court – specialist tribunal*

The Constitutional Court held that sections 33 and 33A of the VAT Act created “its own special procedure” in term whereof a taxpayer can “appeal” SARS’ rejection of an objection to the Tax Court.⁵⁷ As the commissioner who issued the assessment is not a judicial officer, the subsequent disputing thereof in the Tax Court is not an appeal in the forensic sense of the word.⁵⁸ Despite the fact that the Tax Court functions “outside the normal forensic hierarchy”, an appeal before the Tax Court complies with the right to access to courts.⁵⁹ This is because the Tax Court is an independent and impartial specialist tribunal,⁶⁰ which “operates to all intents like an ordinary court”.⁶¹ Furthermore, there is no ouster provision prohibiting a taxpayer from relying on other relief.⁶²

(b) *High Court’s inherent jurisdiction in tax matters*

The Constitutional Court held that a taxpayer may rely on the High Court’s inherent jurisdiction to grant appropriate or ancillary relief in tax matters turning on legal issues, even when the dispute has not yet been adjudicated by the Tax Court.⁶³ Olivier questions the relevance of this statement as the taxpayer argument was that the provisions excluded the jurisdiction of the court *when* the rule was invoked, not that the court’s jurisdiction was completely excluded.⁶⁴ Drawing from this criticism of Olivier, Keulder states that the focus should have been on the fact that access to courts strives to prevent self-help.⁶⁵ The question should have been whether these provisions, at the time it was invoked, unreasonably allowed SARS to help itself by becoming the judge in its own case.⁶⁶ Consequently, the mere fact that there are opportunities for judicial intervention later is insufficient to effectively uphold the right of access to courts. When the “pay now, argue later” approach applies, a taxpayer may be unable to pursue any dispute resolution caused by being out of pocket because of paying before arguing.⁶⁷

(c) *Statement procedure*

In relation to the statement procedure, the Constitutional Court held that the High Court erred in equating the VAT provisions under consideration with section 38(2) of the North West Agricultural Bank Act,⁶⁸ which was declared unconstitutional in *Lesapo v North West Agricultural Bank and Another*.⁶⁹ The provision in *Lesapo* was declared unconstitutional as it authorised the bank to seize and sell property of a debtor whilst the debtor was in lawful and undisturbed possession thereof. This occurred without any court judgment or any statutory safeguards. Consequently, the Constitutional Court in the *Lesapo* judgment held that section 38(2) of the North West Agricultural Bank Act constituted self-help by ousting the jurisdiction of the courts.⁷⁰

The Constitutional Court in *Metcash Trading* distinguished the current provisions from that in *Lesapo* on the basis that section 40(2) of the VAT Act “specifically goes via the ordinary judicial institutions”.⁷¹ This is because once the statement has been filed at court, it constitutes a civil judgment. Thus, so the court held, the ordinary court rules and procedures pertaining to execution would apply to ensure access to courts.⁷² Furthermore, section 40(5) only barred proceedings that question the correctness of the certificate filed. This bar was temporary as the tax system provides “ample opportunity for fair judicial determination in due course of any dispute”.⁷³ One such opportunity is the fact that the judgment obtained in terms of section 40(2) could be rescinded.⁷⁴

The court’s assertion that a taxpayer had access to the courts, based on the requirements that the statement is filed at court and that the execution of the statement procedure must comply with prescribed court rules, is questionable.⁷⁵ Surely, access to courts requires more than a registrar receiving and stamping a document and for the execution of a judgment to occur in terms of prescribed court rules. Although a default judgment in civil proceedings takes place along similar lines, a default judgment can only be obtained when there has been a procedural default from the debtor.⁷⁶ When a tax statement is filed in court, it does not relate to the taxpayer failing to adhere to any procedure. In fact, at the time of the *Metcash Trading*, the

commissioner was not even required to inform the taxpayer of the intended filing.⁷⁷

2.3 The commissioner's discretion

Although the Constitutional Court held that the right to access to courts was not infringed when the relevant provisions were invoked, it indicated that even if these sections infringed on the right to access to courts, it would be reasonable and justifiable in terms of section 36 of the Constitution. The court held that the impact of the “pay now, argue later” approach is ameliorated as the commissioner may suspend the taxpayer’s payment obligation pending dispute resolution.⁷⁸ This is relevant because section 36(1)(c) of the Constitution stipulates that one of the factors to consider when determining the reasonability and justifiability of a limitation is the nature and extent of the limitation.

