

## Payment obligations of taxpayers pending dispute resolution: Approaches of South Africa and Nigeria

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### Summary

*Taxpayers are obliged by law to pay taxes, yet both South Africa and Nigeria afford persons the right to have a dispute adjudicated by an impartial forum. This article examines the interplay in South Africa and Nigeria between a taxpayer's right to access the courts and his or her duty to pay an assessed tax, the purpose being to determine whether the manner in which these countries approach this issue is constitutionally sound. The article demonstrates that Nigeria's general approach ensures that a taxpayer's right of access to the courts remains intact. However, it is illustrated that the South African 'pay now, argue later' rule unreasonably and unjustifiably limits a taxpayer's right of access to the courts.*

**Key words:** *tax payment obligation; right of access to courts; tax administration; taxpayers' rights; 'pay now, argue later' rule*

### 1 Introduction

The Constitution of the Federal Republic of Nigeria, 1999 (Nigerian Constitution)<sup>1</sup> and the Constitution of the Republic of South Africa, 1996 (South African Constitution)<sup>2</sup> provide that a person has the

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1 Secs 1(1) and 1(3) of the Nigerian Constitution confirm the supremacy of the Constitution and stipulate that all law and conduct must be in accordance with the Constitution.

2 Sec 2 of the South African Constitution provides that the South African Constitution is the supreme law of South Africa and that any law or conduct that is contrary to the Constitution will be invalid.

right to have his or her disputes adjudicated by an impartial forum. This right is provided for in section 36(1) of the Nigerian Constitution and in section 34 of the South African Constitution.

Furthermore, both Nigeria and South Africa have ratified the African Charter on Human and Peoples' Rights (African Charter),<sup>3</sup> which aims 'to promote and protect human rights and basic freedoms on the African continent'.<sup>4</sup> In terms of article 1 of the African Charter, this means that South Africa and Nigeria must 'adopt legislative and other measures' that will give effect to the rights and duties provided for in the African Charter. Consequently, in terms of the African Charter, South Africa and Nigeria must ensure that every individual's case be heard,<sup>5</sup> that is, that an individual has the right to appeal to a competent forum when a fundamental right has been violated,<sup>6</sup> and to be presumed innocent until proven guilty by a competent court.<sup>7</sup> Therefore, South Africa and Nigeria have similar obligations in relation to providing access to the courts.

In turn, article 29(6) of the African Charter stipulates that individuals have a duty to pay taxes that are imposed by law as this obligation is in the interests of society.

Therefore, countries that have adopted the African Charter may be confronted with a possible conflict when a taxpayer disputes an assessed tax. Will the taxpayer be able to first have this dispute heard by an impartial forum to give effect to the rights provided for in the African Charter, or will she or he have to comply with the duty to pay the assessed tax, which is also provided for in the African Charter?

This article addresses the interplay in South Africa and Nigeria between the right of access to the courts and a taxpayer's duty to pay an assessed tax in order to determine whether the manner in which these countries approach this issue is constitutionally sound. This interplay is addressed from a legal pragmatic perspective.

A comparison between South Africa and Nigeria is beneficial for two reasons. First, although both countries interpret the right to adjudication by an impartial forum in the same manner and their revenue agencies are obliged to collect taxes, they have divergent approaches as to how to deal with the interplay that arises when a taxpayer disputes his or her tax obligation. Therefore, in considering the constitutionality of both these approaches, one inevitably needs to consider whether there are any lessons the one country can learn from the other's approach. Second, there currently is a dearth of scholarly

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3 African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights (2016) <http://bit.ly/1IObnUQ> (accessed 20 May 2016).

4 African Commission on Human and Peoples' Rights 'African Charter on Human and Peoples' Rights' <http://bit.ly/QlzRuG> (accessed 20 May 2016).

5 Art 7 African Charter.

6 Art 7(1)(a) African Charter.

7 Art 7(1)(b) African Charter.

work and case law in respect of the Nigerian approach, which may be because the Nigerian approach is not considered to affect taxpayers' rights. Nonetheless, Nigeria's reliance on crude oil as a means of revenue<sup>8</sup> is declining, and the country has started to rely on other sources of revenue.<sup>9</sup> As such, a need for prompt and effective tax collection may result in the current approach requiring a complete overhaul. Comparing the Nigerian approach to that of South Africa thus can assist in indicating whether adopting South Africa's approach would be workable for Nigeria in case of an overhaul. Consequently, it is envisaged that this comparison stimulates debate regarding the way in which Nigeria should in future deal with disputed taxes pending dispute resolution.

The article first considers the right of access to the courts in relation to tax disputes in both South Africa and Nigeria. Thereafter, the South African and Nigerian approaches to such disputes are discussed in order to ascertain whether these approaches pass constitutional muster.

## 2 Right of access to the courts

### 2.1 South Africa

Section 34 of the South African Constitution provides:

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

In *Bernstein v Bester (Bernstein)*,<sup>10</sup> the Court indicated that the purpose of the right to access the courts is to separate 'the judiciary from the other arms of the state'.<sup>11</sup> As a result of this separation, the legislature is prevented from becoming the judge, and the rule of law is upheld.<sup>12</sup> Similarly, in *Chief Lesapo v North West Agricultural Bank (Chief Lesapo (CC))*,<sup>13</sup> the Court acknowledged the link between

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8 JU Madugba et al 'Evaluation of the contribution of oil revenue on economic development in Nigeria' (2016) 8 *International Journal of Economics and Finance* 210. According to these authors, almost 80% of Nigeria's government revenue comprises income earned from the sale of crude oil.

