

The constitutionality of third party appointments – before and after the Tax Administration Act

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OPSOMMING

Die aanstelling van 'n derde party namens 'n belastingbetaler – Grondwetlike probleme voor en na die Wet op Belastingadministrasie 28 van 2011

Hierdie artikel handel oor die probleme wat ondervind is met die aanstelling van 'n derde party wat namens die belastingbetaler gelde oorbetaal aan die Suid Afrikaanse Inkomste-diens. Probleme word ondervind aangesien die belastingbetaler 'n reg op toegang tot die howe en regverdige administratiewe praktyke het wat blyk geskend te word deur genoemde aanstelling. Hierdie probleme word uitgewys deur kritiek op *Hindry v Nedcor Bank* te lewer. Die artikel ondersoek voorts of hierdie probleme opgelos kan word deur die Wet op Belastingadministrasie 28 van 2011. Die gevolgtrekking word gemaak dat hierdie wetgewing wel 'n positiewe stap is om hierdie probleme op te los maar dat sekere kenmerke van die vorige wetgewing steeds teenwoordig is.

1 INTRODUCTION

The levying of taxes is imperative for a government to ensure that it achieves its economic objectives¹ which, amongst others, include the economic development of the country and the regulation of levels of employment.² The South African Revenue Service (hereafter SARS³) is empowered to administer and collect tax in South Africa.³

In order to enable SARS to effectively discharge its duty to collect taxes, it is afforded extensive legal and administrative powers by the legislature to effect the efficient and timeous collection of taxes.⁴ One of these powers is the ability to

1 Croome *Taxpayer's rights* (2010) 1.

2 *Idem* 3. See also Alexander Forbes "Born free, taxed to death" (Sept 2011) <http://bit.ly/1bhgk6T> (accessed 4 June 2013); Friedman "Culture, tax collection and governance in South Africa" (June 2003) *Policy issues and actors* <http://bit.ly/1bhgpri> (accessed 4 June 2013) and Clark "Are we going to pay more tax?" (15 Feb 2013) *Money-webtax* <http://bit.ly/YvBnat> (accessed 4 June 2013).

3 The powers of SARS are conferred in terms of ss 3 and 4 of the South African Revenue Services Act 34 of 1997 – hereafter the SARS Act.

4 Muller *A framework for wealth transfer taxation in South Africa* (2010) 63.

appoint a third party agent on behalf of the taxpayer.⁵ The said provision, until recently, was provided for by section 99 of the Income Tax Act⁶ (hereafter “the Act”) and section 47 of the Value Added Tax Act⁷ (hereafter “the VAT Act”). The Tax Administration Act⁸ (hereafter “the TAA”) was enacted in 2011 to “provide for the alignment of the administration provisions of tax Acts and the consolidation of the provisions into one piece of legislation to the extent practically possible”.⁹ In effect, the TAA repealed the third party agent provisions in the Act and the VAT Act. The appointment of a third party for purposes of tax collection is provided for by section 179 of the TAA.

Third party appointment essentially entails that a person who holds any money on behalf of, or due to, a taxpayer can be required to pay this money over to SARS in satisfaction of the taxpayer’s debt to ensure the effective and speedy collection of taxes.¹⁰ In 2009, the Commissioner of SARS indicated that the power to appoint a third party is a tool which SARS will definitely use more frequently.¹¹ It is thus clear that the appointment of a third party is an important tool to collect taxes and can have an impact on all taxpayers.¹²

The SARS’ duty to collect taxes, however, does not exist in isolation. The taxpayer’s constitutional rights¹³ must be taken into consideration.¹⁴ These rights include the right of access to the courts,¹⁵ and just administrative action,¹⁶ which form the focus of this article. It must also be borne in mind that the taxpayer’s

5 In terms of the Act and the VAT Act the term “agent” was used. SARS *Short guide to the Tax Administration Act, 2011 (TA Act)* 52 <http://bit.ly/18eTmGq> (accessed 13 Oct 2012) indicates that this term was confusing and therefore it was replaced with the term third party.

6 Act 58 of 1962.

7 Act 89 of 1991. Due to the fact that the wording in terms of s 99 of the Act and s 47 of the VAT Act is similar, principles regarding the appointment of a third party in terms of one of these Acts refer *mutatis mutandis* to the other Act.

8 28 of 2011.

9 Preamble to the TAA.

10 See s 99 of the Act and s 47 of the VAT Act. See SAICA “SARS’ power to issue a garnishee-type order” (Feb 2009) <http://bit.ly/16skvcz> (accessed 28 May 2013) where it is indicated that it is a “highly effective short-cut” to effect speedy collection of tax.

11 See the Commissioner of SARS’ public address relating to the introduction of administrative penalties (14 Oct 2009) <http://bit.ly/18lpu0Z> (accessed 23 Oct 2013). See also SAICA “Third party appointments” <http://bit.ly/164o7x0> (accessed 15 May 2013). According to SARS “External frequently asked question penalty debt management” (12 Nov 2009) <http://bit.ly/15ZNiaR> (accessed 24 May 2013) a taxpayer will first receive a notice to inform him of a default in paying tax unless there is an indication that the taxpayer is in the process of dissipating assets or the collection of tax might be in jeopardy.

12 See Croome “Last resort for SARS to effect collection of dues” (11 Aug 2012) <http://bit.ly/18eTTIz> (accessed 24 May 2013) where he indicated that the appointment of a third party will be used as a last resort. SARS would first issue letters of demand and telephone the taxpayer before issuing the notice.

13 As provided for in the Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”).

14 Wilkens and Matthews “A survey of federal tax collection procedure: Rights and remedies of taxpayers and the internal revenue service” 1986 *Alaska LR* 269 270 state that the revenue service will always be favoured when balancing the duty to collect tax with the taxpayer’s rights due to the fact that taxpayer’s will start evading tax if the revenue service does not have the required power to efficiently collect tax and implement harsh penalties for non-compliance.

15 As provided for in s 34 of the Constitution.

16 As provided for in s 33 of the Constitution.

constitutional rights are not absolute.¹⁷ This means that the taxpayer's rights may be limited provided that the limitation is reasonable and justifiable.¹⁸ A balance must be struck between SARS' duty to collect tax on the one hand, and the taxpayer's constitutional rights on the other.

This article examines whether the newly-enacted TAA addresses the constitutional problems experienced with third party appointment as provided for in the preceding provisions. These problems relate to the question whether the appointment of a third party can be seen as a reasonable and justifiable limitation on a taxpayer's right of access to the courts and just administrative action.

In order to examine the new provisions and appreciate whether the TAA addresses the aforesaid problems, the basic legal framework for the appointment of a third party in terms of the Act and the VAT Act is addressed first. This will assist the reader to understand the background to third party appointments. Thereafter the constitutionality of the appointment of a third party in terms of the Act and the VAT Act is discussed against the provisions set out in the Constitution. This will provide the reader with insight as to how the courts in the past have dealt with the question of the constitutionality of third party appointments. From this discussion certain constitutional problems with the appointment of a third party are identified. Finally, section 179 of the TAA is examined in order to ascertain whether the identified constitutional problems are addressed by the new provision.