As section 36(1) of the VAT Act provided the commissioner with a discretion to suspend the payment obligation, the decision made when exercising this discretion would be subject to review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).⁷⁹ Despite the fact that the discretion afforded to the commissioner to suspend payment can lessen the impact on taxpayers’ right to access to courts, the review of the decision regarding suspension has drawn criticism. The grounds for reviewing the commissioner’s decision not to suspend the payment obligation, as provided for in section 6 of the PAJA, are narrow.⁸⁰ As it was also unclear when the commissioner would exercise this discretion in favour of the taxpayer and when not, it would have been nearly impossible for the taxpayer to rely on the review ground that irrelevant considerations were taken into account or that relevant considerations were not considered.⁸¹ Olivier remarked that clearly defined grounds would better protect a taxpayer’s rights.⁸² Inserting grounds would curb SARS’ broad discretion to align with the rule of law.⁸³

Even when one of the review grounds is met, in terms of section 8 of the PAJA, the court can grant an order directing the commissioner to provide reasons or reconsider the decision. As an ordinary course, the court does not have the power to

overturn the commissioner's decision.⁸⁴ Thus, a review of the commissioner's discretion does not constitute a strong remedy for the taxpayer.

Moreover,

“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.”⁸⁵

Therefore, Olivier remarks that the fact that the commissioner's conduct can be taken on review does not absolve the legislature from ensuring that provisions are constitutional.⁸⁶

3.3 Impact of the judgment

In the more than two decades since *Metcash Trading* was decided, there have been numerous court cases that have relied on aspects contained in the *Metcash Trading* judgment. There have also been significant legislative amendments. Most importantly, the Tax Administration Act⁸⁷ (TAA) was enacted on 1 October 2012, and in terms thereof the provisions considered under *Metcash Trading* was repealed and replaced by provisions in Chapters 10 and 11 of the TAA. Despite this repeal, the judgment of *Metcash Trading* remains relevant as the new provisions are almost identical to the repealed provisions.

3.3.1 The importance of context

The Constitutional Court's approach to consider the context within which provisions functions can be seen in the 2017 matter of *Nondabula v Commissioner: SARS and Another*.⁸⁸ In this matter, the court had to consider whether SARS could issue a third-party appointment to collect taxes when it did not furnish a notice of assessment to the taxpayer. In addition to considering the textual context of notice of assessments and third-party appointments, the court held that these provisions must be considered in the context of SARS being

part of public administration. This is important, as section 195 of the Constitution places constitutional obligations on the public administration. These include acting in an accountable manner,⁸⁹ and being transparent.⁹⁰ The court held that failure to comply with the constitutional obligations contained in section 195 means that the rule of law is contravened.⁹¹ Hence, in *Nondabula*, the court not only considered the internal context of the provision, following the Constitutional Court's approach in *Metcash Trading*, but also the external constitutional context.⁹² The value of placing the provisions and SARS conduct within a constitutional context in this specific case emphasises that although it is important for SARS to collect taxes, this must be done within the parameters of the Constitution.⁹³

While the contextual approach to interpreting fiscal provisions, as embodied in *Metcash Trading*, can be detected in subsequent tax case law, the confusion regarding the distinction between VAT and income tax regarding the "pay now, argue later" approach continues. *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services, Klüh Investments (Pty) Ltd v Commissioner, South African Revenue Services*⁹⁴ endorsed the court's approach in *Metcash Trading* to consider the "pay now, argue later" approach and certificate statement within the context of the VAT system.⁹⁵ Even though the constitutionality of the equivalent income tax provisions were not attacked in this matter, the court confirmed that the context for income tax might be different.⁹⁶ Hence, one would need to consider these provisions in the income tax context. The court stated that:

"There are material differences distinguishing the position of self-regulating vendors under the value-added tax system and taxpayers under the entirely revenue authority-regulated income tax dispensation. ... In this respect I have the effect of the pay first, argue later' provisions pending the determination of the Commissioner of an *objection* (as distinct from pending the determination by the Tax Court of an appeal) to an income tax assessment particularly in mind as an aspect that might well receive a different treatment if

challenged, particularly in the context of the fundamental right to administrative justice.”⁹⁷