9 E Uzor 'Enhancing tax collection efficiency and compliance in Nigeria: The role of behavioural economics' 20 March 2017 <http://bit.ly/2uAqEZ0> (accessed 31 March 2018).

10 1996 (2) SA 751 (CC).

11 *Bernstein* (n 10 above) para 105.

12 As above. Even though *Bernstein* dealt with the right of access to the courts in terms of sec 22 of the interim Constitution 200 of 1993, this case remains relevant, as the wording contained in sec 22 of the interim Constitution was similar to the wording contained in sec 34 of the South African Constitution.

13 1999 (12) BCLR 1420 (CC) 1429.

section 34 of the South African Constitution and the rule of law.<sup>14</sup> The Court held that the right to access the courts prevents a person from taking the law into his or her own hands, which is inimical to a legal system founded on the rule of law.<sup>15</sup>

In *Chief Lesapo v North West Agricultural Bank (Chief Lesapo (HC))*,<sup>16</sup> the High Court highlighted another aspect of the right to access the courts. The Court indicated that section 34 of the South African Constitution embodied the *nemo iudex idoneus in propria causa est* rule,<sup>17</sup> which means that 'no one may be a judge in his or her own case'.<sup>18</sup> Thus, one of the aims of section 34 of the South African Constitution is to prevent a person from being a judge in a matter to which he or she is a party. However, it must be borne in mind that the right to access the courts in South Africa is not absolute and may be limited if the limitation is reasonable and justifiable.<sup>19</sup>

In South Africa a dispute resolution procedure, which is one way of giving effect to the right to access the courts, is available to a taxpayer who is not satisfied with his or her tax liability. If a taxpayer disputes an income tax or a Value-Added Tax (VAT) liability, section 104 of the Tax Administration Act (TAA)<sup>20</sup> provides that the taxpayer may object to the assessment. If the South African Revenue Service (SARS) disallows the objection, the taxpayer may lodge an appeal with the Tax Court<sup>21</sup> or, if the amount in dispute is less than R1 million and both the taxpayer and a senior SARS official agree thereto, the matter may be heard by the Tax Board.<sup>22</sup> If a taxpayer still is dissatisfied after

14 The rule of law entails that conduct must be in line with 'pre-announced, clear and general rules'. See in this regard AV Dicey *Introduction to the study of the law of the constitution* (1959) 193; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) 1482; *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (5) BCLR 837 (CC) 842; *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the RSA* 2000 (2) SA 674 (CC) paras 19-20; *Affordable Medicines Trust v Minister of Health of the RSA* 2005 (6) BCLR 529 (CC) para 108; B Bekink *Principles of South African constitutional law* (2012) 62.

15 *Chief Lesapo* (n 13 above) para 11.

16 [1999] JOL 5319 (B).

17 *Chief Lesapo* (n 13 above) para 13.

18 Y Burns & M Beukes *Administrative law under the 1996 Constitution* (2003) 197.

19 Sec 36(1) of the South African Constitution indicates that in establishing whether a limitation is reasonable and justifiable, the following factors must be considered: '(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'.

20 Act 28 of 2011.

21 Sec 116 TAA.

22 Sec 109(1) TAA. Sec 109(1) of the TAA provides that an appeal may be heard by the Tax Board if the amount of tax in dispute does not exceed the amount determined by the Minister of Finance. In terms of GN 1196 in *Government Gazette* 39490 (17 December 2015), from 1 January 2016 the amount is R1 million. For a discussion relating to the dispute-resolution procedures pertaining to customs duty, see SARS 'Customs external guide overview of customs procedures' 28 March 2013; T Colesky & R Franzsen 'The adjudication of customs tariff classification disputes in South Africa: Lessons from Australia and Canada' (2015) 48 *Comparative and International Law Journal of Southern Africa* 259-264.

these forums have heard the appeal, the taxpayer may lodge an appeal with the High Court of South Africa.<sup>23</sup> Further recourse may be sought from the Supreme Court of Appeal<sup>24</sup> and the Constitutional Court.<sup>25</sup>

## 2.2 Nigeria

Section 36(1) of the Nigerian Constitution provides that 'a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality'.

This right encapsulates two rules of natural justice, namely, *audi alteram partem*, meaning to 'hear the other side',<sup>26</sup> and the *nemo iudex* rule.<sup>27</sup> However, section 36(2) of the Nigerian Constitution qualifies this right by providing that a law will not be invalid merely because the government is empowered to make administrative decisions that affect the rights and obligations of a person. Such a law would still be valid if the person who is to be affected by the decision has the opportunity to make representations before the decision is made<sup>28</sup> and if the decision is not regarded as being final and conclusive.<sup>29</sup>

The Nigerian Constitution also provides avenues for dispute resolution by impartial forums.<sup>30</sup> The forums relevant to federal tax

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See C Fritz 'An appraisal of selected tax enforcement powers of the South African Revenue Service in the South African constitutional context' unpublished LLD thesis, University of Pretoria, 2017 179-187, where South Africa's approach to the payment obligation pending dispute resolution in relation to customs duty is discussed.