From the article it will appear that even though the court held the appointment of a third party to be constitutional in the case of *Hindry v Nedcor Bank*,¹⁹ there were still certain constitutional problems with the provisions. It will, however, become apparent that due to a new provision in the TAA, the extent of the appointment of a third party on a taxpayer's right to access to the courts and just administrative action is less invasive.

The article concludes that the appointment of a third party in terms of the TAA is aligned with the Constitution and gravitates towards creating a balance between SARS' duty to collect tax and the taxpayer's constitutional rights.

2 BASIC LEGAL FRAMEWORK – APPOINTMENT OF THIRD PARTIES IN TERMS OF INCOME TAX ACT AND VAT ACT

The erstwhile section 99 of the Act and section 47 of the VAT Act both provided for the Commissioner of SARS to appoint a third person to be an agent of the taxpayer.²⁰ The agent would then be required to pay over to SARS money held by such agent on behalf of the taxpayer or money owed to the taxpayer by such agent. This money can include a pension, salary, wages or any other form of remuneration.

17 Croome *Taxpayer's rights in South Africa: An analysis and evaluation of the extent to which the powers of the South African Revenue Service comply with the constitutional rights to property, privacy, administrative justice, access to information and access to the courts* (2008) 16.

18 As provided for in s 36 of the Constitution.

19 [1999] 2 All SA 38 (W).

20 In *Regering van die Republiek van Suid-Afrika v Raubex Konstruksie (Edms) Bpk* 56 SATC 167 174 it was held that this appointment does not need to be in writing.

On a practical level, this could entail that a bank or any other institution (be it a financial institution or not) that is holding money on behalf of the taxpayer, can be required to pay money over to SARS in order to satisfy the taxpayer's debt. The provisions would similarly apply to a debtor or a person holding any money in terms of a security arrangement, such as a pledgee.²¹

From case law it is apparent that the notice to appoint a bank as a third party does not freeze the bank account and does not effect a cession of the funds in the bank account.²² Sonnekus²³ correctly points out that the personal right between the account holder and the bank will not automatically, due to the operation of law, be transferred to SARS when a notice is issued.

Furthermore, the appointed third party will be held personally liable to the extent that the third party holds funds on behalf of the taxpayer and fails to withhold and pay the money over to SARS as required in the appointment notice.²⁴ The third party must inform SARS if the third party cannot comply with the terms set out in the notice together with reasons for such failure and this must be done within the period indicated in the appointment notice.²⁵ From *Smartphone SP (Pty) Ltd v ABSA Bank Ltd*²⁶ it is clear that the third party cannot question the notice or underlying tax *causa*.²⁷

In *Shaikh v Standard Bank of SA Ltd*²⁸ it was held that the appointment notice is valid even though there were certain deficiencies in the notice.²⁹ The third party must, however, ensure that it acts within the scope of the appointment notice,³⁰ as was illustrated in *Nedbank Ltd v Pestana*³¹ and *Goldblatt v Liebenberg*.³² In *Pestana* the bank reversed an original transfer made from the taxpayer's account earlier the same day it received an appointment notice from SARS. The SCA held that an appointment in terms of section 99 of the Act

21 Zulman, Stretch and Silke *Income tax practice manual* (last updated Nov 2012; LexisNexis internet version) B:R4 submit that an attorney holding money on behalf of a client subject to an undertaking to another regarding this money will be obliged to act in accordance with a s 99 notice. It seems this will not be the case if there is a valid cession by the taxpayer to the other person who has received the undertaking. For more on this see also Editorial "Section 99 of the Income Tax Act" Aug 2005 *The Taxpayer* 159.

22 *Pestana v Nedbank Ltd* unreported case no 04/27732 (W) para 10; *Nedbank Ltd v Pestana* 71 SATC 97 103.

23 "Onregmatige terugskryf van kliënt se krediet deur bank onregmatig" 2008 *TSAR* 349 352.

24 See s 97 of the Act and s 48 of the VAT Act.

25 S 47 of the VAT Act. It should be noted that s 99 of the Act does not contain this provision.

26 66 SATC 241.

27 *Smartphone SP* 246.

28 [2008] 2 All SA 159 (SCA). See Croome "Last resort for SARS to effect collection of dues" (11 Aug 2012) <http://bit.ly/18eTTIz> (accessed 24 May 2013) and SAICA "Illegal refunds" (Feb 2008) <http://bit.ly/17WF0i3> (accessed 24 May 2013) for a discussion of this case.

29 *Shaikh* 163. The said deficiencies related to the fact that the appointment notice referred to s 114A of the Customs Act instead of referring to s 47 of the VAT Act.

30 Kotze "SARS agency appointments found to be questionable" <http://bit.ly/15ZO33R> (accessed 20 May 2013). See also Ryan "We are all tax collection agents now" (7 Apr 2013) <http://bit.ly/164oJmo> (accessed 24 May 2013) where retirement funds are cautioned to make sure that they act within the scope of the notice.

31 71 SATC 97.

32 71 SATC 189.

does not entitle the bank to reverse the original transfer as a “completed, juristic act independent of any underlying *justa causa*” took place.³³ In *Goldblatt* the applicants averred that they discharged the obligation to pay over certain payments to the respondent due to the fact that, in terms of an agent appointment, it had already been paid over to SARS. The court held that there was no assessed tax due by the respondent and the obligation to deduct or withhold skills development levies and unemployment insurance was that of the company.³⁴ Accordingly, even though the money was paid over to SARS, the applicant’s obligation to pay the respondent was not discharged.

Due to the effect that the appointment notice can have on a third party it is likely that customers might request tax clearance certificates from their suppliers in order to avoid being furnished with a third party notice.³⁵

3 CONSTITUTIONALITY OF THIRD PARTY APPOINTMENTS IN TERMS OF THE ACTS

In determining whether a certain provision will muster constitutional scrutiny, it is important to note that a taxpayer’s rights are not absolute.³⁶ This means that the court needs to determine whether or not any limitation to the rights of the taxpayer, in this instance the appointment of a third party on behalf of the taxpayer, is reasonable and justifiable.³⁷

In order to balance the taxpayer’s rights with SARS’ duty to effect the speedy collection of taxes,³⁸ the limitation of rights provision in section 36 of the Constitution must be applied. This section provides as follows:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;

33 *Pestana* 104. See Schulze “Electronic fund transfers and the bank’s right to reverse a credit transfer: One small step for banking law, one huge leap for banks” 2007 *SA Merc LJ* 379; Schulze “Electronic fund transfers and the bank’s right to reverse a credit transfer: One big step (backwards) for banking law, one huge leap (forward) for potential fraud: *Pestana v Nedbank* (act one, scene two)” 2008 *SA Merc LJ* 290; Sonnekus 2008 *TSAR* 349; Ryan “We are all tax collection agents now” (7 Apr 2013) <http://bit.ly/164oJmo> (accessed 24 May 2013); and Stretch “Power to appoint an agent” Nov 2009 *Taxgram* 14 for a discussion of this case.