Unfortunately, the court did not expand on this any further and one can only guess how the difference between income tax and VAT in relation to the “pay now, argue later” approach impacts the right to administrative justice. Fritz remarks that perhaps the court meant that the right to administrative justice could be more susceptible to infringement for income tax purposes, as taxpayers would not have the same opportunity to state their case as they would when determining their own VAT liability. She remarked, at that stage, that such an argument would be illogical as the taxpayer generally provided the information in a tax return on which SARS would then determine the taxpayer’s income tax liability by way of an original assessment.⁹⁸ Thus, it was only the actual determination that was performed by SARS but based on the taxpayer provided information. Yet, given that SARS is now employing automatic assessments for income tax based on third-party data, and not on information provided by taxpayers, this line of argument might be more accurate today.

To date, the courts have not provided, in my opinion, convincing reasons why the *Metcash Trading* judgment dealing with VAT would not also apply to income tax. If an income tax attack matter is ever heard by the Constitutional Court, it would be prudent for the court to consider the context within which income tax functions.

3.3.2 Opportunities for judicial intervention

(a) Tax Court – specialist tribunal

In a recent High Court matter, *Poulter v the Commissioner for SARS*, the court had to determine whether a layperson may represent a taxpayer in the Tax Court.⁹⁹ Determining this required the court to establish whether or not the Tax Court is a court of law, as section 15 of the Legal Practice Act¹⁰⁰ provides that only a legal practitioner, either as an attorney or an advocate, can represent another person in a court of law.

In terms of section 166 of the Constitution, courts of law are the Constitutional Court, the Supreme Court of Appeal, the High Court, the Magistrates' Courts and a "court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts". In this regard, section 116(2) of the TAA recognises the Tax Court only as a court of record.

In *Poulter*, the court held that the function of the Tax Court should be considered to determine whether the Tax Court is a court of law or rather an administrative tribunal.¹⁰¹ Here, the Constitutional Court's ruling in *Metcash Trading* pertaining to the Tax Court as a specialist tribunal was "especially instructive".¹⁰² The High Court quoted from *Metcash Trading* that the "appeal" heard by the Tax Court is not an appeal in the forensic sense,¹⁰³ and that the appeal at the Tax Court falls "outside the normal forensic hierarchy" of the High Court and Supreme Court of Appeal.¹⁰⁴ Consequently, the court in *Poulter* held that the Tax Court is not a court of law.¹⁰⁵ Therefore, the *Metcash Trading* judgment was used to reach the conclusion that a layperson may represent another person in the Tax Court, as it is not a court of law.

Although the *Poulter* matter has confirmed that the Tax Court is not a court of law, as indicated in the *Metcash Trading* judgment, the Tax Court "meets the criteria of section 34 of the Constitution".¹⁰⁶ This means that although the Tax Court is not a court of law, it does not affect a taxpayer's right to access to courts.

(b) *High Court's inherent jurisdiction in tax matters*

With the enactment of the TAA, the inherent jurisdiction of the High Court in tax matters is limited. Section 104 of the TAA stipulates that a dispute regarding an assessment, a decision not to extend the period for lodging an objection, or any other decision that is subject to objection or appeal must follow the dispute resolution process, whereby the Tax Court serves as the court of first instance. However, section 105 of the TAA provides an exception in terms whereof the High Court has the discretion to adjudicate a dispute as a court of first instance.

Caroll remarks that section 105 “treads the line” between the High Court’s inherent jurisdiction, as referred to in *Metcash Trading*, and the tax dispute process regulated in terms of the Rules promulgated under section 103 of the Tax Administration Act, 2011.¹⁰⁷

There have been several cases which considered when exactly the High Court would be able to adjudicate a tax matter directly as envisaged in terms of section 105 of the TAA. As Choate points out, this question is not merely an academic exercise. She observes that following the Tax Court route could take 18 to 24 months given the timeframes imposed by the TAA for objection and appeal to the Tax Court.¹⁰⁸

In the *Commissioner for SARS v Rappa Resources (Pty) Ltd*¹⁰⁹ the Supreme Court of Appeal held that the High Court will only be allowed to adjudicate a tax matter as a court of first instance, and thus deviate from the procedure set out in the TAA, when there are exceptional circumstances present.¹¹⁰ In *United Manganese of Kalahari (Proprietary) Limited v The Commissioner for SARS*, the Supreme Court of Appeal¹¹¹ held that these exceptional circumstances, relying explicitly on *Metcash Trading*’s ruling regarding the inherent jurisdiction of the High Court in tax matters, would be when the tax case deals with a legal issue.¹¹²