- 23 In terms of sec 169(1) of the South African Constitution, the High Courts of South Africa may hear any constitutional matter if it is not heard by the Constitutional Court directly or falls within the jurisdiction of a court that has a status similar to a High Court.
- 24 In terms of sec 168(3)(a) of the South African Constitution, the Supreme Court of Appeal may decide appeals emanating from the High Court of South Africa or a court with a similar status, except labour or competition law matters.
- 25 Sec 167(3) of the South African Constitution stipulates that the South African Constitutional Court is the highest court in South Africa.
- 26 Y Burns *Administrative law* (2013) 352.
- 27 *Awazurike v Attorney-General of the Federation* [2009] ALL FWLR (Pt. 489) 549 553; *Olufeagba v Abdur-Raheem* [2010] ALL FWLR (Pt. 512) 1033 1042.
- 28 Sec 36(2)(a) Nigerian Constitution.
- 29 Sec 36(2)(b) Nigerian Constitution.
- 30 Sec 69(1) of the Companies Income Tax Act Cap C21 LFN, 2004 and sec 66 of the Personal Income Tax Act 104 of 1993 provide for a taxpayer to first lodge an objection against an assessment before commencing with appeal proceedings. However, in terms of secs 2, 25 and 68 of the Federal Inland Revenue Service (Establishment) Act 2007 (FIRSEA), the tax-resolution proceedings should be conducted in accordance with the provisions of the FIRSEA. The FIRSEA does not provide for an aggrieved taxpayer to lodge an objection with the FIRS. A Elebiju 'Tax litigation: Paradigm shift on notice of refusal to amend assessment (NORA)' *This Day Lawyer* 6 September 2011 6 submits that procedures (in this instance the objection procedure) that existed prior to the enactment of the FIRSEA should still be available, on condition that this is not inconsistent with the FIRSEA.

disputes are the Supreme Court of Nigeria;<sup>31</sup> the Court of Appeal;<sup>32</sup> the Federal High Court;<sup>33</sup> and the Tax Appeal Tribunal (TAT).<sup>34</sup>

### 3 Approaches to a payment obligation pending dispute resolution

#### 3.1 South Africa

##### 3.1.1 Relevant provisions

Section 164(1) of the TAA provides as follows:

Unless a senior SARS official otherwise directs in terms of subsection (3) –

- (a) the obligation to pay tax; and
- (b) the right of SARS to receive and recover tax will not be suspended by an objection or appeal or pending the decision of a court of law pursuant to an appeal under section 133.

Section 164(1) stipulates that a taxpayer needs to ‘pay now, argue later’. If the ‘pay now, argue later’ rule did not exist, there would be an incentive for a taxpayer to dispute a tax obligation. This could lead to frivolous objections that may cause SARS and the South African government to experience dire financial constraints.<sup>35</sup> In *Capstone*

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31 This Court is established in terms of sec 230(1) of the Nigerian Constitution. Sec 233 of the Nigerian Constitution provides that the Supreme Court of Nigeria has jurisdiction to hear matters pertaining to the federation and states, or between states, and matters that are specifically provided for in terms of legislation (which matters fall within the original jurisdiction of this Court). J Sokefun & NC Njoku ‘The court system in Nigeria: Jurisdiction and appeals’ (2016) 2 *International Journal of Business and Applied Social Science* 5 state that the Supreme Court of Nigeria, the highest court, is the court of last resort in Nigeria.

32 This Court is established in terms of sec 237(1) of the Nigerian Constitution. In terms of secs 239(1) and 240 of the Nigerian Constitution, the Court of Appeal has jurisdiction to hear matters relating to the validity of presidential elections and to determine appeals from courts below it.

33 The Federal High Court is established in terms of sec 249(1) of the Nigerian Constitution. In terms of sec 251(1) of the Nigerian Constitution, this Court has jurisdiction over matters relating to, amongst others, national revenue and the taxation of companies.

34 The TAT is established in terms of sec 59(1), read with para 13(1) of the Fifth Schedule to the FIRSEA. In terms of the First Schedule to the FIRSEA, the TAT has jurisdiction to consider disputes pertaining to company income tax, personal income tax, petroleum income tax, capital gains tax and VAT. See AJA Achor ‘Tax dispute resolution in Nigeria: A storm in a teacup’ (2014) 29 *Journal of Law, Policy and Globalisation* 150 for a discussion regarding the overlapping jurisdiction of the TAT and the Federal High Court. See A Aniyie ‘Taxpayers’ rights in Nigeria’ unpublished MPhil dissertation, University of Pretoria, 2015 55-56 for a brief discussion of the setup and structure of the TAT.

35 *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2000 (2) SA 232 (W) 243 (*Metcash Trading*).

*556 (Pty) Ltd v Commissioner for SARS (Capstone)*,<sup>36</sup> the Court encapsulated the rationale of this rule as follows:

The considerations underpinning the 'pay now, argue later' concept include the public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes.

It should be noted that the 'pay now, argue later' rule in itself does not have a significant bearing on taxpayers' rights as they simply may decide not to pay the disputed tax until the dispute has been resolved. Rather, it is the effect of this rule that has a substantial impact. First, the fact that the payment obligation is not suspended means that interest, currently at 10,5 per cent per annum,<sup>37</sup> will accrue on the outstanding tax from the date the tax was payable,<sup>38</sup> either until the dispute is resolved in favour of the taxpayer or the taxpayer pays the assessed tax.<sup>39</sup>

Second, SARS may enforce the collection of taxes. Thus, if the taxpayer elects not to pay the tax which is subject to dispute resolution, the so-called 'statement procedure' may be implemented.<sup>40</sup> In terms of this procedure SARS may file a statement, indicating the outstanding tax as well as any interest and/or penalty payable, with the clerk or registrar of a competent court. The filing of the statement has the effect of a civil judgment, which enables SARS to obtain a writ to attach and sell the property of the taxpayer.<sup>41</sup> An alternative enforcement action at the disposal of SARS is to appoint a third party on behalf of the taxpayer. The third party will then be required to make payment of the taxes from money held by the third party on behalf of the taxpayer or due to the taxpayer.<sup>42</sup>

However, a taxpayer may request a suspension of a payment obligation if he or she intends to lodge an objection to or an appeal against an assessment.<sup>43</sup> In terms of section 164(3) of the TAA, the senior SARS official must then consider the following factors when exercising this discretion to suspend or not to suspend:

- (a) whether the recovery of the disputed tax will be in jeopardy or there will be a risk of dissipation of assets;

36 [2011] ZAWCHC 297 para 9.