34 *Goldblatt* 104. See Mitchell “Recent cases appointment of agent” Feb 2010 *Income Tax Reporter* 32; Stretch and Silke “Appointment of an agent” Sept 2009 *Taxgram* 8; and Editorial “Income Tax – due on assessment – appointment of former employer as agent under section 99 not displacing judgment debt to pay without deduction or set-off” May 2009 *The Taxpayer* 88 for a discussion of this case.

35 Accounting and Tax Club “The Tax Administration Act – the good, the bad and the ugly. everything you need to know” (11 Dec 2012) <http://bit.ly/1ec0PhH> (accessed 24 May 2013).

36 See para 1 above.

37 As stipulated in s 36 of the Constitution.

38 See Olivier “Tax collection and the Bill of Rights” 2001 *TSAR* 193 193 for a discussion of the impact and effect of the Constitution on tax collection.

- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”³⁹

The application of section 36 of the Constitution is conducted in two stages.⁴⁰ Firstly, it has to be proven that a constitutional right is in fact limited and the limitation is done in terms of law of general application.⁴¹ In the second stage the court considers whether the limitation is reasonable and justifiable.⁴² In ascertaining whether the limitation is reasonable and justifiable, the court would need to consider the factors contained in section 36(1)(a)–(e) as listed above.

In *Hindry* the court had to determine whether the appointment of a third party could be constitutional.

3.1 Constitutional attack – *Hindry*

In *Hindry v Nedcor Bank*,⁴³ SARS erroneously made a refund to a taxpayer and a notice in terms of section 99 of the Act was issued. The notice appointed the taxpayer’s bank as a third party agent of the taxpayer.⁴⁴

The taxpayer applied for an urgent interdict to prevent his bank from effecting a transfer of the funds to SARS as the taxpayer was of the opinion that his rights to just administrative action and access to the courts were adversely affected.⁴⁵ The taxpayer also argued that his right to privacy, as provided for in section 14 of the Constitution, had been infringed upon.⁴⁶ Accordingly, the taxpayer challenged the constitutionality of section 99 of the Act on the following grounds:⁴⁷

- (a) A “removed third party” with no knowledge of the taxpayer’s affairs is obliged to pay the Commissioner monies held on behalf of a taxpayer upon the declaration as third party. This constitutes “an extraordinary mode of obtaining payment”;
- (b) no notification is provided to the taxpayer before the section is brought into operation;
- (c) there is no opportunity for representations by the taxpayer;

39 For reading on the workings of s 36 of the Constitution see Woolman *Constitutional law of South Africa* (2013) 34; *S v Manamela* 2000 3 SA 1 (CC) para 32; *S v Bhulwana* unreported case CCT12/95, ZACC 11.

40 Woolman 34-3.

41 *Idem* 34-4.

42 *Idem* 34-6.

43 [1999] 2 All SA 38 (W). See Joffe “*Hindry v Nedcor Bank Limited*: Another constitutional attack on an income tax provision fails” Dec 1999 *Insurance and Tax* 13, Editorial “The Commissioner’s power of tax collection March 1999 *The Taxpayer* 50; Van Schalkwyk “Constitutionality and the Income Tax Act – revisited 2004 *Meditari Accountancy Research* 195; Croome “Proper procedure: SARS and the taxpayer – part 12 May 2007 *ASA* 52 52 and Zulman, Stretch and Silke (fn 21 *supra*) for a discussion of this case.

44 *Idem* 42.

45 *Idem* 46.

46 *Idem* 46. This article, however, focuses on the procedural rights (right to access to the courts and right to just administrative action) that seem to be infringed upon by the appointment of third party.

47 See Editorial “Appointment of taxpayer’s agent by SARS” March 2005 *The Taxpayer* 41; Editorial “SARS appointing a person holding funds of a taxpayer to be the taxpayer’s agent” Oct 2001 *The Taxpayer* 194; and Editorial “The Commissioner’s power of tax collection” March 1999 *The Taxpayer* 50 for a discussion of other cases where the constitutionality of the appointment of a third party provisions was questioned.

- (d) the prescribed procedure is not under the control of the court; and
- (e) the third party agent is obliged to pay on pain of sanction.⁴⁸

The taxpayer mainly contended that there was a unilateral appropriation of his property with no notice to him or an opportunity for him to state his case.⁴⁹ This, according to the taxpayer, meant that there was no adherence to the principle of *audi alteram partem* which forms part of the right to just administrative action. The taxpayer further argued that his right of access to the courts was denied by SARS' appropriation of his property without a court order.⁵⁰

The Commissioner argued that the appointment of a third party was a reasonable and justifiable limitation for, amongst others, the following reasons:

- (a) Tax collecting procedures have to be effective as they are essential in a self-assessment tax system and the procedure in terms of section 99 of the Act is merely a type of garnishee procedure to achieve the effective collection of taxes;
- (b) the procedure enhances voluntary compliance with tax collection which is essential in the self-assessment tax system of South Africa;
- (c) in order to perform state functions effectively, the prevention of any delays in collecting taxes is of utmost importance;
- (d) due and payable taxes are quickly recovered; and
- (e) taxpayers are treated equally and effective taxation is achieved.⁵¹

In reaching its decision the court referred to the affidavit of Mrs (now Professor) Olivier, from the then Rand Afrikaans University, annexed to the Commissioner's answering affidavit.⁵² In the affidavit reference was made to the USA,⁵³ Canada,⁵⁴ India⁵⁵ and Australia⁵⁶ which had provisions similar to section 99 of the Act.

In summarising similar provisions in the abovementioned countries the court stated that

“[i]n none of these statutes is the taxing officer required to give the taxpayer advance notice of an attachment to enable him to make representations to avoid it. Once the notice is served the garnishee is at risk (even in the USA) unless the notice is withdrawn or set aside”⁵⁷

Bearing in mind the situation in other countries, the court held that it is essential that the taxpayer does not receive any notice, albeit from the third party or SARS, prior to the issuing of a notice to appoint another person, in this instance a bank, as it would frustrate the revenue service's ability to recover tax.⁵⁸

48 *Hindry* 49. See also Silke “Taxpayers and the Constitution: A battle already lost” 2002 *Acta Judicata Revenue Law* 282 305.

49 *Hindry* 49. See also Silke *idem* 306.

50 *Hindry* 49.

51 *Hindry* 58. See also Silke 2002 *Acta Judicata Revenue Law* 282 307 and Editorial “Appointment of taxpayer's agent by SARS” March 2005 *The Taxpayer* 41.

52 *Hindry* 52.

53 S 6631 of the 1986 US Internal Revenue Code.

54 S 224(1) of the Canadian Income Tax Act, RSC 1985, c1.

55 S 226(3) of the Indian Income Tax Act, 1961.

56 S 218(1) of the Australian Income Tax Assessment Act, 1936.

57 *Hindry* 55.