This approach, and, consequently, *Metcash Trading*’s ruling pertaining to the High Court’s inherent jurisdiction with legal issues, was confirmed in the recent Supreme Court of Appeal matter *Commissioner SARS v Absa Bank Ltd and Another* when the court held that:

“It was common cause that such appropriate circumstances should be labelled ‘exceptional circumstances’. The court would require a justification to depart from the usual procedure and, this, by definition, would be ‘exceptional’. However, the quality of exceptionality need not be exotic or rare or bizarre; rather it needs simply be, properly construed, circumstances which sensibly justify an alternative route. When a dispute is entirely a dispute about a *point of law*, that attribute, in my view, would satisfy exceptionally.”¹¹³

However, the subsequent consolidated Constitutional Court judgment, *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service*, held that a High Court would be able to provide a direction to deviate from the procedure set out in the TAA when it is “appropriate or whether there is good cause to approach the High Court rather than the Tax Court”.¹¹⁴ Whilst a dispute about a *point of law* could potentially be sufficient if it is appropriate or if it constitutes good cause for the deviation from the Tax Court, such a dispute would not necessarily confer jurisdiction on the High Court to hear the matter. This is because, under section 105 of the TAA, the inherent jurisdiction of the High Court is conditionally suspended until the High Court grants the required direction.¹¹⁵ Consequently, section 105 of the TAA does substantially limit the inherent jurisdiction on which *Metcash Trading* relied as a basis for concluding that a taxpayer’s right to access to courts is not infringed by the “pay now, argue later” approach.

(c) *Statement procedure*

In the *First National Bank* case the Constitutional Court had to consider the constitutionality of the former section 114 of the Customs and Excise Act.¹¹⁶ This section permitted the commissioner of SARS to collect customs debts by selling goods owned by a debtor or a third party, which were located on the debtor’s premises, without requiring a prior judgment or court authorisation. In this Constitutional Court case it was held that there was an insufficient connection between the customs debt and the person deprived of property (potentially a third party), as well as between the property and the customs debt.¹¹⁷ Consequently, section 114 was declared unconstitutional to the extent that it applied to property owned by third parties.¹¹⁸ Because of this declaration, the court held it unnecessary to pronounce on the constitutionality thereof regarding the right to access to courts as there would be no additional substantive relief granted.¹¹⁹

Nonetheless, the court indicated that the constitutionality in terms of section 34 is questionable as, similar to the *Lesapo* judgment, the debtor had no recourse to court and had “none of the statutory or other safeguards applicable to the attachment

and sale in execution of a judgment debt”.¹²⁰ Consequently, the court held that “[a]ny doubt as to the validity of section 114 on the grounds of its inconsistency with section 34 of the Constitution would be removed by an amendment of the present Act to incorporate a provision corresponding to that of section 40(2)(a) of the VAT Act”.¹²¹ The court further held that such an amendment would be constitutionally sound for the reasons advanced in *Metcash Trading* being that the court officials will be involved in the process and the execution of the judgment would form part of the ordinary execution process.¹²² This obiter endorsement of *Metcash*, without considering the correctness and Olivier’s criticism of this aspect in *Metcash Trading*, led to an amendment of section 114 of the Customs and Excise Act to provide for a statement procedure similar to the sections 40(2)(a) and 40(5) of the VAT Act.

With the enactment of the TAA, sections 172 and 174 of the TAA replaced section 40(2)(a) of the VAT Act. This means that SARS still retains the power to file a statement in court, which then holds the effect of a civil judgment for a liquidated debt in the amount specified in the statement. However, the certificate process in terms of the TAA now requires that SARS first needs to provide the taxpayer with at least 10 business days’ notice, before filing such a statement.¹²³

Although the TAA does not include a provision like section 40(5) in terms whereof the correctness of the statement cannot be questioned, the views expressed in *Metcash Trading* regarding section 40(5) not being an absolute bar to court access remain relevant today. In *Barnard Labuschagne Incorporated v SARS*,¹²⁴ the Constitutional Court had to consider whether a statement filed at court is rescindable like an ordinary judgment.¹²⁵ In this matter, the court affirmed the importance of *Metcash Trading* in this respect by stating that:

“The reasoning in *Metcash* on rescindability was not ‘merely . . . an observation’, it was an integral part of this Court’s reasoning. . . . Observance of the rules of precedent is not a display of politeness to courts of higher authority;

it is a component of the rule of law, which is a founding value of the Constitution.¹²⁶

3.3.3 The commissioner's discretion

After the *Metcash Trading* judgment, SARS issued Media Release 27,¹²⁷ indicating that when the commissioner exercises its discretion as to whether to suspend the payment obligation, the commissioner must consider whether paying the tax amount pending dispute resolution would lead to irreversible damage for the taxpayer and other appropriate circumstances, such as assurance that the disputed amount will be paid if the appeal fails.

