THE USE OF DEFERRED PROSECUTION AGREEMENTS IN TAX DISPUTES.

by

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[2] Research output, in this context, is defined as a mini-dissertation, dissertation or thesis.

Acknowledgements

I write this dissertation at a very complicated time in South Africa. We are fewer than two years away from the most important election since 1994. Many young South Africans such as me, born into a democratic South Africa, are facing a fight for recovery from capture and corruption. My generation is slowly realising that there is no one who will save this country except for us, which is terrifying. This mini dissertation and the research that went into, it is my way of contributing to the fight for a recovered South Africa. Often when we ask for changes in the law, many people who haven't read the law resist, the change. I hope that someone will read this research and realise it always seems impossible until we read to understand, apply ourselves and get it done.

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Abstract

"Simply put when we tax the rich, we all do better."

- The Tax the Rich Movement

Taxation plays a vital role for developing countries to meet their development goals.[1] Efficient and effective tax collection is necessary for a tax authority to meet its objectives.[2] There has been a rise in global economic crime that threatens the ability of tax administrators to fulfil their mandate.[3] South Africa is no exception to this global trend. South Africa experienced a period of systemic corruption and capture.[4] The South African Revenue Service (SARS) also experienced this capture.[5] The capture of SARS severely impacted the ability of the institution to collect tax revenue due to the collapse of many enforcement units within the organisation.[6] As a result, delinquent taxpayers took advantage of a dysfunctional revenue authority, and measures to counter criminality were rendered ineffective.[7]

On 25 January 2018, the Judicial Commission of Inquiry into State Capture, Corruption and Fraud in the Public Sector Including Organs of State (the Zondo Commission) was established by the President of the Republic of South Africa in terms of section 84(2)(f) of the Constitution. The Zondo Commission looked at the capture of state entities in South Africa. In dealing with the ramifications of economic crime, Zondo J recommended the introduction of deferred prosecution agreements between the state and offending companies to recoup lost funds and achieve accountability. The Commission of Inquiry into Tax Administration and Governance by SARS was established in terms of Presidential Proclamation 17 of 2018 (the Nugent Commission)[8] with Judge Robert Nugent as its chair. Nugent J recommended that SARS re-

[1] OECD 'Tax and Developing Countries' Available at https://www.oecd.org/ctp/tax-and-developing-countries.htm (Accessed 4 October 2022).
[2] M Maganya 'Tax Revenue and Economic Growth in Developing Country: An Autoregressive distribution lags approach' (2020) 7 *sciendo* 205 page 209.
[3] OECD 'Tax and Crime' Available at https://www.oecd.org/tax/crime/about-tax-and-crime.htm (Accessed 4 October 2022).
[4] I Mpofu 'The Admissibility of Evidence Gathered by the Zondo Commission in a Criminal Trial' unpublished LLM Dissertation, University of Pretoria 2022 1.
[5] Nugent J *The Commission of Inquiry into Tax Administration and Governance by SARS Final Report* December 2018, page 2.
[6] Nugent J (n 5 above).
[7] Nugent J (n 5 above), 26.
[8] GG 41652 of 24 May 2018

establishes the capacity to investigate illicit trade and that it takes appropriate action against delinquent taxpayers[9] and SARS that SARS takes steps to re-establish cordial and working relationships with law enforcement agencies such as the National Prosecuting Authority of South Africa (NPA).[10]

The purpose of this study is fourfold: first, to analyse and understand the history and mandate of SARS while specifically looking at its mandate with respect to tax prosecutions; second, to analyse the relationship SARS between SARS and the NPA in prosecuting tax crime. The study also analyses the challenges experienced by both institutions that resulted in an increase in tax crimes and a simultaneous decrease in tax prosecutions; third, the study will analyse the history and legislative development of deferred prosecution agreements as a prosecutorial mechanism to address economic crime. The study will analyse the effective use of deferred prosecution agreements in the prosecution of large corporations who contravened various tax laws within their respective jurisdictions; finally, the study concludes with a comparative study on the use of deferred prosecution agreements in foreign jurisdictions.

[9]Nugent J (n 5 above) 195.
[10]Nugent J (n 5 above) 196.

List of abbreviations

ACJR	African Criminal Justice Reform
Am.Crim.L.Rev	American Criminal Law Review
Crim.L.R	Criminal Law Review
DOJ	Department of Justice
DPA	Deferred prosecution Agreements
FATF	Financial Action Task Force
GBP	Great British Pound Sterling
Int'L J	International Journal of Communications
Ksh	Kenyan Shilling
MD.L.Rev	Maryland Law Review
Marq.L.Rev	Marquette Law Review
NDPP	National Director of Public Prosecutions
NPA	The National Prosecuting Authority of South Africa.
NYU	New York University.
PAJA	Promotion of Administrative Act 3 of 2000.
PER/PELJ	Potchefstroomse Elektroniese Regstydskrif/ Potchefstroom Electronic Law Journal
SACR	South African Criminal Law Reports
SAPS	The South African Police Service
SARS	The South African Revenue Services.
SARS ACT	South African Revenue Service Act 34 of 1997.
SFO	United Kingdom's Serious Fraud Office
STU	Specialised Tax Component.

TAA	Tax Administration Act 28 of 2011.
U.C.D. L. Rev	University of California, Davis, Law Review
UK	The United Kingdom.
US	The United States of America.
USD	United States Dollar
Univ.Chic.L.Rev	University of Chicago Law Review
VA.L.Rev.Brief	Virginia Law Review

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CHAPTER 1: INTRODUCTION

'...so broken is the system, in such a state of disrepair is the system'

-Edward Kieswetter, South African Revenue Services Commissioner.

1.1. Background

The South African Revenue Service (SARS) was established in terms of section 2 of Act 34 of 1997[11] (SARS Act). The primary objective of SARS is the efficient and effective collection of revenue.[12] Section 2 of Act 28 of 2011[13] (TAA) explains how SARS goes about ensuring for the effective and efficient collection of tax. This includes the aligning of the administration of the tax Acts to the extent practically possible.[14] SARS was given independence as an organ of the State to ensure that it can administer its business efficiently.[15]

The period between 1998 to 2009 is one of the most successful periods of SARS.[16] During the term of the then Commissioner of SARS, Pravin Gordhan,[17] SARS was able to increase the number of income taxpayers from 2.67 million to 4.1 million people.[18] This was a turnaround from the previous administration which had experienced many challenges with tax collection.[19] The previous challenges experienced by the revenue authority were due to tax evasion as a form of political protest.[20] Businesses were not tax compliant due to collusive relationships

[11] South African Revenue Service Act 34 of 1997.
[12]Act 34 of 1997 sec 3.
[13]Tax Administration Act 28 of 2011.
[14]Act 28 of 2011 sec 3.
[15]BG Peters 'The future of governing: four emerging models' (1996) 32 *Lawrence KS: University Press of Kansas* 180.
[16]D Hausman' Reworking the Revenue Service: Tax Collection in South Africa, 1999-2009' December 2013 https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/Policy_Note_ID125.pdf (accessed 26 May 2022)
[17]South African History Online 'Pravin Jamnadas Gordhan' https://www.sahistory.org.za/people/pravin-jamnadas-gordhan (accessed 26 May 2022)
[18]Hausman (n 16 above), 8.
[19]Hausman (n 16 above), 2.
[20]Hausman (n 16 above), 1.

with the old Apartheid government and poor management and understaffing.[21] By 2009, SARS became one of the most successful revenue authorities in the world.[22] The key success of this administration includes an annual increase of seven to twelve per cent in revenue collection,[23] an increase of twenty-seven per cent in tax revenue and a complete revitalisation and transformation of the South African tax regime.