37 SARS 'Table 1 interest rates in respect of the various Acts administered by SARS' June 2016 <http://bit.ly/1RLuT58> (accessed 30 March 2017).

38 B Croome & L Olivier *Tax administration* (2015) 371.

39 The accrual of interest will be subject to the *in duplum* rule. As stated in *Union Government v Jordaan's Executors* 1916 TPD 411 413, this rule prohibits interest from accruing 'after the amount is equivalent to the amount of the capital'. Consequently, the interest on the outstanding tax will accrue only until it is equal to the amount of tax disputed.

40 See in this regard sec 172 of the TAA.

41 *Capstone* (n 36 above) para 37.

42 This power is provided for in sec 179 of the TAA.

43 Sec 164(2) TAA.

- (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.

Some factors contained in section 164(3) of the TAA require further scrutiny. In relation to the first factor the TAA does not specifically indicate when recovery of tax will be in jeopardy. Nonetheless, the Short Guide to the Tax Administration Act, 2011 provides some guidance in this regard. According to the Guide, the recovery of tax will be in jeopardy when there is some risk that the tax may be lost if collection thereof is delayed.<sup>44</sup>

The inclusion of the words *prima facie* in relation to the factor dealing with fraud is of some concern. A taxpayer will not yet have had the opportunity to defend herself or himself against the allegation of fraud.<sup>45</sup> Furthermore, an adverse finding by SARS based on whether fraud was *prima facie* involved conflicts with section 35(3)(h) of the South African Constitution, which provides that an accused person has the right to be presumed innocent until proven guilty.<sup>46</sup>

The factor relating to irreparable hardship, in essence, appears to be subjective in nature. Also, this factor does not simply consider the taxpayer's hardship, but rather weighs it up against the interests of SARS and the fiscus.<sup>47</sup> It is impossible to understand how SARS can act in an objective manner when weighing the taxpayer's hardship against its own interests. This proposal is also in conflict with the *nemo*

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44 SARS 'Short guide to the Tax Administration Act, 2011 (28 of 2011)' 5 June 2013 36. This guide deals with jeopardy in terms of jeopardy assessments as envisaged in sec 94 of the TAA. In terms of this section SARS may make a jeopardy assessment before a return is due if the commissioner is satisfied that it is necessary to secure the collection of tax which would otherwise be in jeopardy. An example of when a jeopardy assessment would be appropriate is when a taxpayer is on the brink of leaving South Africa without paying her or his outstanding taxes. See also T Solomon "'Pay now argue later" – Recent amendments to section 164 of the Tax Administration Act no 28 of 2011' 22 April 2015 *Tax ENSight* <http://bit.ly/1OdGCes> (accessed 9 November 2016).

45 L Rood 'Pay now, argue later' *Finweek* 13 August 2009 44. Although Rood's concern relates to the repealed sec 88 of the Income Tax Act 58 of 1962 and sec 36 of the Value-Added Tax Act 89 of 1991 (VAT Act), it is submitted that this concern also relates to the current similar provision of the TAA.

46 It is submitted that other instances where an adverse finding is made based on an allegation of a crime being committed, the matter must be considered by an impartial party. Eg, when a judge or magistrate considers a bail application, sec 60(5) of the Criminal Procedure Act 59 of 1977 allows an impartial presiding officer to consider the crime that has allegedly been committed.

47 H Louw 'Changes to the criteria considered by SARS when suspending payment of tax' 30 January 2015 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2015/tax/30-january-changes-to-criteria-considered-by-sars-when-suspending-payment-of-tax.html> (accessed 30 June 2018).



*iudex* rule. Therefore, the fact that SARS has to exercise its discretion in taking its own interests into consideration infringes on a taxpayer's right of access to the courts.

Further, as regards this factor, Williams questions whether financial hardship<sup>48</sup> can ever be considered to be irreparable, as it could be remedied by an award of damages.<sup>49</sup> However, an award of damages may not remedy the situation where a taxpayer is rendered insolvent or liquidated and a court only thereafter finds in favour of the taxpayer.<sup>50</sup>

Also, Du Plessis and Dachs point to a 'catch-22'<sup>51</sup> situation relating to whether irreparable financial hardship is present. If the taxpayer argues that the payment of tax would not result in irreparable financial hardship, SARS in all likelihood would not suspend the payment of tax. Conversely, if the taxpayer argues that the payment of tax pending an objection or appeal would lead to irreparable financial hardship, SARS might be concerned that the taxpayer would not be able to pay the tax at a later stage and, accordingly, decide not to suspend the payment of the assessed tax.<sup>52</sup>

With regard to the last factor listed in section 164(3) of the TAA, namely, the taxpayer's ability to furnish security, the question might arise as to when it would be more beneficial to accept security over the payment of assessed taxes. If SARS rejects the request to suspend the payment obligation, this does not automatically mean that it would receive the outstanding disputed tax as it might need to use its enforcement powers to obtain such tax. Consequently, SARS needs to weigh up the certainty of furnished security against the probability that it might need to enforce collection of the outstanding tax.