After this media release, section 88 of the ITA and section 36 of the VAT Act were amended to contain the factors that the commissioner could take into consideration when exercising its discretion to suspend a payment pending dispute resolution.¹²⁸ These factors are:

1. the amount involved;
2. the taxpayer's compliance history;
3. whether the taxpayer might alienate his assets during the postponement of payment;
4. whether the taxpayer is able to provide adequate security for the payment of the assessed amount;
5. if payment of the amount would cause the taxpayer irreparable financial hardship;
6. whether sequestration or liquidation proceedings are impending;
7. whether the taxpayer had failed to furnish requested information; and
8. whether fraud was involved in the origin of the dispute.¹²⁹

With the implementation of the TAA, section 164 thereof retains the "pay now, argue later" approach,¹³⁰ as previously contained in section 36(1) of the VAT Act, which can now be deviated from when a taxpayer requests a suspension.¹³¹ It is now within the discretion of a senior SARS official, and not simply the commissioner, to grant such a suspension based on a

non-exclusive list of factors listed in section 164(3) of the TAA. These factors initially mirrored those contained in the amended section 36 of the VAT Act but were later amended as follows:

- “(a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;
- (b) the compliance history of the taxpayer with SARS;
- (c) whether fraud is *prima facie* involved in the origin of the dispute;
- (d) whether payment will result in irreparable hardship to the taxpayer not justified by the prejudice to SARS or the *fiscus* if the disputed tax is not paid or recovered; or
- (e) whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the *fiscus*.”

As the absence of explicit factors were criticised under 1.2.3, the inclusion of factors in legislation is welcomed. Although these factors are susceptible to criticism,¹³² it is appropriate for the current discussion to focus on the fact that the legislature deemed it necessary to provide factors. In *Metcash Trading* the Constitutional Court presented the review process as an opportunity for taxpayers to access the courts concerning the “pay now, argue later” approach. Still, only with clear criteria of what should be considered when exercising this discretion can a taxpayer effectively use the review proceedings. Thus, until clear criteria were provided, the “pay now, argue later” approach could not effectively ameliorate the impact of this approach.

Another interesting legislative development in respect of the “pay now, argue later” approach is that section 164(6) establishes a so-called grace period during which SARS is prohibited from enforcing a tax debt from the time it receives a suspension request from the taxpayer until 10 days after it has denied this request. Generally, this new provision is a positive development for taxpayers, who now have legal certainty that

SARS cannot proceed with collections during this grace period. Yet, somewhat pessimistically, this provision may encourage SARS to reach decisions quickly to resume collection efforts. If these decisions are made without carefully considering the specifics of each case, taxpayers would then need to seek a review of those decisions.¹³³

3.4 Conclusion

Whilst the Constitutional Court in *Metcash Trading* did acknowledge the importance of interpreting fiscal provisions within the context in which it functions, the Constitutional Court erred in various aspects. Most significantly, it equated a taxpayer's right to access to courts when disputing the tax obligation and subsequent enforcement thereof with a taxpayer's right to access courts in general. Just because a taxpayer in general has various options to have a matter heard by an impartial forum, by way of appeal or review, does not mean that taxpayers had a right to access to courts in this specific instance. Therefore, I opine that the right to access to courts was indeed infringed on and the court should have examined much more closely whether the relevant provisions is a reasonable and justifiable limitation in terms of 36. In relation to section 36, the court simply stated that the challenged provisions are like those in other open and democratic societies. However, a brief discussion of Canada, which the court held to be one of these jurisdictions, show that the approach in Canada is not comparable.