From about September 2014, SARS experienced capture.[24] This capture resulted in fragmentation of the functioning of the various disciplines within the organisation.[25] This capture also resulted in the degeneration and inefficacy within SARS. As a result, delinquent taxpayers took advantage of a dysfunctional revenue authority and subsequently measures to counter criminality were rendered ineffective.[26] The capture of SARS along with the capture of other entities in South Africa, resulted in a loss of approximately ninety billion Rand in tax revenue during the Tom Moyane administration.[27]

In response to the crisis of state capture, the President of South Africa Cyril Ramaphosa, established three commissions of inquiry.[28] There are two commissions of inquiry relevant to this research. The first is the Commission of Inquiry into Tax Administration and Governance by SARS, which was established in terms of Presidential Proclamation 17 of 2018 (the Nugent Commission),[29] with Judge Robert Nugent as its chair. The second commission of inquiry relevant for this research, is the Judicial Commission of Inquiry into allegations of State Capture established in terms of Presidential Proclamation 8 of 2018 (the Zondo Commission).[30] Chief Justice Raymond Zondo was appointed chair of this commission. Nugent J recommended that SARS re-establish the capacity to investigate illicit trade and take appropriate action against delinquent taxpayers[31] and that SARS takes steps to re-establish cordial and working

[21]Hausman (n 16 above), 1.
[22] Nugent J (n 5 above), 21.
[23] Hausman (n 16 above), 23.
[24]E Ferreira 'Zondo: Like Moyane, Zuma was central in SARS capture' January 2022 https://ewn.co.za/2022/06/14/top-energy-producer-australia-braces-for-blackouts (accessed 22 May 2022).
[25] Nugent J (n 5 above), 25.
[26] Nugent J (n 5 above), 26.
[27]M Merten 'State Capture wipes out third of SA's R4.9-trillion GDP – never mind lost trust, confidence, opportunity' March 2019 https://www.dailymaverick.co.za/article/2019-03-01-state-capture-wipes-out-third-of-sas-r4-9-trillion-gdp-never-mind-lost-trust-confidence-opportunity/ (accessed on 22 May 2022).
[28]T Masuku 'Contrary to public expectations, South Africa's many inquiries won't necessarily deliver accountability for the crimes they uncover.' December 2019 https://issafrica.org/iss-today/justice-and-commissions-of-inquiry-a-tenuous-link (accessed 1 June 2022).
[29] GG 41652 of 24 May 2018
[30] GG 41522 of 20 March 2018.
[31]Nugent J (n 5 above), 195.

relationships with law enforcement agencies such as the NPA.[32] Zondo J recommended the introduction of legislation that enables the use of deferred prosecution agreements. These agreements would be used where the prosecution of accused companies is deferred on certain conditions.[33]

In response to the recommendations made by the various commissions of inquiry, SARS and the NPA's Specialised Tax Component Unit (STU) updated its memorandum of understanding in 2019. The biggest update was a commitment to investigate and prosecute tax offences mainly committed within racketeering schemes.[34] In addition, in a joint statement, SARS commissioner Edward Kieswetter and the National Director of Public Prosecution (NDPP) Shamila Batohi, agreed to further enhance collaboration between the two entities with the primary focus of dealing 'with key challenges of tax crime and non-compliance, eroding the tax revenue base and the integrity of the tax system.[35] In this statement, the NPA and SARS acknowledged that both institutions have different mandates. However, the need for accountability and structures to deal with tax noncompliance and grand fraud and corruption is paramount.[36] To give expression to the collaborative relationship and the mandates of both institutions, SARS allocated capacity and resources to the NPA's STU to 'prepare solid cases for prosecution.'[37]

The NPA is mandated in terms of section 179 of the Constitution of the Republic of South Africa, 1996 (the Constitution) to institute criminal proceedings on behalf of the State. The NPA is the only institution that has this power in South Africa. A criticism of the NPA is the prolonged trials and constant delays in prosecutions and the obtaining of convictions.[38] The consequence of this is that an accused's right to a fair trial, which includes the expeditious conclusion of criminal proceedings as discussed in *Sanderson v Attorney-General*,[39] is infringed upon. The average case involving complex corruption, fraud or money laundering is

[32]Nugent J (n 5 above), 196.
[33]Zondo J the *Judicial Commission of Inquiry into allegations of State Capture Report Part VI* June 2022, page 23-24.
[34] NPA 'Special Tax Component' https://www.npa.gov.za/specialised-tax-component (accessed 2 June 2022).
[35]SARS 'SARS and NPA: Joint media statement on prioritising tax crime' February 2021 https://www.sars.gov.za/media-release/sars-and-npa-joint-media-statement-on-prioritising-tax-crime/(accessed 2 June 2022).
[36]Zondo J (note 33 above).
[37]Zondo J (note 33 above).
[38]E Cameron, J Du Toit & A Katsignis 'Justice postponed: What causes unreasonable delays in criminal trials?' (2020) 6 *De Rebus* 7.
[39] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 20.

litigated for more than 10 years in South Africa.[40] This also applies to tax prosecutions as seen with *Africa Cash & Carry (Pty) Ltd v The Commissioner for the South African Revenue Service.*[41] In this matter, the taxpayer fraudulently suppressed sales figures for several years which resulted in its income tax and VAT liability being underdeclared.[42] The taxpayer challenged the estimated assessments totalling 600 million Rand which included unpaid taxes, penalties, and interest for the period of 2003-2009. The matter was first investigated by SARS in 2007.[43] Between 2007 and 2015, there were ongoing disputes between the taxpayer and SARS[44]. In 2015, the matter was first heard in the tax court and was only finalised in November 2019 in the Supreme Court of Appeal.[45]

The prolonged delays in the prosecution of companies are not unique to South Africa. In addition, there has been a global increase in economic crimes and tax non-compliance.[46] This rise in economic crime has cost the taxpayers billions.[47] In response to these two factors, foreign jurisdictions have looked to alternatives to conventional prosecution to mitigate the impact of delays on law enforcement. An alternative to conventional prosecution that has been adopted is the use of deferred prosecution agreements (DPAs). DPAs are understood to be a contractual arrangement between the State and a company that is being investigated for future prosecution to postpone the prosecution subject to the conditions in the agreement.[48] The main component of DPAs is that the offending company acknowledges guilt and consents to paying a fine and other penalties as well as cooperating with the State in ongoing or future investigations.[49] In December 2019, the US Attorney's Office in the South District of Florida entered into a DPA with HSBC Private Bank (Suisse) SA. HSBC Switzerland agreed to pay a

[40] S Ngqakamba 'Court postponements: Who really suffers?' July 2019 https://www.news24.com/news24/SouthAfrica/News/court-postponements-who-really-suffers-20190701 (accessed 1 June 2022).
[41] *Africa Cash &Carry (Pty) Ltd v The Commissioner for the South African Revenue Service* 2020 (2) SA 19 (SCA).
[42] *Africa Cash & Carry* (n 25 above) para 1.
[43] *Africa Cash & Carry* (n 25 above) para 2-26.
[44] *Africa Cash & Carry* (n 25 above) para 134-137.
[45] *Africa Cash & Carry* (n 25 above) para 134-137.
[46] M Bisgrove & M Weeks 'Deferred Prosecution Agreements: A Practical Consideration' (2014) 6 *Crim. L.R* 416 *page* 418.
[47] M Bisgrove & M Weeks (n 46 above), 417.
[48] B Greenblum 'What Happens to a Prosecution Deferred - Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005)105 *Colum.L.Rev* 1863 page 1863.
[49] J Warin & A Boutros 'Deferred Prosecution Agreements: A view from the Trenches and a Proposal for Reform' (2008) 121 *VA.L.Rev.Brief* 122.

penalty of 192.35 million USD in exchange to defer the prosecution of tax evasion charges.[50] This is one of the largest deferred prosecution settlements relating to tax offences in the world.

1.2. Research Statement

DPAs have been explored by several authors in many jurisdictions. There is little academic research on DPAs in South African jurisprudence and very little academic literature on the use of DPAs in tax disputes.

Accordingly, this dissertation adds to the academic research on DPAs but seeks to begin the research on the use of DPAs in South Africa and more specifically in tax disputes.