58 *Ibid.*

In *Contract Support Services (Pty) Ltd v SARS*⁵⁹ the South African Tax Court agreed that prior notice or a hearing would defeat the purpose of the section 47 notice and, with reference to *Gardener v East London Transitional Local Council*,⁶⁰ indicated that if a notice or hearing would in effect nullify the proposed act, no notice or hearing is required.⁶¹

In *Hindry* the court furthermore stated that the appointment of a third party under section 99 of the Act is a form of garnishment similar to the procedure available in ordinary civil judgments relating to judgments for the payment of money.⁶² This statement was approved by the courts in *Goldblatt v Liebenberg*⁶³ and *Nedbank Ltd v Pestana*.⁶⁴

Wunsh J concluded that section 99 of the Act is a reasonable and justifiable limitation of the taxpayer's right to just administrative action and access to the court. Furthermore, any loss by the taxpayer can later be remedied with the available legal or administrative relief.⁶⁵ Accordingly, the appointment of a third party was held to be constitutional.

Even though the appointment of a third party was held to be constitutional, it must be mentioned that the manner in which this collection power is exercised by the Commissioner is of utmost importance. According to (then) Deneys Reitz Attorneys, the focus must be on whether the Commissioner has applied his mind when deciding to appoint a third party and whether all the formalities were complied with.⁶⁶ Croome⁶⁷ correctly indicates that if there is no assessment or the section 99 notice is based on an incorrect assessment, the taxpayer should have the notice set aside on administrative justice grounds.

3 2 Criticism of *Hindry*

In *Mpande Foodliner CC v Commissioner for South African Revenue Service*^{68 69} it was held that *Hindry* was not authority for the issue relating to the denial of the *audi alteram partem* rule before the issuing of a section 47 notice in terms of the

59 [199] 61 SATC 338. See Editorial "SARS appointing a person holding funds of a taxpayer to be the taxpayer's agent" Oct 2001 *The Taxpayer* 194 194; Olivier "Uncertainty regarding the philosophy underlying South African Revenue Service collection procedures" 2003 *TSAR* 382 383; Croome "Proper procedure: SARS and the taxpayer – part 12" May 2007 *ASA* 52 53; and SAICA Taxing acts and the Constitution (Aug 2000) <http://bit.ly/1evQSNb> (accessed 27 May 2013) for a discussion of this case.

60 1996 3 SA 99 (E) 116.

61 *Contract Support* 35.

62 *Hindry* 51.

63 71 SATC 189 197.

64 *Pestana* 103. See Schulze 2007 *SA Merc LJ* 379; Schulze 2008 *SA Merc LJ* 290 and Sonnekus 2008 *TSAR* 349 for a discussion of this case.

65 *Hindry* 186.

66 Thersby "Appointment of agent by SARS: The importance of adhering to procedures" Feb 2005 *Tax Breaks* 8. According to Thersby (8) these formalities include the issuing of an assessment, providing time for an objection to be lodged, considering the objection and informing the taxpayer of the decision.

67 "Proper procedure: SARS and the taxpayer – part 12" May 2007 *ASA* 52 53.

68 63 SATC 46.

69 See Editorial "SARS appointing a person holding funds of a taxpayer to be the taxpayer's agent" Oct 2001 *The Taxpayer* 194 195 for a discussion of this case.

VAT Act.⁷⁰ Patel J held that on the facts of this specific case the applicant had the right to a hearing before the section 47 notice could be issued.⁷¹

In *Smartphone SP*⁷² *National Educare Forum v Commissioner, SARS*⁷³ the courts, however, declined *Mpande Foodliner's* interpretation⁷⁴ and confirmed that SARS is justified in invoking the section 47 notice without prior consultation or hearing. The court refrained from deciding which point of view is correct in *Industrial Manpower Projects (Pty) Ltd v Receiver of Revenue, Vereeniging*⁷⁵ but stated that there is much to be said for the *Contract Support* judgment.⁷⁶

Further criticism arose from Joffe⁷⁷ who indicates that the fact that judicial intervention can be used to rectify any errors caused by the appointment of a third party will place “an unfair burden on the taxpayer” as it is possible that the taxpayer’s last financial resource, his bank account, which he needs to use in order to rectify the injustice, may be depleted due to the appointment of a third party, the bank.

Two questions arise from *Hindry*. First, was the court correct in deciding that the third party appointment in South Africa is similar to other countries and therefore constitutional? Secondly, can the appointment of a third party be placed on an equal footing with the civil procedure of obtaining a garnishee order?

3 2 1 Third party appointment in other countries

As was stated above,⁷⁸ the court mentioned that in none of the countries compared does a taxpayer receive prior notice of a third party appointment. However, it is submitted that it is not adequate to simply determine that no prior notice is given. It is important to examine the entire provision, as there might be aspects that alleviate the extent of the infringement.⁷⁹

The court first referred to section 218(1) of the Australian Income Tax Assessment Act, 1936.⁸⁰ This section enables the Australian Commissioner of Taxation to appoint a third party as an agent of the taxpayer. The Commissioner is, however, required to provide the garnishee with written notice and the notice must be forwarded to the taxpayer. It is submitted that the fact that the notice

70 *Mpande Foodliner* 62.

71 *Idem* 64.

72 66 SATC 241 248. See also Zulman, Stretch and Silke (fn 21 *supra*) and Thersby Feb 2005 *Tax Breaks* 7 for a discussion of this case.

73 [2002] JOL 9423 (TK) 43.

74 *Industrial Manpower Projects (Pty) Ltd* 402.

75 63 SATC 393. See Editorial Oct 2001 *The Taxpayer* 194 195; Olivier “Uncertainty regarding the philosophy underlying South African Revenue Service collection procedures” 2003 *TSAR* 382 383; Croome May 2007 *ASA* 52 53; Zulman, Stretch and Silke (fn 21 *supra*); and Stretch and Silke “VAT collection: Powers of SARS to appoint an agent” Aug 2004 *Taxgram* 12 for a discussion of this case.

76 *Industrial Manpower Projects (Pty) Ltd* 402.

77 “*Hindry v Nedcor Bank Limited*; Another constitutional attack on an income tax provision fails” Dec 1999 *Insurance and Tax* 13 16.

78 See para 3 1 above.

79 It is important to determine the extent of the infringement and whether there are less invasive means to achieve the same purpose as it is one of the aspects contained in s 36 of the Constitution.

80 *Hindry* 52.

must be forwarded to the taxpayer implies that it has already been sent to the third party. Accordingly, the taxpayer would not receive notice of the appointment before the third party has in fact been appointed. These “statutory garnishee provisions”⁸¹ are currently provided for in terms of section 260-5 in Schedule 1 to the Australian Tax Administration Act 1953.⁸²

In terms of Practice State Law Administration 2001/18⁸³ (hereafter “the PSLA”), the Australian Tax Office (hereafter and commonly referred to as “the ATO”) indicated circumstances under which it would consider to issue this garnishee note to appoint a third party as an agent. The ATO would take into consideration the financial position of the debtor, which includes the debt owed to other creditors, whether the debtor has preferred paying other creditors rather than the Commissioner, and whether such a notice would hamper the taxpayer’s ability to provide for his family.