Furthermore, section 164(6) provides:

During the period commencing on the day that –

- (a) SARS receives a request for suspension under subsection (2); or

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48 Before 20 January 2015, this factor was concerned with 'financial hardship'. However, sec 5 of the Tax Administration Laws Amendment Act 44 of 2014 amended this factor to refer only to 'hardship'. Solomon (n 44 above) understands this to mean that the legislature recognises that a taxpayer may suffer hardship in relation to the 'pay now, argue later' rule that is not financial in nature. However, it is difficult to offer an example that does not indirectly relate to a financial aspect. It may be that the legislature meant that the hardship does not need to be directly related to a person's finances.

49 RC Williams 'Unresolved aspects of the "pay now, argue later" rule' *Synopsis* January 2012 6.

50 C Keulder "'Pay now, argue later" rule – Before and after the Tax Administration Act' (2013) 16 *Potchefstroom Electronic Law Journal* 144.

51 *Collins dictionary* <http://bit.ly/1dpX2zH> (accessed 9 November 2016) defines the phrase 'catch-22' as 'a situation in which any move that a person can make will lead to trouble'.

52 B du Plessis & P Dachs 'Pay now argue later' 23 July 2014 *Tax ENSight* <http://bit.ly/1FB3OZW> (accessed 3 June 2015).

- (b) a suspension is revoked under subsection (5), and ending 10 business days after notice of SARS' decision or revocation has been issued to the taxpayer, no recovery proceedings may be taken unless SARS has a reasonable belief that there is a risk of dissipation of assets by the person concerned.

The effect of this section is that there is an automatic suspension of a taxpayer's payment obligation if SARS fails to deliver its decision as to whether the obligation has been suspended or not. Nevertheless, SARS is allowed to continue with the collection procedures in the absence of delivering its decision if it has a reasonable belief that the taxpayer may alienate assets.

Section 164(6) of the TAA provides a taxpayer with a degree of certainty, as she or he is guaranteed that SARS will not continue with any collection steps during the time that the collection of tax is stayed, unless SARS believes that the taxpayer may alienate assets. As a result, SARS will do its utmost to reach a decision as soon as possible regarding the request for suspension of the obligation to pay taxes pending dispute resolution in order to ensure that it is able to continue collecting taxes swiftly. This situation provides an incentive for SARS to reach a quick decision or to provide reasons why it believes the taxpayer may alienate assets. However, this need for haste may result in senior SARS officials not taking into account all relevant considerations in determining whether payment pending an objection or an appeal may be suspended. If this indeed is the case, taxpayers would have to take the decision on review in order to have it re-evaluated<sup>53</sup> which, in turn, may have severe financial and time implications for the taxpayer.

Furthermore, in terms of section 256(3)(a) of the TAA, SARS may provide a tax clearance certificate only if the taxpayer does not have an outstanding tax debt, unless the tax debt is subject to an instalment payment agreement,<sup>54</sup> has been compromised<sup>55</sup> or has been suspended in terms of section 164 of the TAA. Thus, if SARS fails to deliver a decision in relation to the suspension request, a tax clearance certificate cannot be issued. It should be noted that this certificate is essential, as businesses frequently require it in tender processes or before a particular service can be rendered.<sup>56</sup>

In the case of either a senior SARS official rejecting the request for suspension or the taxpayer not requesting such a suspension and proceeding to pay the outstanding tax pending dispute resolution, the amount in excess plus interest must be refunded to the taxpayer if the matter is later adjudicated in favour of the taxpayer.<sup>57</sup> The

53 In terms of sec 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000, this will constitute a ground for judicial review.

54 In terms of sec 167 of the TAA.

55 In terms of sec 204 of the TAA.

56 Aucamp Scholtz Lubbe Chartered Accountants 'Tax clearance certificates' 5 June 2013 <http://bit.ly/2vk5Znu> (accessed 14 July 2017).

57 Sec 164(7) of the TAA.

interest, calculated at 9,75 per cent per year,<sup>58</sup> accrues from the date on which the payment was received until the refund is made.<sup>59</sup> This amount appears to compare negatively with the interest rate applicable to other debts, which is currently 10,5 per cent per year.<sup>60</sup> However, interest in relation to other debts is calculated from the date a demand for payment is made or a summons issued, whichever occurs first.<sup>61</sup> Consequently, interest in relation to a repayment by SARS could accrue before interest in relation to other debt would start to accrue. Nonetheless, in some instances the payment of interest to a taxpayer may not be enough to prevent the taxpayer from experiencing financial ruin.<sup>62</sup>

### 3.1.2 Constitutional considerations relating to the South African approach

The case of *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance (Metcash Trading (HC))*<sup>63</sup> challenged the constitutionality of the 'pay now, argue later' rule contained in section 36 of the VAT Act on the grounds that it violated the taxpayer's right of access to the courts.<sup>64</sup> Although this provision (section 36) has been repealed and replaced by section 164 of the TAA, it remains essential to consider this case, as the provisions contained in the erstwhile section resemble the current provisions.<sup>65</sup> As such, *Metcash Trading (HC)* and its subsequent appeal to the

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58 SARS (n 37 above).