The main question of the proposed research is: *The use of Deferred Prosecution Agreements in tax disputes.*

1.3. Purpose of Statement

South Africa has experienced almost a decade of what has become known as State Capture and abuse of power by those entrusted to protect the State.[51] The capture of this State included law enforcement agencies and the prosecution authority that ordinarily would be entrusted and empowered by our law, to gather evidence and prosecute those implicated in a timeous manner.[52]

Simultaneous with the capture and the dysfunction it caused on SARS, South Africa saw an increase in delinquent taxpayers and tax non-compliance, which has had adverse effects on the country's tax revenue. As South Africa embarks on the recovery project, it is necessary to hold companies accountable that took advantage of the dysfunction caused by State Capture and recover the lost tax revenue. This is not only important for the ability of the country to recoup the lost revenue but also to restore confidence and public perception of the relationship between SARS and the NPA's STU.

[50] Department of Justice 'Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA' December 2019 https://www.justice.gov/usao-sdfl/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa (accessed 12 June 2022).
[51] M Camerer 'Challenges in Integrity Management: The Case of the National Prosecuting Authority (NPA)' Occasional Working Paper 10 2020 page 4.
[52] M Camerer (n 51 above) page 5.

The world has seen a stark increase in economic crimes and tax non-compliance by companies.[53] This has had severe consequences for tax authorities across the world.[54] The response to this crisis has been alternatives to conventional prosecution such as DPAs. This new strategy for accountability appears to be a more effective and efficient mechanism for tax revenue recovery and restoring tax compliance. The use of deferred prosecution agreements remains controversial owing to the perception that it is a way for companies to escape accountability.[55]

This study seeks to explore the possible use of DPAs in tax disputes within the South African legal framework as recommended by the Zondo Commission and Nugent Commission of Inquiry. The study reflects on the mandate of SARS and the NPA in prosecuting companies that contravene the various tax legislations. The study analyses foreign jurisdictions which have adopted the use of DPAs in tax disputes.

1.4. Importance and Benefits of the Study

It is submitted that the findings of this research can be utilised as tools for engagement for legal scholars, academics, professionals, SARS and the NPA when considering mechanisms to recover from the effects of State Capture especially as it pertains to tax compliance.

This research is intended to contribute to the reform of the current tax prosecution model in South Africa as it relates to companies. Arguably the reform could strengthen the relationship between the NPA and SARS and assist in the more urgent goal of recouping lost tax revenue.

1.5. Delimitations

This mini dissertation only evaluates the use of DPAs in tax disputes involving corporates. The mini dissertation does not consider the possible use of DPAs with respect to offending individual taxpayers. The reason for this delimitation is that countries that have legislation that allows for DPAs, have yet to extend it to private individuals owing to the feasibility of prosecuting individuals and the public interest in pursuing conventional prosecution.[56]

[53] A Argentiero 'Does Tax Evasion Effect Economic Crime? (2020) 41 *Fiscal Studies* 114.
[54] A Argentiero (n 53 above), 114.
[55] D Uhlmann 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 *MD.L.Rev.* 1296.
[56] M Bisgrove & M Weeks (n 46 above), 433.

The mini dissertation only analyses the use of DPAs in tax disputes. The dissertation does not explore the use of DPAs as it relates to other common law or statutory offences. The reason for this delimitation is that there is extensive literature that explores the use of DPAs broadly but limited research on their use in tax matters.

1.6. Research methodology

This study follows a qualitive documentative approach. In order to decide whether or not the current legal framework of SARS and the NPA is effective in prosecuting tax noncompliance of companies, it is imperative to understand the current landscape around the laws of tax prosecution in South Africa. This is done by adopting a historical assessment of the relevant legislation and its effectiveness.

Once the status quo is established, the research investigates the legal framework of DPAs. There is no legal framework in South Africa which allows for the use of DPAs. This analysis relies on the legal framework of foreign jurisdictions. Following this, a comparative analysis of foreign jurisdictions' use of DPAs is conducted.

Thereafter, the mini dissertation identifies the challenges of DPAs. The mini dissertation proceeds to interrogate and discuss possible solutions to the identified challenges. Lastly, the research reflects on the current laws and make conclusions on possible solutions and remedies.

In order to establish and discuss the scope and application of DPAs in respect of tax offences, the following research questions are considered.

a. What is the mandate of SARS in terms of section 2 of Act 34 of 1997?
b. What is the mandate of SARS in terms of sections 2 and 3 of Act 28 of 2011?
c. What is the mandate of SARS in terms of section 43 of Act 28 of 2011?
d. What are the duties of SARS in terms of section 234 of Act 20 of 2021?[57]
e. What are the duties of the NPA in terms of section 179 of the Constitution?
f. What are the duties of the NPA as it relates to tax prosecution in terms of Act 32 of 1988?[58]

[57] Taxation Laws Amendment Act 20 of 2021.
[58] National Prosecuting Authority Act 32 of 1998.

g. What is the relationship between SARS and the NPA's STU in terms of their memorandum of understanding?
h. What are the challenges in the status quo as it relates to tax prosecutions of companies?

After the assessment of the various legislation, I analyse.

i. What are deferred prosecution agreements?
j. How are deferred prosecution agreements utilised in tax prosecutions?
k. How are deferred prosecution agreements used in foreign jurisdictions as they relate to tax prosecutions?

1.7. Dissertation Structure

The chapter outline of this dissertation is as follows.

Chapter 1:

In this chapter, I provide a brief overview of the research topic and the motivations for this study.

Chapter 2:

This chapter provides an analysis of SARS mandate with respect to tax collection and tax prosecution.

Chapter 3:

This chapter critically analyses the relationship between SARS and the NPA with respect to tax prosecutions.

Chapter 4:

In this chapter, I discuss DPAs and how they are used in tax disputes.

Chapter 5:

This chapter is a comparative analysis of foreign jurisdictions and their use of DPAs. The first jurisdiction chosen for this study is the United Kingdom (UK). The UK is relevant as the South African legal taxation framework was modelled off legislation from the UK such as the New South Wales Act, of 1895.[59] The second tax jurisdiction chosen for this study is the United States of America (US). DPAs originated in the US.[60] The motivation for this selection is that the US has recently extended the use of DPAs to tax disputes between the Internal Revenue Service and companies.[61] The final jurisdiction chosen for this study is Kenya. Kenya is the first African country to implement DPAs within its legal framework.[62] Kenya, like South Africa[63] and other commonwealth jurisdictions, allows for settlement by agreement with the taxpayer and the relevant tax authority.[64]

[59] PARI 'Fiscal Histories of Sub-Saharan Africa: the case of South Africa' July 2017 https://southafrica.fes.de/fileadmin/user_upload/publications/Fiscal-Histories-240817-1.compressed.pdf (accessed 6 August 2022).

[60] J Arlen 'The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S' (2019) *NYU School of Law, Public Law* Research Paper No. 19-30 at 2.

[61] C Chance ' Deferred Prosecution Agreements and U.S Approaches to resolving Criminal and Civil Enforcement Actions: A regime characterised by limited judicial involvement' April 2012 https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/05/deferred-prosecution-agreements-and-us-approaches-to-resolving-criminal-and-civil-enforcement-actions.pdf (accessed 6 August 2022).

[62] FTI Consulting South Africa 'Deferred prosecution agreements: a solution to prosecuting backlog?' June 2021 https://www.fticonsulting.com/-/media/files/emea--files/insights/articles/2021/jun/deferred-prosecution-agreements-solution-prosecuting-backlog.pdf?rev=3d8c825869f84197a0e810a30a076039&hash=712632C95CF248490A43BA6B2B0245C7 (accessed 4 August 2022).

[63] Act 28 of 2011, Chapter 9.

[64] G Kashindi 'Tax Disputes Resolution in Kenya: Viability of Including Alternative Dispute Resolution Mechanisms' Thesis, University of Nairobi, 2017 page 2.

CHAPTER 2: THE MANDATE OF SARS WITH RESPECT TO TAX COLLECTION AND TAX PROSECUTION.

'The power of taxing people and their property is essential to the very existence of government.'

- James Madison, 4TH US President

2.1. Introduction

This chapter commences with a discussion of the history and development of SARS. The chapter then briefly discusses the capture of SARS and the impact it had on the ability of SARS to collect efficiently taxes and to hold those who were non-compliant to account. The chapter concludes by discussing the mandate of SARS as it pertains to tax collection and prosecution of alleged tax offences committed under any of the tax Acts.