There have been legislative amendments made to the "pay now, argue later" approach and the statement procedure. These include providing clear legislative criteria regarding the discretion to suspend the payment obligation, allowing a grace period before collection actions commence to enable SARS to consider a taxpayer's suspension request, and giving a taxpayer notice of the imminent filing of a statement at court. Considering these amendments, it is clear that over time the legislature has incorporated several built-in protections for the taxpayer. Reflecting on the provisions as it were at the time of

Metcash Trading, it is difficult to understand the court's finding that the right to access to courts was not even infringed.

Is there much to fault the Constitutional Court judgment on? Yes. Yet, there are also numerous precedent-setting principles that apply and provided clarity in matters that do not deal with the constitutionality of the "pay now, argue later" approach and the statement procedure. These are that the Tax Court is not a court of law; the High Court has an inherent jurisdiction to hear tax matters dealing with issues in law and a filed statement is rescindable.

Endnotes

- 1 2001 1 SA 1109 (CC).
- 2 200 of 1993.
- 3 Interim Report of the Commission of Inquiry into certain aspects of the Tax Structure of South Africa, ch 6, 67, 18 November 1994.
- 4 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* 2002 4 SA 768 par 31.
- 5 s 3(a) of the South African Revenue Service Act 34 of 1997.
- 6 89 of 1991.
- 7 In terms of section 167(5) of the Constitution, the Constitutional Court “must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force”.
- 8 *Metcash Trading Ltd v Commissioner for the SA Revenue Service* 2000 3 BCLR 318 (W) 322.
- 9 *Metcash Trading* (HC) (n 8) 242.
- 10 *Metcash Trading* (HC) (n 8) 244.
- 11 *Metcash Trading* (HC) (n 8) 244. The Davis Tax Committee “Report on Tax Administration” (2017) 74 remarked that the “pay now argue later” approach does infringe on the right not to be arbitrarily deprived of property. See Fritz and Brits “Does the ‘pay now, argue later’ approach in the Tax Administration Act 28 of 2011 infringe on a taxpayer’s right not to be deprived of property arbitrarily?” 2020 SAJHR 200-220 where the authors found that the “pay now, argue later” approach is neither procedurally nor substantively arbitrary.
- 12 In terms of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 21 of 2018, the VAT rate has been amended to 15% effective 1 March 2018.
- 13 *Metcash Trading* (CC) (n 1) par 12-15.
- 14 *Metcash Trading* (CC) (n 1) par 16.
- 15 *Metcash Trading* (CC) (n 1) par 17-18.
- 16 *Metcash Trading* (CC) (n 1) par 21-22.
- 17 *Metcash Trading* (CC) (n 1) par 22.
- 18 Du Plessis *Re-interpretation of Statutes* (2002) 112.
- 19 See for instance *S v Makwanyane* 1995 6 BCLR 665 (CC) par 115; 278; *Executive Council of the Western Cape Legislature v President of the RSA* 1995 10 BCLR 1348 (CC) par 204; and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) par 87.
- 20 Croome *Taxpayers’ Rights in South Africa* (2010) 40; and Van Zyl “The time is ripe to reconsider the pay-now-argue-later principle” 2018 THRHR 172.
- 21 58 of 1962.
- 22 Croome (n 20) 40.
- 23 Williams “Unresolved aspects of the ‘pay now, argue later’ rule” 2012 *Synopsis* 4.
- 24 See *Metcash Trading* (CC) (n 1) par 16, 17 and 22.
- 25 Fritz *An Appraisal of Selected Tax-Enforcement Powers of the South African Revenue Service in the South African Constitutional Context* (2017 thesis SA) 153.