The Australian law furthermore provides for certain limitations on the use of the statutory garnishee.⁸⁴ Amongst others, if the garnishee relates to a salary no more than 30% of the salary would be subject to the garnishee.⁸⁵ A higher percentage may be subject to the garnishee if the taxpayer has another source of income.

The ATO is also willing to entertain a request from the taxpayer to vary or withdraw the garnishee notice, provided that the debtor makes reasonable arrangements to pay the debt.⁸⁶

Even though the ATO appears to be sympathetic to the taxpayer by taking various aspects into account and being willing to withdraw or vary a garnishee notice subject to reasonable payment arrangements, it must be emphasised that this procedure in Australia is not without challenges.⁸⁷ For instance, the garnishee notice can damper a taxpayer’s cash flow⁸⁸ and can, even in certain circumstances, provide the ATO with preference over a secured creditor.⁸⁹

81 See *Bluebottle UK Ltd v Deputy Commissioner of Taxation* [2007] HCA 54 para 88 where the court described s 218 as “statutory garnishee provisions”.

82 In terms of the Explanatory Memorandum to “A new tax system (Tax Administration) bill” 1999 (Cth) 50 the provisions in terms of s 26-5 and s 218 of the Australian Income Tax Assessment Act are similar. The new legislation did not aim to render any changes to provisions previously in force. This means that case law regarding s 218 of the Australian Income Tax Assessment Act will also apply to s 260-5.

83 www.ato.gov.au (accessed 22 Feb 2013).

84 PSLA paras 61–78 www.ato.gov.au (accessed 22 Feb 2013). See also Le Roux and Van der Walt “Shifting the tax liability” 7 Feb 2013 *SAIT* (accessed 17 May 2013) where it is indicated that in South Africa, unlike Australia, there are no statutory limitations relating to the instalments imposed by SARS.

85 PSLA paras 61–78 www.ato.gov.au (accessed 22 Feb 2013).

86 PSLA para 55 www.ato.gov.au (accessed 22 Feb 2013).

87 Hargreaves “Got debtors? The ATO wants them” <http://bit.ly/175U8p3> (accessed 22 Feb 2013).

88 *Ibid.*

89 *Commissioner of Taxation v Park* [2012] FCAFC 122. From this case it seems that the *fiscus* would enjoy preference when a secured creditor releases its legal charge. For more on this topic, see Gill “*Commissioner of Taxation v Park*: Garnishee powers and registered mortgages in Australia” (14 Jan 2013) *Global Insight* <http://bit.ly/18eYoCT> (accessed 18 Feb 2013); “Release at your peril – *Commissioner of Taxation v Park* [2012] FCAFC 122” (Sept 2012) <http://bit.ly/1aJn1PO> (accessed 18 Feb 2013); O’Donnell *et al* “When does the Commissioner of Taxation have priority over a secured lender?” (16 Oct 2012)

continued on next page

The court in *Hindry* furthermore referred to section 226(3) of the Indian Income Tax Act 1961.⁹⁰ In terms of this section the assessing officer or tax recovery officer may appoint, by way of a written notice, a person who holds or will hold money due to the assessee (taxpayer) to pay such money over to the assessing officer or tax recovery officer. A copy of this notice must also be forwarded to the taxpayer after the notice of appointment has been provided to the third party.⁹¹ It is important to note that section 226(3) does not place any limitation on the ambit of the appointment notice. Therefore, unlike Australia, there is no limitation as to the percentage of a person's salary that can be subject to the garnishee notice.

Brief mention was also made of the Canadian Income Tax Act, more specifically section 224(1), that empowers the Minister of National Revenue to request a third party to pay money due to the taxpayer over to the revenue agency. This request must be in writing. No provision is made for the third party or the National Revenue office to send the said notice to the affected taxpayer.

As to the United States of America, section 6331 of the 1986 US Internal Revenue Code was also analysed.⁹² This section indicates that a tax may be collected through a garnishee order or third party. There must, however, be a written notice to the taxpayer indicating that tax will be levied in this manner 30 days after this notice.⁹³ During the provided 30 days the taxpayer could make representations to the secretary in order to uplift the attachment of his salary or money held by a third party.⁹⁴ It appears that once the notice is issued to the taxpayer, the money is attached but the transfer of the money to the revenue service will only take place once the 30 days have lapsed.⁹⁵ Accordingly, the USA provides the opportunity to the taxpayer to state his or her case without the danger of the taxpayer withdrawing the funds.⁹⁶

From the discussion of other countries it is apparent that the third party appointment procedure in Australia and the USA is less invasive than that of South Africa. This is due to the fact that Australia, unlike South Africa, has certain limitations on the percentage of a person's salary that can be garnished and the possibility of adjusting the notice in light of a suitable payment arrangement.

Ashurst Tax Alert 1; <http://bit.ly/1ddigLV> (accessed 18 Feb 2013); www.charteredaccountants.com.au/Industry-Topics/Tax/Tax-bulletin/Tax-cases (accessed 13 Feb 2013); Ellison *et al* "Mortgagees and ATO section 26-5 notices – be aware!" <http://bit.ly/1aRHOGd> (accessed 30 Sept 2012).

90 *Hindry* 53.

91 S 226(3)(iii) of the Indian Income Tax Act 1961.

92 *Hindry* 54.

93 Ss 6331(d)1 and 6331(d)2 of the US Internal Revenue Code.

94 *Hindry* 55.

95 This seems similar to the suggestion in Editorial "The use by SARS of section 99 of the Income Tax Act and section 47 of the VAT Act to extract payment of a tax amount from a taxpayer's bank account" March 2003 *The Taxpayer* 42 where it is suggested that that a bank should inform the taxpayer of an appointment notice subject to a caveat on the taxpayer's bank account.

96 Professor Phelan from the Texas Tech University, however, indicated that the excessive powers afforded to the revenue service coupled with uninformed taxpayers can have a dramatic effect on a taxpayer's rights. She elaborated that even though there is a Taxpayer Bill of Rights, sight was lost of the process rights of taxpayers. See Phelan "A summary of the extensive collection powers of the internal revenue service" 1990 *Virginia Tax R* 405.

The USA affords the taxpayer an opportunity to make representations. South African taxpayers do not have such opportunity. Even though these countries all contain provisions which enable the revenue services to appoint a third party, some countries⁹⁷ appointment provisions provide built-in protection for taxpayers. The dual requirement in South Africa that the third party must withhold and immediately pay the money over to SARS does not enhance the legitimate responsibility and powers of SARS to collect taxes. Where the taxes are found to be wrongly withheld and paid, SARS has an obligation to refund. This refund should include interest,⁹⁸ currently at a prescribed rate of 4.5 per cent.⁹⁹ The additional administrative resources of paying and refunding could be alleviated by SARS granting the taxpayer the ability to state his case or remedy the situation by paying from other sources than by having the amount paid to SARS immediately.