2.2. The historical context of SARS

Prior to democracy, the Revenue Authority of South Africa was characterised as an institution that was ineffective in tax collection.[65] The tax legislation and the institutions tasked with tax collection allowed individuals and companies to divert large amounts of income taxes due to the State, away from the Revenue Authority.[66] Tax non-compliance and tax evasion became a form of protest in South Africa and the Revenue Authority had lost legitimacy in the eyes of the South African public.[67]

In 1994, the newly elected democratic government established the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa (the Katz Commission)[68] with Michael Katz as its chair. The primary objective of the work of the Katz Commission was to suggest

[65]S Smulders 'The transformation of the South Africa Revenue Authority in the Post-Apartheid Era' (2013) 43 *TAXtalk* 54.
[66]E Hazlehurst 'A net gain: new legislation and better collection are building government's political credibility (2003) 170 Financial *Mail* 64-66.
[67] Hausman (n 16 above).
[68]SARS '20 years 1997-2017 Tax & Triumphs' 2017 https://www.sars.gov.za/sars-20-year-celebration-doublespread/ (accessed 29 July 2022).

reforms of the taxation system and the administration of tax collection in a manner that 'achieves goals of strong and sustainable growth, development and meaningful alleviation of poverty in a time of increased international competitiveness.'[69] By 1997, the recommendations made by the Katz Commission were being implemented.[70] In 1997, SARS Act was promulgated and a new revenue authority was established with clear transformation objectives.[71] SARS was granted administrative autonomy as recommended by the Katz Commission.[72]

SARS transformation is one of the greatest success stories of the new democratic South Africa.[73] SARS increased its revenue collection by achieving three main objectives. First, SARS widened the tax net.[74] By 2002, five years after the Katz Commission finalised its work, SARS was able to increase the total number of persons and companies registered for income tax by 43 per cent, and by 40 per cent, respectively.[75] Against the global decline of economic growth in the early 2000s, SARS was able to raise a remarkable 249.4 billion Rand in revenue.[76] This was done through an aggressive technical transformation policy that allowed SARS to computerise its operations and overhaul outdated infrastructure and a much more publicised prosecution of transgressors which improved tax compliance in South Africa.[77] The second strategy employed by SARS, was to increase its sources of revenue collection.[78] After Apartheid, people of colour entered the formal economy in large numbers.[79] This improved income tax collection by seven per cent per year.[80] The collection of value-added tax (VAT) increased on average by three per cent per year.[81] The VAT increase is due to improved compliance by VAT vendors and an increase in registered VAT vendors.[82] SARS was also able

[69] Joint Standing Committee on Finance on the third interim report of the Katz Commission of Inquiry into Taxation' December 1995 http://www.treasury.gov.za/publications/other/katz/3.pdf (accessed 17 July 2022).
[70] Smulders (n 66 above), 56.
[71] Smulders (n 66 above), 56.
[72] Smulders (n 66 above), 56.
[73] L Smith 'The Performance of the South African Revenue Service and some of its implications (2003) 16(2) *Policy: Issues and Actors* 5.
[74] Smith (n 73 above).
[75] SARS 'Annual Report 2001-2002' https://www.sars.gov.za/sars-ar-04-annual-report-2001-2002/ (accessed 21 July 2022).
[76] n 75 above.
[77] n 75 above, 5.
[78] Smith (n 71 above), 10-12.
[79] Smith (n 71 above).
[80] Smith (n 71 above).
[81] Smith (n 71 above),11.
[82] Smith (n 73 above), 11.

to increase its tax revenue collection in the corporate sector.[83] With the increase in economic activity in the 2000s in South Africa, SARS was able to collect tax from corporates at a rate of 30 per cent.[84] Finally, SARS reduced the tax gap. The tax gap is understood to be the difference between the amount of tax imposed by the State and the amount actually reported and paid by the taxpayer.[85] SARS did this, by developing seventeen special investigative units, such as the Woodmead project.[86] These units were tasked to understand how selected industries operated and how they may have been complicit in tax evasion.[87] These units saw a significant increase in additional revenue being collected by SARS.[88] The National Treasury of South Africa developed legislation such as the Taxation Laws Amendment Bill[89] to assist SARS to widen the tax net.[90]

By 2014, SARS had made significant strides as a revenue authority which earned it international accolades and praise.[91] In oral testimony before the Nugent Commission, Dr Randall Carolissen testified that SARS was recognised as a world-class institution conforming to international best practices.[92] SARS was highly respected and regarded as a model institution by the Organisation for Economic Co-operation and Development (OECD).[93] The 2013 to 2014 fiscal year saw SARS increase its tax revenue collection from 814.1 billion Rand to 899.7 billion Rand .[94] The three main revenue contributors for SARS were personal income tax of 310.5 billion Rand, corporate income tax of 179.9 billion Rand and VAT of 237.7 billion Rand.[95]

[83] Smith (n 73 above), 11
[84] Smith (n 73 above), 10.
[85] M Mazur and A Plumely ' Understanding the Tax Gap' (2007) 60(3) *National Tax Journal* 22.
[86] Smith (n 73 above), 12.
[87] Smith (n 73 above),) 12.
[88] Smith (n 73 above), 12.
[89] Act 20 of 2001.
[90] Smith (n 73 above), 12.
[91] Nugent J (n 5 above),21.
[92] Nugent J (n 5 above), Appendix 4.
[93] OECD '2015 Economic Surveys South Africa' July 2015 http://www.oecd.org/economy/surveys/South-Africa-OECD-economic-survey-overview.pdf (accessed 23 July 2022).
[94] SARS '1 April 2014 – Preliminary Outcome of Revenue Collection for the 2013-14 Fiscal Year' April 2014 https://www.sars.gov.za/media-release/1-april-2014-preliminary-outcome-of-revenue-collection-for-the-2013-14-fiscal-year/ (accessed 21 July 2022).
[95] n 94 above.

2.3. The mandate of SARS

Taxation is the most important means for a government to raise revenue to meet public expenditure.[96] The mandate of SARS is found in the preamble of SARS Act. SARS Act provides that SARS is 'to make provision for the efficient and effective administration of the revenue collecting system of the Republic; and for this purpose, to reorganise the South African Revenue Service…' This same phrase is repeated in the general explanatory note of the TAA.

The objective of SARS is the efficient and effective collection of revenue. Section 4 of SARS Act provides the manner in which SARS goes about fulfilling its primary objective. This includes securing the efficient and effective, and the widest possible enforcement[97] of, including but not limited to national legislations, advising the Minister of Finance on all matters concerning revenue[98] and the exercise of any power or the performance of any function assigned to the Minister.[99] Section 4(2) of SARS Act provides that SARS 'must perform its functions in the most cost-efficient and effective manner.' Section 2 of the TAA provides the provisions for which SARS goes about collecting tax in an efficient and effective manner. In summary, this provision speaks to the alignment of the various tax legislation[100] and gives effect to the objects and purposes of tax administration[101] which is the primary objective of the effective and efficient collection of tax revenue.

The efficiency and efficacy of tax administration is a term that is still being investigated by taxation experts.[102] The conceptualisation of an efficient and effective tax administrator is beyond the scope of this research. However, efficiency in the context of tax administration is understood to be the highest amount of tax collection from existing resources with the lowest possible collection costs.[103] Scholars explain efficacy in tax administration to mean the degree

[96] R Bird and E Zolt 'Introduction to Tax Policy Design and Development Practical Issues of Tax Policy in Developing Countries, World Bank' April 2003 http://www1.worldbank.org/publicsector/LearningProgram/PracticalIssues/papers/tax%20administration/Admin%20paper%20Jan%202004.doc (accessed 30 July 2022).
[97] Act 34 of 1997 sec 4(1)(a).
[98] Act 34 of 1997 sec 4(1)(b)(i).
[99] Act 34 of 1997 sec 4(1)(b)(ii)
[100] Act 28 of 2011 sec 2(a).
[101] Act 28 of 2011 sec 2(3).
[102] P Bejakovic 'How to Achieve Efficiency and Equity in the Tax System?' September 2019 https://hrcak.srce.hr/file/351917 (accessed 1 August 2022).
[103] A Shahroodi 'Investigation of the effective factors in the efficiency of tax system' (2010) 2(3) *Journal of Accounting and Taxation* 42.

of success of a taxation system in achieving its set objectives.[104] Efficacy is reflected in the increased voluntary compliance of taxpayers.[105] The fiscal stability of any country is contingent on effective and efficient tax collection.[106] The tax legal framework of South Africa is specifically designed to ensure that SARS fulfils this mandate.