59 Sec 164(7) TAA. Sec 164(7) provides that this interest is calculated in terms of sec 187(1) of the TAA. Sec 187(1), in turn, refers to secs 188 and 189 of the TAA to calculate the interest. However, the relevant subsection has not yet come into operation and is awaiting proclamation by the President (GN 51 in *Government Gazette* 35687 14 September 2012). As the relevant provisions of the TAA relating to interest have not yet come into operation, the accrual of interest must be regulated in terms of the specific tax Act.

60 Sec 1 of the Prescribed Rate of Interest Act. GN 461 in *Government Gazette* 39743 22 April 2016 provides that the prescribed rate of interest from 1 May 2016 is 10,5% per annum.

61 Sec 2A(2)(a) of the Prescribed Rate of Interest Act 55 of 1975.

62 South African Institute for Chartered Accountants 'Taxpayers may be at risk with new "pay now, argue later" rule' 15 February 2011 <http://bit.ly/1lk6BxF> (accessed 21 April 2016).

63 2000 (2) SA 232 (W). For a discussion of *Metcash Trading* (n 35 above), see L Olivier 'Tax collection and the Bill of Rights' (2001) 1 *Journal of South African Law* 194; J Silke 'Taxpayers and the Constitution: A battle already lost' (2002) 17 *Acta Juridica* 310; Croome & Olivier (n 38 above) 372; Keulder (n 50 above) 135-136.

64 *Metcash Trading* (n 35 above) 237. Initially, the taxpayer also considered this rule to violate his right to property as envisaged in sec 25(1) of the South African Constitution. However, he did not pursue the argument regarding the possible infringement of sec 25(1) of the Constitution further. See C Fritz (n 22 above) 160 where it is indicated why a constitutional attack based on the right to property would have been unsuccessful.

65 See Keulder (n 50 above) 148 where the differences regarding the provisions in the repealed VAT Act and the provisions in the TAA are indicated.

Constitutional Court (*Metcash Trading (CC)*)<sup>66</sup> provide valuable insight into the constitutionality of the 'pay now, argue later' rule.

In *Metcash Trading (HC)*, Snyders J held that the 'pay now, argue later' rule violated a taxpayer's right to access the courts, as SARS acts as a substitute for the court by determining every component of the vendor's liability and the enforcement thereof.<sup>67</sup> The Court also held that '[t]he prospect that an eventual successful appeal might reverse the situation is no answer to the actual infringement which endures until then'.<sup>68</sup> The Court rejected the commissioner's argument that the limitation placed on a taxpayer's right of access is reasonable and justifiable,<sup>69</sup> and held that the limitation on a person's right of access to the courts was extensive and, although it may only be temporary in nature, that the effect thereof can be permanent.<sup>70</sup> Accordingly, the limitation was held to be unreasonable and unjustifiable. The High Court referred the matter to the Constitutional Court to confirm its declaration of invalidity.<sup>71</sup>

In *Metcash Trading (CC)*, the Minister of Finance and the commissioner contended that the limitation imposed by the 'pay now, argue later' rule was not unreasonable and unjustifiable as a taxpayer has several opportunities for a 'hearing' with regard to the assessment.<sup>72</sup> Metcash considered this to be insufficient as the taxpayer would still be required to pay before she or he could avail herself or himself of these opportunities.<sup>73</sup> Moreover, Metcash was of the view that there were less invasive means available to effect a speedy collection of taxes,<sup>74</sup> such as the furnishing of security and higher interest rates.<sup>75</sup>

The Constitutional Court held that the 'pay now, argue later' rule had two objectives, namely, to ensure that the payment obligation pertaining to a disputed tax was not delayed while a taxpayer pursued remedies in this regard; and to provide that the required refunds would be made at a later stage.<sup>76</sup> The Court concluded that the 'pay

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66 *Metcash Trading Ltd v Commissioner for the South African Revenue Service and the Minister of Finance* 2001 (1) SA 1109 (CC).

67 *Metcash Trading* (n 35 above) 242.

68 As above.

69 *Metcash Trading* (n 35 above) 243.

70 *Metcash Trading* 244.

71 *Metcash Trading* 246.

72 *Metcash Trading* (n 66 above) 1118. According to the Minister and the commissioner, these opportunities are objecting to the assessment; requesting an extension to pay, and, if this request is refused, taking the matter on review; as well as appealing to the Tax Court. See Keulder (n 50 above) 137-138 for a discussion of the Constitutional Court decision.

73 *Metcash Trading* (n 66 above) 1119.

74 As above.

75 *Metcash Trading* (n 35 above) 244.

76 *Metcash Trading* (n 66 above) 1130.

now, argue later' rule did not limit a taxpayer's right of access to the courts, and, consequently, the rule was held to be constitutional.<sup>77</sup>

In considering the Constitutional Court's decision, it appears that not suspending a payment pending dispute resolution does not, in an unconstitutional manner, limit a taxpayer's right to access the courts. Nonetheless, commentary and criticism concerning this decision point to the contrary. The taxpayer contended in *Metcash Trading* that the court's jurisdiction was excluded when the 'pay now, argue later' rule was invoked, not that the court's jurisdiction was entirely disregarded.<sup>78</sup> Thus, it may be argued that the 'pay now, argue later' rule infringes on the right of access to the courts, as it promotes 'self-help' by SARS.<sup>79</sup> Accordingly, the question before the court should

not be whether the taxpayer will have access to the courts at some stage, but rather whether the taxpayer will have the opportunity to access the courts before being obliged to pay the assessed amount.<sup>80</sup>

Furthermore, in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs (Dawood)*,<sup>81</sup> the Court held that

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

Consequently, the legislature must ensure that provisions are constitutional despite the fact that a decision may be subject to review.<sup>82</sup> Therefore, the mere fact that the decision of SARS not to suspend a payment obligation can be taken on review is not sufficient to ensure that the 'pay now, argue later' rule would pass constitutional muster.