3 2 2 Appointment of third party – a garnishee order?

As previously indicated,¹⁰⁰ the court in *Hindry* held that the appointment of a third party is similar to the garnishee procedure used in civil proceedings. From the investigation below it will become apparent that these two procedures are in fact not at all similar.

In civil proceedings a person (the judgment creditor) who has obtained a judgment against another party (the judgment debtor) has various options to execute the judgment.¹⁰¹ One of these would be a garnishee order, provided that the judgment is sounding in money.¹⁰² The garnishee procedure entails that a judgment creditor could attach money due to the judgment debtor in the hands of a third party (the garnishee).¹⁰³ In order to initiate the garnishee procedure the judgment creditor has to bring an *ex parte*¹⁰⁴ application to court, indicating that there was a judgment granted in favour of the judgment creditor, the judgment amount is still unsatisfied, that there is a debt “at present or in future owing or accruing by or from the garnishee to the judgment debtor” and the amount of this debt.¹⁰⁵

97 Australia and USA.

98 See s 102 of the Act and s 45 of the VAT Act. Once ch 12 of the TAA comes into operation, interest on refunds will be dealt with under ss 187–189 of the TAA. See Croome “VAT returns – part 14” July 2007 *ASA* <http://bit.ly/1aJntxt> (accessed 4 June 2013).

99 See Anonymous “Interest rates” <http://bit.ly/164r6FP> (accessed 5 June 2013) and James “In your interest 2012/2013” <http://bit.ly/1908bz5> (accessed 4 June 2013). This is in contrast with the 8.5 per cent interest taxpayers have to pay on the outstanding balance of a tax debt due to SARS. See SARS “Tables of interest rates” <http://bit.ly/17yqUSV> (accessed 4 July 2013). Thuronyi *Tax law: Design and drafting* (1999) 110 indicates that the lower interest rate for refunds is to discourage taxpayers from saving at SARS.

100 See para 3 1 above.

101 Van Winsen *The civil practice of the supreme court of South Africa* (1997) 768.

102 *Ibid.*

103 *Idem* (2009) 768. See also Paterson *Principles of civil procedure in the magistrates’ court* (2005) 271.

104 Ellis and Dendy “Civil procedure: High court” 3 *LAWSA* (2007) para 17 explains that *ex parte* is “where no relief is claimed against any person, and it is neither necessary nor proper to give any person notice of the application, the notice of motion is addressed to the registrar only”.

105 Rule 47(1) of the Magistrate’s Court Rules.

A garnishee order will be issued once the court is satisfied as to the merits of the application. This order is a rule *nisi* and the garnishee and judgment debtor may on the return date furnish reasons why the debt ought not to be attached. This is, however, not an opportunity for the judgment debtor to question the correctness of the judgment.¹⁰⁶

The court has a discretion regarding garnishee orders and may vary or set aside a garnishee order, if it can be proven that the judgment debtor may not be able to maintain himself and his dependants after satisfaction of the garnishee order.¹⁰⁷

The appointment of a third party on behalf of the taxpayer does indeed bear a strong resemblance to the civil procedure of a garnishee order. In both instances a third party holding money due to the judgment debtor or taxpayer can be ordered to pay the said money to the judgment creditor or the SARS, as the case may be. There are, however, important differences relating to the constitutionality of these provisions.¹⁰⁸

The first difference is that in terms of a civil garnishee order a debtor's rights of access to the courts¹⁰⁹ and just administrative action¹¹⁰ are not infringed upon.¹¹¹ This is due to the fact that a garnishee order can only be granted after the creditor has obtained a court order regarding debt owed to the creditor. Therefore, when a garnishee order is obtained the judgment debtor would have had ample opportunity to defend the action in a court before judgment was granted, by filing a notice of intention to defend and a plea. Hence the common law principle of *audi alteram partem*, which forms part of the right to just administrative action, is adhered to.¹¹² Furthermore, the right of access to the courts has been complied with as the judgment debtor had a fair public hearing by an impartial party.¹¹³ The garnishee order is merely the execution of the judgment.¹¹⁴

With the appointment of a third party, the taxpayer does not receive any notice from SARS of its intentions and, as a consequence, the taxpayer does not have the opportunity to state his case.¹¹⁵ If the third party notifies the taxpayer

106 Paterson 273.

107 S 65J(6) of the Magistrates' Courts Act 32 of 1944.

108 These differences also assist in identifying the constitutional problems experienced with the appointment of a third party for the taxpayer.

109 In terms of s 34 of the Constitution.

110 As provided for in s 33 of the Constitution.

111 This refers to the first stage to determine constitutionality.

112 In *Skeyi v Ordemann* 1910 EDL 60 62 the court stated that "there is also a sound maxim, *audi alteram partem*. The court should always afford both parties every assistance in laying their cases before them". This principle literally means to hear the other side. See also *Builders Ltd v Union Govt* 1928 AD 59; *Sachs v Minister of Justice* 1934 AD 38; *R v Zackey* 1945 AD 505; *Elliot v Pieters* 1926 SWA 22; *Kadalie v East London Town Council* 1933 EDL 187; Kelly "Audi alteram partem" 1964 *Natural Law Forum* 103; De Smith "The right to a hearing in English administrative law" 1955 *Harvard LR* 569; Burns *Administrative law under the 1996 Constitution* (2003) 193; and Paterson *Eckard's Principles of civil procedure in the magistrates' courts* (2005) 48 for more on the *audi alteram partem* rule.

113 Currie and De Waal *The Bill of Rights handbook* (2013) 740.

114 S 65J(6) of the Magistrates' Courts Act 32 of 1944.

115 See also Le Roux and Van der Walt "Shifting the tax liability" *SAIT* <http://bit.ly/18lw0oD> (accessed 17 May 2013); Editorial "The use by SARS of section 99 of the Act and section 47 of the VAT Act to extract payment of a tax amount from a taxpayer's bank account" March 2003 *The Taxpayer* 41.

after the money is withheld or even transferred to SARS it is merely a matter of courtesy as no official obligation rests on the third party to do so, apart from the contractual relationship between the third party and the client, or in terms of other laws such as the Banks Act.¹¹⁶ There is also no court participation or independent authorisation¹¹⁷ before commencement of the process.

At this stage of the comparison it is already apparent that the procedure of a garnishee order has certain measures built in to provide adherence to the principle of *audi alteram partem*, and by implication to the right to just administrative action, and to the right of access to the courts. The same cannot be said of the appointment of a third party. With the third party appointment SARS assumes the role of the creditor, adjudicator and enforcement agent with regard to the debt owed, or supposedly owed to it (SARS). In this regard SARS determines that a debt is owed to it, that the amount of the debt should be collected in terms of a law and imposes, or at least delegates, an enforcement obligation on the third party to collect and pay over the amount due.