2.4. The mandate of SARS with respect to the prosecution of tax-related criminal offences.

Section 3(2)(f) of the TAA empowers SARS at the direction of the Commissioner, to investigate offences that may have been committed in terms of the various tax acts and lay criminal charges. The section also allows for the provision of assistance that is reasonably required for the investigation and prosecution of tax offences or related common law offences. Section 43 of the TAA empowers SARS to refer serious tax offences for criminal prosecution. The conduct of a criminal investigation is covered in section 44 of the TAA. Chapter 17 of the TAA provides for tax-related criminal offences. In terms of economic crimes, section 234 of the TAA deals with the criminal offences relating to tax non-compliance and section 235 of the TAA deals with the criminal offences relating to evasion of tax.

It is evident that the mandate of SARS is not criminal prosecution. Its mandate as it relates to prosecution, is mainly the identification of the criminal offences committed by taxpayers and it may lay the criminal charges with the South African Police Service (SAPS) and provide reasonable assistance to the investigation and prosecution authorities. This identification is done through an investigation by a SARS-appointed investigator who exercises their powers in terms of section 6 of the TAA. Section 63 of the TAA authorises the search and seizure without a warrant by the relevant SARS investigator. This is the extent to which SARS is involved in tax-related criminal investigations.

This procedure is illustrated in the King[107] case, which is one of the most significant prosecuted tax evasion cases in South Africa's history. David Cunningham King is a Scottish-South African businessman. King was investigated by SARS in 1990 in terms of the relevant sections

[104] S Kumar, A Nagar and S Samanta 'Indexing the Effectiveness of Tax Administration'(2007) 42(50) *Economic and Political Weekly* 104-106.
[105] Kumar (n 92 above) 109.
[106] C McClellan 'The Consequence of Poor Tax administration: Collections, Growth and Corruption' unpublished PhD thesis, Georgia State University, 2013 12.
[107] *The Director of Public Prosecution v David Cunningham King* 2008 CC 257/2005 (unreported).

of various tax legislation.[108] Over the 8-year investigation, King was requested by SARS to make full and frank disclosure of his tax affairs.[109] After many failed attempts to negotiate with King and his submission of false documents to investigators, the Commissioner of SARS in terms of section 3(1)(f) of the TAA, proceeded to lay criminal charges with the SAPS and refer the matter for further investigation and prosecution.[110] The allegation by SARS was that King generated over a billion rand between 1990-2001, however, he only declared an annual income of 80 000 Rand only and King deregistered as a taxpayer.[111] On 13 June 2002, King was arrested on approximately 322 charges, including money laundering, contravening the Income Tax Act 58 of 1962 and Exchange Control Regulations, 1961, fraud and racketeering.[112] SARS alleged that King defrauded SARS in relation to his tax affairs.[113] The investigation resulted in a docket that comprised 200 000 pages and an 800-page indictment.[114] Once the matter was enrolled before the High Court of South Africa, Transvaal Provincial Division, now known as the High Court of South Africa, Gauteng Division, Pretoria, SARS became a complainant in the matter and SARS investigators tasked with the King case, became witnesses in the criminal matter.

The King case illustrates three main principles relevant to this research. First, that SARS during the period between 1990 and 2001 had the necessary capabilities to fulfil its mandate and enforce the relevant provisions of the tax legislation. Second, the case illustrates the relationship SARS has with other law enforcement agencies in terms of enforcing its mandate. Lastly, the case illustrates the role SARS plays in criminal prosecution in terms of Chapter 17 of the TAA.

2.5. The capture of SARS and its impact.

In his report, Judge Nugent said SARS is an institution that is vital for the welfare of the country, and it is one that is particularly vulnerable to corruption.[115] At this point, it is important

[108] SARS 'Media Statement Responding to King' November 2008 https://www.sars.gov.za/sars-mr-2008-030-media-release-on-responding-to-dave-king-4-november-2008/(accessed 06 August 2022).
[109] *The Director of Public Prosecution v David Cunningham King* (n 107 above).
[110] n 108 above.
[111] n 108 above
[112] *Director of Public Prosecution v David Cunningham King* (107 above), para 1-2.
[113] n 108 above
[114] *Director of Public Prosecution v David Cunningham King* (107 above), para 1-2.
[115] Nugent (n 5 above), 3.

to understand the capture of SARS and how it affected SARS' ability to fulfil its mandate to collect tax revenue in an effective and efficient manner and hold those who are tax non-compliant, to account.

State capture is defined as well-organised and systematic political corruption.[116] President Jacob Zuma was South Africa's third democratically elected president.[117] State capture in South Africa became most evident under the Zuma administration when allegations were made that President Zuma and other politicians in his administration, used their positions to further the interests of private individuals.[118] The capture of SARS was one that was intentional.

SARS was deliberately and systematically weakened by President Zuma and Tom Moyane.[119] This was done through the appointment of Bain & Company as consultants to assist in the radical overhauling of a functioning state institution.[120] The plan[121] created by Bain & Company and Mr Moyane, saw the dismissal of competent senior employees within SARS who resisted the 'strategic refresh' of SARS.[122] Finally, SARS's most important units and projects designed to ensure tax compliance were disbanded and this weakened the ability of SARS to collect tax revenue effectively.[123]

The impact of state capture on SARS was devastating. The significant decline in revenue collection meant that government programmes had to be curtailed,[124] money had to be borrowed on account of a fiscal deficit[125] and most importantly for this research, Bain & Company's decision to restructure the legal and enforcement units within SARS severely

[116] L Sitorus 'State Capture: Is it a Crime? How the World perceived it' (2011) 1(2) *Indonesia Law Review* 147 at 162.
[117] South African History Online 'Jacob Gedleyihlekisa Zuma' https://www.sahistory.org.za/people/jacob-gedleyihlekisa-zuma (accessed 02 August 2022).
[118] The Public Protector's State of Capture: Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in the improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses Report No.6 of 2016/17, page 29
[119] Zondo J *The Judicial Commission of Inquiry into allegations of State Capture Report Part I* January 2022, page 712-713.
[120] Zondo J (n 119 above).
[121] Bain & Company Incorporated is a global management consulting firm incorporated in Bost Massachusetts, United States.
[122] Zondo J (n 119 above),712 .
[123]Zondo J (n 119 above),713.
[124] Nugent J (n 5 above),17.
[125] Nugent J (n 5 above),17.

damaged SARS' ability to hold delinquent taxpayers accountable.[126] The testimony of Sarita Lubbe[127] before Nugent J highlights the severity of Bain & Company's policies. Prior to the capture of SARS and the capture of the organisation, the legal unit would acquire approvals for legal actions within 24-48 hours. This legal action requirement of 'hours' changed to many months and thereafter the legal and enforcement unit lost a significant number of competent and senior enforcement agents as a result of the restructuring.[128]

In light of the capture and collapse of the enforcement and litigation units within SARS, Nugent J recommended that these units be re-established.[129] In response to these recommendations, Commissioner Edward Kieswetter committed SARS to support law enforcement agencies in the investigation and prosecution of money laundering and corruption activities.[130] In addition, SARS signed a memorandum of understanding with the NPA in 2019 for the prosecution of tax crimes.[131]

2.6. Conclusion

This chapter illustrates the origin of SARS and how it developed to be a world-class tax authority. The chapter also demonstrates the mandate of SARS as it relates to revenue collection and prosecution of non-compliant taxpayers. Finally, the chapter concludes by discussing the nature of the capture of SARS and the impact it had on the ability of SARS to fulfil its mandates. In the next chapter, I discuss the relationship between the NPA's STU and SARS and their respective mandates, with regard to the prosecution of tax offences.