Olivier also notes that the Court did not deal with the applicant's argument that there are less invasive ways to ensure the efficient collection of taxes.<sup>83</sup> This consideration is important in view of the fact that one of the factors the Court had to consider when determining whether a limitation is reasonable and justifiable in terms of section 36(1) of the South African Constitution is whether there are less invasive ways to achieve the objective of SARS.

There is also some debate as to whether the Court would have held the 'pay now, argue later' rule to be constitutionally sound if the matter before the Court had concerned income tax instead of VAT.

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77 *Metcash Trading* (n 66 above) 1132.

78 Olivier (n 63 above) 196.

79 Keulder (n 50 above) 140.

80 As above.

81 2000 (8) BCLR 837 (CC) para 48. See also Olivier (n 63 above) 198 in this regard.

82 Keulder (n 50 above) 140.

83 Olivier (n 63 above) 199.

Croome is of the view that the Court would have come to the same conclusion.<sup>84</sup> Williams, on the other hand, states that the Court would not necessarily have held the rule to be constitutional had the matter concerned income tax.<sup>85</sup> Possible support for Williams's view is to be found in *Metcash Trading (CC)* where the Court explicitly distinguished between VAT and income tax.<sup>86</sup> The Court stated that a VAT liability arises continuously, whereas an income tax liability arises when an assessment is issued.<sup>87</sup> Moreover, a taxpayer who is a VAT vendor<sup>88</sup> collects money as an agent of SARS,<sup>89</sup> as the vendor may set off 'tax incurred on enterprise inputs (input tax) from the tax collected on supplies made by the enterprise (output tax)'.<sup>90</sup> Furthermore, the Court held that the calculation of VAT payments was less complicated than that of income tax.<sup>91</sup> For that reason, the Court held that, in the case of income tax, room for dispute regarding the interpretation of the statute or accounting practices is far greater than in the case of VAT.

It is submitted that the distinction made by the Court in relation to income tax and VAT is flawed. First, the income tax liability, which is similar to that in respect of VAT, depends on an activity that triggers the levying of the specific tax. Hence, in both instances the liability arises as often as an activity occurs which triggers tax liability. Second, the Court's argument that the taxpayer acts as a collection agent is of no relevance. In *Director of Public Prosecutions, Western Cape v Parker (Parker)*,<sup>92</sup> the Court recognised that a VAT vendor and SARS have a debtor-creditor relationship.<sup>93</sup> Consequently, the fact that a vendor holds money on behalf of SARS as an 'agent' does not change the nature of the relationship between the (vendor) taxpayer and SARS. Third, the Court's broad statement regarding room for dispute is

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84 B Croome 'Paying up or arguing first' (2001) *Business Day Professional* 6; B Croome 'Taxpayers' 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, University of Cape Town, 2008 173; B Croome *Taxpayers' rights in South Africa* (2010) 40.

85 Williams (n 49 above) 4.

86 *Metcash Trading* (n 66 above) 1121-1122. See also Croome & Olivier (n 38 above) 372.

87 *Metcash Trading* (n 66 above) 1121.

88 See sec 1, read with secs 23 and 50A of the VAT Act, in relation to when a person would be a vendor for VAT purposes.

89 *Metcash Trading* (n 66 above) 1122.

90 SARS 'VAT 404 Guide for vendors' 31 March 2015 2. See M Silver *Deloitte VAT handbook* (2017) 14 for a discussion of input and output tax.

91 *Metcash Trading* (n 66 above) 1125.

92 2015 (4) SA 28 (SCA).

93 *Parker* (n 92 above) para 9. The Court indicated that it is a relationship of debtor-creditor because, when a VAT vendor fails to pay over the tax that is due and payable, SARS may sue the vendor for payment. Also, this non-compliance would constitute a non-compliance offence as opposed to common law theft of which a person would be guilty if the relationship was one of trust.

incorrect. Calculating an income tax or VAT liability would depend on the complexity of specific transactions.

In *Capstone*, a case similar to that of *Metcash Trading (CC)*, the Court endeavoured to differentiate between the 'pay now, argue later' rule in relation to VAT and income tax. The Court remarked:<sup>94</sup>

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

From this *dictum*, it appears that *Metcash Trading (CC)* might have been considered differently had it related to income tax, as VAT is self-assessed and income tax is not. However, the Court did not elaborate on this aspect, as it did not have to be considered in the specific matter.<sup>95</sup> It is possible that the Court made this remark because, in the case of VAT, the taxpayer, to a certain extent, would have had an opportunity to state her or his case as she or he is responsible for assessing her or his own VAT liability. In contrast, with regard to income tax a taxpayer does not have the same opportunity as she or he has to pay tax as assessed by SARS. However, such an argument would be unsound. Generally, a taxpayer submit informations, be it by way of self-assessment of the VAT liability or a return<sup>96</sup> relating to income tax liability. This information then is used to determine the taxpayer's liability.<sup>97</sup> Accordingly, the taxpayer has the same opportunity to provide SARS with information, irrespective of whether it relates to income tax or VAT.

Consequently, the arguments espoused by the courts in *Metcash Trading (CC)* and *Capstone* do not hold water. However, it is submitted that the arguments of tax scholars pertaining to the fact that the Court erred in declaring the 'pay now, argue later' rule constitutional are valid.