The second difference deals with the question as to whether an infringing provision is reasonable and justifiable,¹¹⁸ more specifically whether there is less invasive means available.¹¹⁹ When applying for a garnishee order, the court has the opportunity to examine the judgment debtor's financial position and vary the order accordingly, provided that the garnishee order relates to the attachment of the debtor's salary.¹²⁰ The court does not have the same opportunity to examine the taxpayer's situation to ascertain whether the taxpayer has sufficient money or resources to survive. The financial impact this can have on a taxpayer may be dire and the extent of this limitation on a taxpayer's right of access to the courts and just administrative action can be excessive.¹²¹

Furthermore, a judgment debtor's pension fund benefit cannot be attached by way of a garnishee order,¹²² whilst the appointment of a third party specifically empowers SARS to declare a person an agent even if the money due to the taxpayer is pension.¹²³ Accordingly, a restriction is placed on the type of money that can be attached by way of an ordinary civil garnishee order. No such restriction exists with regard to third party agent appointments.

Bearing in mind these differences, it is submitted that the appointment of a third party is not equivalent to a garnishee order as indicated by the court in *Hindry*.¹²⁴ It is furthermore submitted that SARS enjoys almost draconian

116 94 of 1990.

117 Le Roux and Van der Walt "Shifting the tax liability" *SAIT* <http://bit.ly/18lw0oD> (accessed 17 May 2013).

118 This forms part of the second stage of constitutional evaluation. See para 3 1.

119 As provided for in terms of s 36(1)(d).

120 S 65J(6) of the Magistrates' Courts Act 32 of 1944.

121 S 36(1)(c) of the Constitution provides that a court must consider the extent of a limitation when determining whether this limitation is reasonable and justifiable.

122 S 37A(1) of the Pension Fund Act 24 of 1956. See Le Roux and Van der Walt "Shifting the tax liability" *SAIT* <http://bit.ly/18lw0oD> (accessed 17 May 2013).

123 It is interesting to note that in terms of s 23(7) of the Insolvency Act 24 of 1936, a person's pension benefits acquired after sequestration will not form part of the insolvent estate. Therefore, not even in insolvency circumstances can a pension benefit be attached to pay creditors. According to <http://bit.ly/14Us3kL> (accessed 19 Feb 2013) SARS regularly appoints retirement funds as a third party of the taxpayer.

124 *Hindry* 52.

powers to effect speedy collection of taxes which does not seem to adhere to the principle of *audi alteram partem* or to allow the taxpayer access to the courts.

It is submitted that the court in *Hindry* erred in comparing the appointment notice in terms of the Act with the appointment of a garnishee in terms of ordinary civil proceedings. From the comparison it is clear that the extent of the infringement in appointing a third party is far greater than an infringement in terms of an ordinary garnishee order.¹²⁵

It must, however, be borne in mind that since 1 October 2012 the appointment of a third party is provided for in terms of section 179 of the TAA. Does the TAA address the problems that were identified with the appointment of a third party?

4 APPOINTMENT OF A THIRD PARTY IN TERMS OF TAA

The legislature began drafting the TAA in 2005 and it came into operation on 1 October 2012.¹²⁶ This Act, amongst other objectives, aims to “provide for the effective and efficient collection of tax”.¹²⁷ It is therefore clear that the TAA was enacted to assist SARS in its duty to collect tax. This is achieved by, amongst others, “aligning the administration of the tax Acts”.¹²⁸ If a taxpayer is liable for the payment of tax in terms of a provision in a tax Act, for instance the VAT Act, the tax administration will be carried out in terms of the TAA, except if the TAA is silent with regard to the administration in that instance.¹²⁹ The TAA specifically deals with the situation where a third party is appointed to satisfy the tax debts of a taxpayer. Accordingly, since 1 October 2012, the appointment of a third party is dealt with in terms of section 179 of the TAA.¹³⁰

Section 179 of the TAA firstly indicates that a person (third party) may be required, in terms of a notice by a senior SARS official, to pay money held or due by or in future held or due by him to the taxpayer, over to SARS in satisfaction of the taxpayer’s tax debt within the period specified in the notice.¹³¹ This money could include salary, wages, pension or any other form of remuneration.¹³² In practice the third party will receive an electronic notice (titled “Assessed Tax – Third Party appointment”) indicating, amongst others, that the third

125 The extent of the infringement is important as s 36(e) specifically indicates that the court should examine whether there are less invasive means to obtain the purpose of the infringing provision.

126 In terms of s 272 of TAA, the President determined by means of promulgation 51 in GG 35687 of 14 Sept 2012, that the TAA, except for certain provisions, will become operational on 1 Oct 2012.

127 S 2 of the TAA.

128 S 2(a) of the TAA.

129 Ss 4(1) and 4(2) of the TAA. If the TAA is silent with regard to the administration in a specific instance, the provisions of the relevant tax Act will apply. See Croome “Inexorable powers of the tax collector” (11 March 2013) <http://bit.ly/164sh81> (accessed 24 May 2013) for a discussion of SARS’ collection powers under the TAA.

130 In terms of s 270(2)(g) of the TAA, proceedings to appoint a third party that was instituted but not finalised before 1 Oct 2012 must be continued and concluded under the provisions of the TAA.

131 In terms of s 6(3) of the TAA, a “senior SARS official” is the Commissioner, a SARS official with specific written authority from the Commissioner to do so, or a SARS official who is occupying a post designated for this purpose.

132 S 179 (1) of the TAA.

party is appointed on behalf of the taxpayer, the start and end date of payments that must be made and the amount due to SARS.¹³³

Secondly, if the third party is unable to comply with the requirements set out in the notice, the senior SARS official must be informed within the period specified. The senior SARS official may then withdraw or amend the notice as is deemed fit in the circumstances.

The third party must pay in accordance with the notice. If the third party acts contrary to the notice, that party will be held personally liable.¹³⁴

After receiving a request from a person affected by the notice it is in SARS' discretion to amend the notice by extending the period over which amount must be paid over to SARS. This is to enable the taxpayer to provide for the basic living costs for him and his dependants.¹³⁵

At face value it seems as if the appointment of a third party in terms of the TAA is similar to the previous provisions due to the fact that in both instances provision is made for a third person to be liable for the tax debt of the taxpayer. In order to ascertain whether the provision in the TAA can address the problems identified with the appointment in terms of the Income Tax Act and VAT Act, it is, however, essential to scrutinise the differences between these sections.

4 1 Appointment of third party in terms of the Act and the VAT Act versus appointment of third party in terms of the TAA

The appointment of a third party in terms of the TAA deviates from the prior provisions relating to the appointment of a third party in terms of the Acts whose provisions it repeals in three ways.

Firstly, in terms of the TAA, a senior SARS official has the authority to furnish a person with a notice informing him that he is appointed as a third party. Previously, only the Commissioner had such an authority.¹³⁶ The fact that the ambit of people permitted to furnish an appointment notice has been extended has the effect that more appointment notices can be issued which would increase the effective collection of taxes. Le Roux and Van der Walt¹³⁷ point out that the wording of the electronic form that is sent to a third party does not currently identify the person on whose instructions the appointment notice is issued. It is therefore difficult to determine whether the appointment of a third party is in fact done by a senior SARS official.