- 26 s 1 of the VAT Act defines “vendor” as “any person who is or is
required to be registered under this Act”.
- 27 s 7(1)(a) of the VAT Act.
- 28 s 7(1)(b) of the VAT Act.
- 29 s 7(1)(c) of the VAT Act.
- 30 s 5(1) of the Income Tax Act.
- 31 s 96(1)(d) of the Tax Administration Act 28 of 2011 (TAA).
- 32 s 28(1) of the VAT Act read with s 91(2) of the TAA.
- 33 At the time of the *Metcash Trading* matter this was in terms of s
31 of the VAT Act. Now, after the enactment of the TAA, this is
provided for in s 91(2) of the TAA.
- 34 s 1 read with s 162(1) of the TAA.
- 35 Van Zyl and Fritz “The law of obligations, tax debts, insolvency,
and the dissipation of assets to the prejudice of the fiscus” 2024
THRHR 23 29.
- 36 2025 1 SA 127 (SCA) par 29.
- 37 2025 ZASCA 56 (12 May 2025) par 32. See s 5 of the Income Tax
Act.
- 38 2025 5 BCLR 530 (CC) par 85.
- 39 *Henque* (n 37) par 36.
- 40 2015 4 SA 28 (SCA) par 9.
- 41 *Metcash Trading* (CC) (n 1) par 61.
- 42 Olivier “Tax collection and the bill of rights” 2001 *TSAR* 192 199.
- 43 *Sanderson v Attorney-General, Eastern Cape* 1997 12 BCLR 1675 (CC)
par 26.
- 44 1995 6 BCLR 665 (CC) par 109.
- 45 s 225.1 of the Income Tax Act RSC 1985, c 1 (5th Supp).
- 46 s 225.1(2) and 225.1(3) of the Income Tax Act.
- 47 Fritz “Reconsidering the ‘pay now, argue later’ approach of South
Africa in relation to disputed taxes – lessons from Canada and
Australia” 2019 *JJS* 20 31.
- 48 s 225.1(6) of the Income Tax Act.
- 49 s 225.1(7) of the Income Tax Act. In terms of s 225.1(8) a large
corporation is a corporation that has a total of taxable capital
employed in Canada exceeding \$10 million. Large corporations are
required to pay 50 per cent of the disputed tax pending dispute
resolution.
- 50 s 225.2(2) of the Income Tax Act.
- 51 s 225.2(5) of the Income Tax Act. See *Canada v Cormier-
Imbeault* (2009) 6 CTC 45 where the court identified factors that
may justify the granting of such a court order.
- 52 s 225.2(8) of the Income Tax Act.
- 53 Alpert Law Firm “Defending jeopardy assessments” 2012 *Legal
Business Report* 3 available at <http://bit.ly/1UudsFD> (18-04-2024).
- 54 Fritz (n 47) 34.
- 55 Simard “How to object to assessment in Canada”, available at
<http://bit.ly/1PMSl05> (19-04-2024).
- 56 s 179.1 of the Income Tax Act.
- 57 *First National Bank* (n 4) par 32-33. The court confirmed in par
32 that because of the fact the commissioner who issued the
assessment is not a judicial officer, the subsequent disputing

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- thereof in the Tax Court is not an appeal in the forensic sense of the word.
- 58 *Metcash Trading* (CC) (n 1) par 32.
59 *Metcash Trading* (CC) (n 1) par 47.
60 *Metcash Trading* (CC) (n 1) par 34, 47.
61 *Metcash Trading* (CC) (n 1) par 47.
62 *Metcash Trading* (CC) (n 1) par 33.
63 *Metcash Trading* (CC) (n 1) par 43-45. The court relied on the matters of *Contract Support Services (Pty) Ltd and Others v C: SARS* 1999 3 SA 1133 (W); and *Shell's Annandale Farm (Pty) Ltd v CSARS* 2000 3 SA 564 (C) in this respect.
64 Olivier (n 42) 196.
65 Keulder “‘Pay now, argue later’ rule – Before and after the Tax Administration Act” 2013 *PELJ* 140 140.
66 Keulder (n 65) 140.
67 Fritz (n 47) 40.
68 14 of 1981.
69 1999 12 *BCLR* 1420 (CC).
70 *Lesapo* case (n 69) 1421.
71 *Metcash Trading* (CC) (n 1) par 51.
72 *Metcash Trading* (CC) (n 1) par 51.
73 *Metcash Trading* (CC) (n 1) par 58.
74 *Metcash Trading* (CC) (n 1) par 66.
75 Olivier (n 42) 198.
76 Olivier (n 42) 198. See also Keulder *Does the Constitution Protect Taxpayers Against the Mighty SARS? – An Inquiry into the Constitutionality of Selected Tax Practices and Procedures* (2011 dissertation SA) 47 in this regard.
77 Olivier (n 42) 198. However, see the discussion under 1.3.3 where SARS is now required to give a taxpayer notice in terms of s 172(1) of the TAA.
78 *Metcash Trading* (CC) (n 1) par 62.
79 *Metcash Trading* (CC) (n 1) par 38-39.
80 Olivier (n 42) 197.
81 s 6(2)(e)(iii) of PAJA.
82 Olivier (n 42) 199.
83 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 *BCLR* 837 (CC) 842.
84 Only in exceptional circumstances does s 8(1)(c) of PAJA empower the court to substitute the commissioner’s decision.
85 *Dawood* (n 83) par 48.
86 Olivier (n 42) 198.
87 28 of 2011.
88 2018 3 SA 541 (ECM).
89 s 195(1)(f) of the Constitution.
90 s 195(1)(g) of the Constitution.
91 *Nondabula* (n 88) par 24.
92 Mdumbe “Has the literal/intentional/textual approach to statutory interpretation been dealt the coup de grace at last?” 2004 *SA Public Law* 472 475 indicates that “internal” context refers to read the legislation holistically and “external” context refers to “all factors outside the statutory text which could assist in determining its