[126] Nugent J (n 5 above), 53.
[127] Sarita Lubbe is a Legal Investigations Specialist employed by the South African Revenue Service.
[128] Nugent J (n 5 above), 54-55.
[129] Nugent J (n 5 above), 193-194.
[130] SARS 'SARS and the Criminal Justice System' (April 2021) https://www.sars.gov.za/targeting-tax-crime/what-is-a-tax-crime/sars-and-the-criminal-justice-system/ (accessed 24 July 2022).
[131] NPA 'Specialised Tax Component' https://www.npa.gov.za/specialised-tax-component (accessed 24 July 2022).

CHAPTER 3: THE RELATIONSHIP BETWEEN THE SPECIALISED TAXATION UNIT AND SARS

"Criminal justice" is what happens after a complicated series of events has gone bad. It is the end result of failure"

\- Paul Delano Butler

3.1. Introduction

In December 2019, the National Director of Public Prosecutions, Advocate Shamila Batohi and the Commissioner of SARS, Edward Kieswetter, signed a memorandum of understanding (MOU) between the NPA and SARS. In summary, the MOU commits SARS to refer criminal tax matters to the NPA and the SAPS for investigation and prosecution.[132] The primary area of cooperation relevant for this research that is covered by the MOU is the 'effective investigation of tax, fiscal and financial corruption-related offences, which will lead to the increase of tax compliance to tax legislation.'[133] In terms of the MOU, SARS is responsible for 'laying criminal complaints resulting from a SARS criminal investigation of an offence'[134] under the relevant SARS legislation. SARS is required to inform the STU of the criminal complaint and request that the SAPS provide an investigating officer.[135] SARS is also required to refer the docket to the STU.[136] The MOU makes the NPA STU responsible for prosecuting cases referred to it concerning tax offences.[137] The STU may engage a SARS criminal investigator.[138]

3.2. The National Prosecuting Authority

At the dawn of democracy, South Africa was grappling with escalating levels of serious crime[139] including economic and tax crime. In 1998, the NPA was established in terms of the National Prosecuting Authority Act 38 of 1998. The NPA adopted prosecution-driven investigations as a strategy to combat the high levels of crime.[140] In terms of section 179(2) of

[132] Memorandum of understanding between the SARS and the NPA, paragraph 3.
[133] n 132 above, para 3.2.1.
[134] n 132 above, para 4.1.1.
[135] n 132 above para 4.1.2.
[136] n 132 above para 4.1.2
[137] n 132 above para 4.2.1.
[138] n 132 above para 4.2.1.
[139] M Schonteich 'A story of trials and tribulations, The National Prosecuting Authority, 1998-2014' (2014) 50 *AJOL* 5.
[140] Schonteich (n 139 above), 5.

the Constitution, the NPA is the only institution with the express powers to institute criminal proceedings on behalf of the State. The NPA Act[141] ratifies the section 179 Constitutional powers of the NPA and endorses the NPA as the sole prosecuting authority in South Africa.[142] In 1999, the NPA embarked on a strategy of innovation and specialisation to combat the crime in the country.[143] This was in the form of specialised directorates and units within the NPA. The establishment of these units saw positive changes within the organisation and had a positive impact on the performance of the NPA.[144]

The criminal justice system in South Africa is ordinarily a two-pronged process. The first stage is the investigation stage.[145] A complaint is laid with the SAPS, and they are mandated in terms of section 205(3) of the Constitution to investigate crimes in South Africa. In relation to tax offences, the investigation is conducted by SARS in terms of section 3(1)(f) of the TAA. The second stage is when a matter is assigned to a prosecutor from the NPA to conduct the criminal trial and finalise the criminal complaint. In tax-related matters, the prosecutor is ordinarily selected from the Specialised Tax Unit.[146]

Like SARS, the NPA experienced capture.[147] The capture of the criminal justice agencies by the Zuma Administration was intended to render them dysfunctional.[148] The visible consequence of the capture and manipulation of the NPA was a decline in prosecutorial performance, and disruption and mismanagement of law enforcement which resulted in an

[141] Act 32 of 1998.
[142] NPA 'NPA Mandate' March 2022 https://www.npa.gov.za/npa-mandate#:~:text=The%20NPA%20derives%20its%20mandate,fear%2C%20favour%2C%20or%20prejudice. (accessed 12 August 2022).
[143] Schonteich (n 139 above), page 7.
[144] Schonteich (n 139 above), page 11.
[145] South African Government 'How does the justice system work?' https://www.gov.za/faq/justice-and-crime-prevention/how-does-criminal-justice-system-work (accessed 10 August 2022).
[146] MOU between the SARS and the NPA.
[147] Mokgoro J *Mokgoro Enquiry in terms of Section 12(6) of the National Prosecuting Authority Act 32 of 1998, Unabridged Version* April 2019.
[148] Institute for Security Studies & Corruption Watch 'State Capture and the Political Manipulation of criminal justice agencies. A joint submission to the Judicial Commission of inquiry into Allegations of State Capture' June 2016 https://issafrica.s3.amazonaws.com/site/uploads/2019-06-20-other-zondo-commission-submission.pdf (accessed 12 August 2022).

inability to investigate and prosecute complex commercial crimes.[149] The capture of law enforcement agencies, including the NPA, had a disastrous effect on tax prosecutions.[150]

A reality of the NPA is that the organisation is facing an institutional crisis.[151] The organisation has experienced a high level of resignation of skilled and competent staff which means the organisation lacks the capacity to prosecute complex cases including those relating to tax offences.[152] The NPA has also experienced declining prosecution and conviction rates[153] which in effect means the organisation is failing in its core business mandate.[154] In addition, the NPA has not reviewed its prosecution policy or policy directives since 2014[155] which means the organisation has failed to engage properly with new and innovative methods to deal with the rising level of crime, including tax crimes in South Africa.

The impact of the NPA's failings is most evident in financial and economic crimes. In August 2022, the Financial Action Task Force (FATF) began considering putting South Africa on the grey list.[156] The 'grey list' consists of countries that are currently facing deficiencies in their regimes to counter economic crimes of which tax offences may be included. The consequence of grey listing includes economic sanctions from intergovernmental organisations such as the World Bank,[157] a reduction in trade[158] as well as a limit to a country's ability to obtain loans from international organisations.[159] The reasons for South Africa's potential grey listing are the consequences of state capture such as the collapse of law enforcement agencies, a

[149] Institute for Security Studies (n 148 above), 4.
[150] M Soko 'State Capture eroded institutions in South Africa. How the revenue service is rebuilding itself' August 2022 https://theconversation.com/state-capture-eroded-institutions-in-south-africa-how-the-revenue-service-is-rebuilding-itself-187891 (accessed 16 August 2022).
[151] L Muntingh ' Accountability Op-Ed: The National Prosecuting Authority is in crisis and is failing in its core business — the prosecution of suspects January 2022 https://www.dailymaverick.co.za/article/2022-01-18-the-national-prosecuting-authority-is-in-crisis-and-is-failing-in-its-core-business-the-prosecution-of-suspects/#:~:text=Declining%20performance%2C%20lack%20of%20independence,to%20acknowledge%20it%20as%20such. (accessed 06 August 2022).
[152] L Muntingh, J Redpath & K Petersen 'An Assessment of the National Prosecuting Authority: A controversial Past and Recommendations for the Future (2017) 3 *ACJR* 35.
[153] NPA 'NPA Annual Report 2019-2020' May 2021 https://www.npa.gov.za/sites/default/files/media-releases/NPA_Annual_Report_2019-2020.pdf (accessed 06 August 2022) 23-26.
[154] L Muntingh (n 151 above).
[155] L Muntingh (n 152 above).
[156] S Smit 'What the Fica? South Africa's possible grey listing in black and white' August 2022 https://mg.co.za/business/2022-08-05-what-the-fica-south-africas-possible-greylisting-in-black-and-white/ (accessed 10 August 2022).
[157] A Shah 'The geopolitics of Pakistan's 2018 grey listing by the Financial Action Task Force' (2021) 76 *Int'l J* 280.
[158] Smit (n 156 above).
[159] Smit (n 156 above).