Secondly, section 179 provides that "a person who holds or owes or will hold or owe any money" may receive a notice to pay money over to SARS. This means that money that a third party will hold in future can also be subject to the third party appointment. This was not the case previously. It means that money that is not yet possessed by the third party can in future be subject to the appointment.

Finally, the third party appointment contains an additional provision, subsection (4). This subsection indicates that the period for paying tax on behalf of the

133 Le Roux and Van der Walt "Third party appointments by SARS under the Tax Administration Act" Jan/Feb 2013 *TaxTalk* 15 16.

134 S 179(3) of the TAA.

135 S 179(4) of the TAA.

136 See para 2 above.

137 "Shifting the tax liability" *SAT* <http://bit.ly/18lw0oD> (accessed 17 May 2013).

taxpayer can be extended. The SARS will consider allowing an extension on request of an affected person in order to permit the taxpayer to pay his or her basic living expenses and those of his or her dependants. The TAA does not specifically state what is meant by basic living expenses and it will probably be determined on the facts of each specific case.¹³⁸

What follows is an outline of whether the changes to the appointment of a third party contained in the TAA assist with the problems that were previously experienced.

4.2 TAA – addressing the problems

The SARS' powers in terms of the TAA can be exercised by the Commissioner or a senior SARS official. In terms of the repealed provisions of the Act and the VAT Act, the powers were only exercisable by the Commissioner. However, in terms of section 3(1) of the Act and section 5(1) of the VAT Act, the powers conferred and the duties imposed on the Commissioner by or under the provisions of the Act or the VAT Act (or any amendment thereof with regard to the VAT Act) may be exercised or performed by the Commissioner personally, or by any officer or person engaged in carrying out the said provision under the control, direction or supervision of the Commissioner. Interpreted broadly, this implies that any SARS official could exercise the powers to appoint an agent under the Act. The TAA provision reduces the ambit of the persons that can exercise the powers conferred to the Commissioner to senior SARS officials. "Senior SARS official" is defined in the Act as the Commissioner, a SARS official who has specific written authority from the Commissioner to exercise the powers or a SARS official occupying a post designated by the Commissioner for this purpose.¹³⁹ Thus, the designation as "senior SARS official" has no inherent attribute of seniority, experience, qualities or qualifications. The designation as senior SARS official is an internal SARS determination. Any SARS official can be a senior SARS official in relation to the TAA. Practically, that means that there is no effective difference between the identity of the person exercising the powers in terms of the Act, the VAT Act and the TAA.

This change in delegation does not address the fact that a taxpayer's right of access to the courts and just administration is infringed. Furthermore, it does not seem to assist in reducing the extent of the limitation. Therefore, the first change in terms of the TAA appointment of a third party does not assist with the problems identified above.¹⁴⁰ On the contrary, it could be argued that it maintains the powers of SARS as were granted under the Act or the VAT Act.

The fact that future money held by or owed by the third party can also form part of the notice does not seem to assist in protecting a taxpayer's rights to access to the courts and just administrative action. Furthermore, it cannot reduce the extent of any limitation on those rights as this has the effect that the possibilities as to the kind of money that can be attached are now wider. The provision effectively extends and broadens the powers of SARS.

138 Zerbst "Fund collecting tax for SARS – who bears liability?" <http://bit.ly/WqdgIH> (accessed 20 May 2013).

139 S 1 definition of "senior SARS official" read with s 6(3) of the TAA.

140 See para 3.2 above.

The additional provision contained in section 179(4) creates no opportunity for court intervention. Therefore, the taxpayer's rights to just administrative action and access to the courts are still infringed upon. This provision, nevertheless, seems to assist with reducing the extent of the limitation of the taxpayer's rights by affording an opportunity to take into consideration the taxpayer's basic financial expenses. It is therefore possible that it is a reasonable and justifiable limitation on a taxpayer's rights. This is also in line with the situation in Australia and with the ordinary garnishee procedure where the affected person's financial circumstances are taken into account.

Consequently, the TAA's appointment of a third party does not have the effect that a taxpayer's rights to access to the courts and just administrative action remain completely intact. It may, nevertheless, lessen the extent of the appointment of a third party which is one of the factors that must be taken into account when determining whether an infringement is reasonable and justifiable.¹⁴¹

5 CONCLUSION

The SARS is afforded the power to appoint a third person as an agent of the taxpayer to ensure the effective and speedy collection of tax. This power must, however, be applied with cognisance of a taxpayer's rights of access to the courts and just administrative action. In the event that this power of SARS infringes upon the taxpayer's rights, it can only be constitutional if this limitation is reasonable and justifiable.

This article indicates that the appointment of a third party in terms of the Act and VAT Act infringes upon a taxpayer's rights. However, in *Hindry* the court held that this limitation is reasonable and justifiable. The court erred in equating this power to the procedure of a garnishee order and it was argued that the extent of this provision has a greater impact on a taxpayer than the garnishee order has on a judgment debtor. It was furthermore made clear that the provisions in certain foreign jurisdictions, specifically Australia and USA, are less invasive. The court correctly referred to these provisions but failed to import the positive attributes of these provisions into the decision-making process regarding the constitutional compliance of the South African provisions. The withholding and paying over to SARS of moneys owing to the taxpayer go further than SARS requires in order to effectively collect taxes. A less invasive means would be for the third party to withhold pending the taxpayer making representations, or the matter being decided upon by a court of law.

This article furthermore dealt with the question whether the introduction of the TAA, more specifically section 179 of the TAA, assists in resolving the problems that were identified with the appointment of a third party in terms of the Act and VAT Act.

It is submitted that section 179(4) has the potential of reducing the extent of the limitation, which is one of the factors that the court should take into account when balancing the taxpayer's rights with SARS' duty to collect tax.

It is submitted that the legislature has taken a positive step towards ensuring that the taxpayer's rights are not unreasonably and unjustifiably infringed due to the fact that the taxpayer's financial situation is taken into account. On the other

141 See para 3 above.

hand, this positive step does not deprive SARS of its power to effectively collect tax. In conclusion, section 179 of the TAA appointment of a third party gravitates somewhat towards creating a balance between the taxpayer's rights and SARS' collection duty. However, this is only to the extent that the taxpayer's financial situation is to be taken into account. To a very large extent the TAA maintains the good, the bad and the ugly attributes of the erstwhile provisions in the Act and the VAT Act. To expect otherwise could be to lead to self-inflicted and unwarranted disappointment. The salient purposes of the TAA as outlined in its preamble do not promise anything more than "[t]o provide for the effective and efficient collection of tax; to provide for the alignment of the administration provisions of tax Acts and the consolidation of the provisions into one piece of legislation to the extent practically possible; to determine the powers and duties of the South African Revenue Service and officials; to provide for the delegation of powers by the Commissioner". For now SARS remains the legislature, the judge and the police, all in one.