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94 *Capstone* (n 36 above) pars 9.

95 As above.

96 According to sec 1 of the TAA, a 'return' refers to information submitted to SARS which forms the basis of an assessment.

97 This does not apply to instances where SARS has furnished an additional assessment based on information obtained by, eg, conducting an audit.

## 3.2 Nigeria

### 3.2.1 Relevant provisions

In terms of an information circular issued by the Federal Inland Revenue Service (FIRS), an assessed tax that is subject to an appeal will become payable only within one month after the dispute has been finalised.<sup>98</sup> This means that a taxpayer's payment obligation is suspended pending dispute resolution.

However, in terms of paragraph 15(7) of the Fifth Schedule to the Federal Inland Revenue Service (Establishment) Act (FIRSEA), this approach does not apply in all circumstances. When an appeal is brought before the TAT, the Tax Appeal Commissioner may adjourn the appeal and order the taxpayer to satisfy a part of the assessed tax before the matter can proceed if FIRS can prove that

- (a) the appellant has for the year of assessment concerned, failed to prepare and deliver to the Service returns required to be furnished under the relevant provisions of the tax laws mentioned in paragraph 11;
- (b) the appeal is frivolous or vexatious or is an abuse of the appeal process; or
- (c) it is expedient to require the appellant to pay an amount as security for prosecuting the appeal.

It is submitted that the first ground on which the TAT may make an order for the partial payment of a disputed tax does not give rise to any concern as this can be established objectively. However, the same cannot be said of the other two grounds. First, when can it be said that an appeal has been brought frivolously or is an abuse of the appeal process? In order for the TAT to be satisfied that this is indeed the case, the tribunal would have to consider the merits of the dispute as a whole and not simply the version of FIRS. Second, when would it not be considered expedient for the taxpayer to rather pay the disputed tax as security?

When the Tax Appeal Commissioner decides to adjourn the matter and order the payment of a portion of the disputed tax, the taxpayer will have to pay the lesser of an amount equal to the assessed amount in respect of the previous year of assessment or half of the assessed amount that is currently subject to appeal plus 10 per cent of the amount.<sup>99</sup> If the taxpayer fails to pay the amount determined by the TAT, the assessment will be confirmed and the taxpayer may not continue with an appeal in relation to that assessment.<sup>100</sup>

98 FIRS 'Information circular: Collection procedure' 25 March 1993 para 1.4.

99 Para 15(7) of the Fifth Schedule to the FIRSEA. Aniyie (n 34 above) fn 180 states that the deposit is paid in the same manner as an assessed tax, namely, by paying it into the FIRS account. The taxpayer then has to present proof of payment to the TAT.

100 Para 15(7) of the Fifth Schedule to the FIRSEA.



### 3.2.2 Constitutional considerations relating to the Nigerian approach

The general approach in Nigeria results in a taxpayer's right of access to the courts remaining intact, as a taxpayer is required to fulfil her or his payment obligation only once the dispute has been resolved. As a result, there is no Nigerian case law or scholarly work dealing with the interplay between a taxpayer's right of access to the courts and such taxpayer's duty to pay an assessed tax.

However, this seemingly faultless protection of a taxpayer's right of access to the courts is deceptive if one considers paragraph 15(7) of the Fifth Schedule to the FIRSEA. Whilst ordering a taxpayer to pay a portion of the amount in question ensures that the FIRS is able to collect some of the taxes in an effective manner, it precludes a taxpayer with insufficient financial resources from exercising her or his right to appeal and to have a fair hearing. When the TAT exercises this power, it limits the right of access to the courts only to taxpayers with sufficient financial means. Consequently, it is submitted that this power is contrary to the section 36 constitutional right and cannot fall within the qualification contained in section 36(2) of the Nigerian Constitution, as it has a final and conclusive effect on a taxpayer's tax dispute.

## 4 Conclusions and recommendations

Nigeria and South Africa endeavour to achieve the same aim in relation to the right of access to the courts, namely, to ensure that a party to a matter does not adjudicate a dispute in relation to that matter. However, in considering the situation where a dispute arises regarding an assessed tax, these two countries have divergent approaches in relation to this aim.

The South African approach of 'pay now, argue later' results in the effective and efficient collection of taxes, whereas the Nigerian approach of suspending the payment obligation pending dispute resolution need not be as effective from a revenue collection point of view.

From a taxpayer's rights point of view, the Nigerian approach is more appropriate as a taxpayer's right of access to the courts generally remains completely intact. Nevertheless, it is submitted that the power assigned to the TAT to adjourn a matter until a portion of the assessed tax is paid is unconstitutional and should be done away with.

It is understandable that South Africa is not in a position to provide the same unhindered protection of the right of access to the courts when an assessment is disputed as it does not rely on a resource similar to Nigeria's crude oil. However, on the basis of the taxpayer's argument in *Metcash Trading (CC)* and Olivier's criticism, South Africa should consider whether there are not less invasive alternatives to

effect the speedy collection of taxes whilst ensuring that a taxpayer's right of access to the courts is not unreasonably and unjustifiably limited.

In addition to revealing that South Africa should consider less invasive alternatives, the arguments in *Metcash Trading (CC)* and Olivier's criticism reveal that when Nigeria reconsiders its approach, as it now needs to focus on the effective and efficient collection of taxes, it should steer clear of an approach similar to that of South Africa as this may lead to related constitutional problems.

Consequently, this article has revealed that both approaches are inadequate to ensure optimal tax collection and at the same time respect a taxpayer's right of access to the courts, and require reconsideration.