stagnation in legislation designed to combat economic crime as well as increased economic crime in the country.[160]

3.3. The Specialised Tax Unit and SARS

A specialist tax prosecuting unit was established in 2003 by agreement between SARS and the NPA.[161] This is now known as the Specialised Tax Unit (STU). It is important to note that the establishment of the STU does not preclude other prosecutors within the NPA from prosecuting tax-related offences, provided it is done under the guidance and consultation with the STU.[162]

The STU is established as a dedicated and permanent tax prosecution capacity within the NPA.[163] The STU consists of a team of prosecutors tasked with the responsibility to prosecute tax-related matters. The role of STU prosecutors is to guide investigations, institute prosecutions, and manage criminal tax prosecutions.[164] The STU consists of sub-units in the respective offices of the Directors of Public Prosecutions of South Africa.[165] Where there is a dedicated tax prosecutor and resources but no sub-unit, the Director of Public Prosecution of that unit, will oversee and take responsibility for tax-related prosecutions in that division.[166] In the event that SARS and the NPA identify a need to expand the resources of prosecutors and SARS investigators of the STU in other regions, SARS will be contacted. SARS undertakes to provide sufficient and continuous workload to the regions.[167] The NPA may, in addition to the resources provided by SARS, authorise external legal practitioners to prosecute exceptional cases that require specific tax expertise.[168]

Section 7 of Annexure A of the MOU between the NPA and SARS deals with SARS' case selection. The responsibility of the decision to resolve a matter by civil remedies or refer it for

[160]FATF 'Mutual Evaluation Report South Africa' October 2021 https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-South-Africa.pdf (accessed 10 August 2022) page 8-12.
[161] Annexure A to the MOU between the NPA and SARS para 2.1.
[162] Annexure A to the MOU between the NPA and SARS para 2.3.
[163] NPA SARS MOU para 1.1.24.
[164] NPA SARS MOU page 3.
[165] Annexure A to the MOU between the NPA and SARS para 3.1.
[166] Annexure A to the MOU between the NPA and SARS para 3.3.
[167] Annexure A to the MOU between the NPA and SARS para 3.4-3.5.
[168] Annexure A to the MOU between the NPA and SARS para 3.6.

criminal investigation is in the mandate and discretion of SARS.[169] This decision shall be done as per the internal protocols and procedures of SARS.[170]

Section 10 of Annexure A also deals with the outcomes the STU and SARS seek to achieve in their cooperative relationship. Both parties agree that the objective of this relationship is outcome-based prosecutions resulting in deterrence of tax non-compliance.[171] Both parties agree that the tax non-compliance is aimed at defrauding the fiscus.[172] Section 10 of the MOU also discusses where there are tax offences relating to legal entities, the STU should endeavour to prosecute both the individuals of those entities privately, in addition to, companies.[173] The NPA further commits not to enter into agreements with legal entities of possible pleas or sentence agreements unless the circumstances justify such decisions, and[174] with prior consultation with SARS.[175] In chapter four I discuss how DPAs could enable the STU and SARS to achieve their aims of deterrence as set out in section 10 of Annexure A of the MOU.

In terms of the approach to the investigation and prosecution of tax offences, three points are notable from the Annexure A of the MOU between the NPA and SARS. First, that SARS commits to providing training that is necessary for new tax-related priority areas to which the STU prosecutors have not had exposure in advance to SARS undertaking investigations in these new fields.[176] Second, SARS and the NPA agree to prosecutor-involved investigations during the investigation phases of complex tax-related cases as this is essential to reduce the turnaround time in tax-related investigations and prosecutions.[177] This will be decided on a case-by-case basis.[178] In terms of the MOU between the NPA and SARS, the STU prosecutor assigned to prosecute tax-related offences may engage SARS criminal investigator in order for SARS to provide the necessary material information pertaining to proving the related tax offence under the relevant tax legislation.[179]

[169] Annexure A to the MOU between the NPA and SARS para 7.1.
[170] Annexure A to the MOU between the NPA and SARS para 7.5.
[171] Annexure A of the MOU between the NPA and the SARS para 10.
[172] Annexure A of the MOU between the NPA and the SARS para 10.1.
[173] Annexure A of the MOU between the NPA and the SARS para 10.3
[174] Annexure A of the MOU between the NPA and the SARS para 10.4.
[175] Annexure A of the MOU between the NPA and the SARS para 10.5.
[176] Annexure A of the MOU between the NPA and the SARS para 8.3.
[177] Annexure A of the MOU between the NPA and the SARS para 8.4.
[178] Annexure A of the MOU between the NPA and the SARS para 8.5.
[179] NPA SARS MOU para 4.2.1.

SARS/STU relationship is regulated and managed through the National Coordinating Committee and the National Working Committees.[180] According to the MOU, the National Working Committees meet regularly to discuss matters of policy and prosecution of tax offences as well as SARS criminal investigation processes and procedures.[181]

The challenges being experienced by the NPA also extend to the STU. In studying the NPA's annual reports for the period of 2016-2021, it is evident that the NPA does not report on the cases within the STU. There is no reliable data which is publicly available to assess whether the current form of the STU and SARS relationship is productive and meets its objectives as set out in the MOU.

3.4. Conclusion

The relationship between the NPA and SARS is necessary for both organisations to fulfil their respective legislative mandates. The MOU between the NPA and SARS, establishes a relationship between the entities to hold non-compliant taxpayers to account while establishing a framework for the investigation and prosecution of tax offences. However, it is clear that the NPA's organisational challenges means that there are obvious challenges in achieving the objectives of the MOU, while South Africa continues to grapple with the consequences of state capture and its impact on the tax revenue collection on the fiscus. The proceeding chapter will introduce DPA's as a possible update to the NPA and SARS MOU, as means to strengthen the objectives of SARS to collect tax revenue in an efficient and effective manner.

[180] NPA SARS MOU para 4.3.1.
[181] NPA SATS MOU para 4.3.2.

CHAPTER 4: DEFERRED PROSECUTION AGREEMENTS IN TAX DISPUTES

"Some financial firms violate major anti-fraud laws because there's no real penalty for being a repeat offender…. So, pass legislation that makes the penalties for fraud count"

- President Barack Obama, 44th US President.

4.1. Introduction

Airbus SE is a European multinational aerospace corporation with its headquarters in the Netherlands.[182] Airbus remains one of the world's largest aerospace companies with a market cap of approximately 75 billion USD.[183] In 2020, Airbus finalised one of the largest deferred DPAs in history with the prosecution authority of the District of Columbia in the United States for 3.9 billion USD.[184] The company was accused of conspiracy, bribery, and the corruption of government officials across the world in order to retain business and sell aircrafts.[185] The company ran a multi-year scheme to enhance its business interests which began in 2008.[186] On 29 January 2022, Airbus admitted to the charges in exchange for deferred prosecution, ongoing cooperation with continuing investigations and prosecutions of individuals involved in the scheme, the payment of the fine and remediation.[187] A major motivation for pursuing a deferred prosecution agreement with Airbus was the shift in prosecutorial culture from a retroactive focus on punishment to an ex-ante emphasis on compliance.[188]

The use of deferred prosecution agreements in tax noncompliance prosecutions is underdeveloped in global jurisprudence. This chapter explores the current rise in global economic crimes and non-compliance and its effects on prosecution efficacy. The chapter discusses the legal framework of DPAs and their positives and criticism. An analysis of DPAs

[182] Airbus 'Who we are' https://www.airbus.com/en/who-we-are (accessed 29 August 2022).
[183] Airbus Áirbus reports Half-year(H1) 2022 results. https://www.airbus.com/en/newsroom/press-releases/2022-07-airbus-reports-half-year-h1-2022-results (accessed 29 August 2022).
[184] The United States Department of Justice 'Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case' https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case (accessed 29 August 2022).
[185] n 184 above.
[186] n 184 above.
[187] n 184 above.
[188] W Kaal and T Lacine 'The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013' (2014) 70 *The Business Lawyer* 61.

in the context of tax offence prosecutions is then conducted. In conclusion the chapter discusses the use of DPAs in South Africa and its impact on the mandate of SARS and the NPA.