- purpose”. These factors include commission reports, other legislation, common law principles and most importantly the Constitution.
- 93 Fritz “‘Victory’ for taxpayer after SARS fails to fulfil its duties” 2019 *De Jure Law Journal* 181 185.
- 94 2011 6 SA 65 (WCC).
- 95 *Capstone* (n 94) par 2 and 9.
- 96 *Capstone* (n 94) par 9.
- 97 *Capstone* (n 94) par 9. Own emphasis added.
- 98 Fritz “Payment obligations of taxpayers pending dispute resolution: Approaches of South Africa and Nigeria” 2018 *African Human Rights Law Journal* 171 185.
- 99 (A88/2023) 2024 ZAWCHC 97 (2 April 2024).
- 100 28 of 2014.
- 101 *Poulter* (n 99) par 27 referring to *President of the Republic of South Africa and Others v South African Rugby Football Union and others* 2000 1 SA 1 (CC).
- 102 *Poulter* (n 99) par 49.
- 103 *Poulter* (n 99) par 49 quoting *Metcash Trading* (CC) (n 1) par 47.
- 104 *Poulter* (n 99) par 50 quoting *Metcash Trading* (CC) (n 1) par 47.
- 105 *Poulter* (n 99) par 53.
- 106 *Poulter* (n 99) par 50; *Metcash Trading* (CC) (n 1) par 47.
- 107 Caroll “Don’t go banking on review” (2 November 2023) *CDH Tax and Exchange Control Alert*, available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2023/Practice/Tax/tax-and-exchange-control-alert-2-november-dont-go-banking-on-review> (accessed 27 Apr 2024).
- 108 Choate “Trends in judicial cases in Tax Administration” 2023 *TAXTalk* 39.
- 109 2023 4 SA 488 (SCA) par 16.
- 110 *Rappa Resources* (n 109) par 17.
- 111 2018 2 SA 275 (SCA).
- 112 *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service and Four other Cases* 2025 5 BCLR 530 (CC).
- 113 2023 ZASCA 125 par 25. Own emphasis added.
- 114 *United Manganese of Kalahari (Pty) Limited* (n 112) par 75. For a critique of the High Court judgment of *ABSA Bank*, see Keulder and Legwaila “A review muddle on an inappropriate application of general anti-avoidance rules” 2025 *Journal of South African Law* 133–144.
- 115 *United Manganese of Kalahari (Pty) Limited* (n 112) par 53.
- 116 91 of 1964.
- 117 *First National Bank* (n 4) par 108–109.
- 118 *First National Bank* (n 4) par 133.
- 119 *First National Bank* (n 4) par 115.
- 120 *First National Bank* (n 4) par 117.
- 121 *First National Bank* (n 4) par 119.
- 122 *First National Bank* (n 4) par 118 quoting with approval from *Metcash Trading* (CC) (n 1) par 51.
- 123 s 172(1) of the TAA.
- 124 2022 ZACC 8 (11 March 2022).

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- 125 *Barnard Labuschagne Incorporated* (n 124) par 3.
126 *Barnard Labuschagne Incorporated* (n 124) par 30.
127 *Barnard Labuschagne Incorporated* (n 124) SARS Media Release 27 of
2000 (24 Nov 2000).
128 Taxation Laws Second Amendment Act 18 of 2009.
129 For a critique of some of these factors, see Williams (n 23) 4; Rood
“Pay now, argue later” 13 Aug 2009 *Finweek* 44.
130 s 164(1) of the TAA.
131 s 164(2) of the TAA.
132 See Fritz (n 25) 171–174 for a discussion of these factors.
133 Keulder (n 76) 149–150.