4.2. The global trend in economic crimes and tax non-compliance.

Economic crime is understood to be illegal acts committed by a group of individuals or corporates to obtain a financial or professional advantage.[189] The crimes include fraud, corruption, money laundering, tax evasion and tax non-compliance.[190] The total estimated cost of global economic crime in 2021 was 213.9 billion USD.[191] This amount is a significant increase from 180.9 billion USD in 2020.[192] Contributors to the increase in economic crime were the digital transformation, evolving global markets and expanding digital channels.[193] Economic crimes have seen a stark increase in countries that are in the process of economic, social and political development.[194] Furthermore these countries tend to have the most difficulties investigating these offences.[195]

Tax evasion and tax non-compliance are the main types of economic crimes perpetuated by large corporations that contribute to the cost of global economic crime.[196] Tax noncompliance remains a threat to economies across the world.[197] Countries across the world must recognise globalisation and increasing technological change that threaten the tax base.[198] States continue to make efforts to combat this negative phenomenon.[199] Criminal prosecution of tax crimes is required to deter further tax crimes.[200] Globally, there appears to be a decline in corporate

[189] Europol 'Economic crime' https://www.europol.europa.eu/crime-areas-and-statistics/crime-areas/economic-crime (accessed 2 September 2022).
[190] D Mehta 126th International Senior Seminar Visiting Experts' Papers *Economic Crime in a globalizing society its impact on the sound development of the State- An Indian Perspective* page 72.
[191] LexisNexis Risk Solutions *True Cost of Financial Crime Compliance Study, Global Report June 2021.*
[192] n 191 above.
[193] LexisNexis *Risk Solutions 2021 True Cost of Financial Crime Compliance Study: United States and Canada Edition.*
[194] D Mehta (n 190 above), 72.
[195] D Mehta (n 190 above), 72.
[196] n 191 above.
[197] D Saxunova & R Szarkova 'Global Efforts of Tax Authorities and Tax Evasion Challenge' (2018) *Journal of Eastern Europe Research in Business and Economics* 2.
[198] T Neubig 'Global Tax Administration Initiatives Addressing Tax Evasion and Avoidance' (2018) *Tax Notes International* 1137.
[199] T Neubig (n 198 above).
[200] 1971 Annual Report of the Commissioner of Internal Revenue 36 at 29.

prosecutions,[201] including the prosecution of tax crimes.[202] The current traditional criminal prosecution of economic crime is ineffective due to the ability of large corporations to subvert the criminal justice system.[203] Foreign jurisdictions have turned to the use of non-trial resolutions to resolve cases of economic crime.[204] Non-trial resolutions are a wide range of mechanisms including sanctions and confiscations used by the prosecuting authority in agreement with an individual or company, to resolve criminal matters without the need for full court proceedings.[205] This research focuses specifically on the sub-category of non-trial resolutions DPAs as recommended by the Zondo Commission of Inquiry.

4.3. Deferred Prosecution Agreements (DPAs)

The US introduced DPAs as an alternative to the prosecution of non-violent juvenile and drug offenders.[206] These agreements allowed the government to refrain from prosecuting a defendant in exchange for a formal binding agreement which admits to the wrongdoing, restitution, and cooperation with other obligations.[207] In 1991, the US Department of Justice (DOJ) extended the use of DPAs to companies in the matter of Salomon Brothers for Securities fraud violation.[208] Since 1991, the US DOJ has issued a series of guidelines to direct the

[201]B Garrett 'Declining Corporate Prosecutions' https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2020/03/57-1-declining-corporate-prosecutions.pdf (accessed 2 September 2022) page 115.
[202]European Parliament 'Member States 'capacity to fight tax crimes Ex post impact assessment' July 2017 https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603257/EPRS_STU(2017)603257_EN.pdf (accessed 2 September 2022).
[203] Dr A Makinwa 'Current Trends in Foreign Bribery Investigations and Prosecutions' June 2020 https://assets-global.website-files.com/5e0bd9edab846816e263d633/5f15e0a4a35dd9b7abd817b1_FACTI%20BP6%20Foreign%20bribery.pdf (accessed 2 September 2022) page 4.
[204] OECD 'Resolving Foreign Bribery Cases with Non-Trial Resolutions, Settlements Non-Trail Agreements by Parties to the Anti Bribery Convention' December 2019 https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf (accessed 2 September 2022) page 19.
[205] UNODC *Alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return* September 2021 https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2021-September-6-10/CAC-COSP-WG.2-2021-CRP.1.pdf (accessed 3 September 2022).
[206] House Hearing, 111 Congress 'Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements' June 2009 https://www.govinfo.gov/content/pkg/CHRG-111hhrg50593/html/CHRG-111hhrg50593.htm (accessed 10 September 2022).
[207] n 206 above.
[208] R Delaney 'Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements' (2009) 93(2) *Marq.L.Rev* 875 page 879.

prosecution on handling DPAs. [209] Since the 1990s, the US has claimed billions of US dollars from offending firms including from foreign firms[210] through the effective use of DPAs. In addition, they have been successful in serving as deterrence for companies and incentivised compliance.[211]

For DPAs to be effective in any country, clear and prescribed rules and guidance provided by the legislature, must exist. In 2014, the UK legislature promulgated the Crime and Courts Act 2013.[212] Schedule 17 of the Crimes and Court Act 2013 states that the purpose of DPAs is 'to provide prosecutors with an extra tool to tackle economic crime in England and Wales which currently too often goes without redress.' The UK also provides a Code for prosecutors and criminal procedure rules on how to facilitate these agreements in a manner which is consistent with constitutional principles and the rule of law.[213] Schedule 17 of the Crime and Courts Act provides procedural guidance for DPAs. First, a designated prosecutor[214] may enter into a DPA with a person who is a juristic person but never an individual.[215] Second, the agreement must have a statement of facts relating to the offences and may include admissions made by the juristic person.[216] The DPA must have an expiry date when the DPA ceases to have an effect.[217] The DPA may order the juristic person to pay a financial penalty to the prosecutor;[218] compensate victims of the alleged offences;[219] disgorge any profits;[220] implement compliance programmes;[221] co-operate with any investigations relating to the offences[222] and pay costs to the prosecutor relating to the DPA.[223] This list is not exhaustive.[224] Third, the DPA must have judicial oversight.[225] The first instance of judicial oversight begins at the negotiation of the

[209] W Kaal and T Lacine 'The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013' (2015) 70(1) *The Business Lawyer* 61 page 73.
[210] J Arlen 'The potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S' in T Soreide & A Makinwa *Negotiated Settlements in Bribery Cases: A Principled Approach* (2020) 156.
[211] J Arlen (n 210 above).
[212] M Bisgrove & M Weekes (n 46 above).
[213] M Bisgrove & M Weekes (n 46 above).
[214] Schedule 17 (3) of the Crime and Court Act 2013.
[215] Schedule 17 (4) of the Crime and Court Act 2013.
[216] Schedule 17 (4)(1) of the Crime and Court Act 2013.
[217] Schedule 17 (5)(2) of the Crime and Court Act 2013.
[218] Schedule 17 (5)(3)(a) of the Crime and Court Act 2013.
[219] Schedule 17 (5)(3)(b) of the Crime and Court Act 2013.
[220] Schedule 17 (5)(3)(d) of the Crime and Court Act 2013.
[221] Schedule 17 (5)(3)(e) of the Crime and Court Act 2013.
[222] Schedule 17 (5)(3)(f) of the Crime and Court Act 2013.
[223] Schedule 17 (5)(3)(g) of the Crime and Court Act 2013
[224] Schedule 17 (3) of the Crime and Court Act 2013.
[225] Schedule 17 (7)-(8) of the Crime and Court Act 2013.

DPA. This requires that the prosecution applies to the courts for a declaration that entering into a DPA with the juristic person is in the interest of justice[226] and is fair, reasonable, and proportionate.[227] The second instance of judicial oversight is at the finalisation of the DPA. The prosecutor must seek a court declaration that the terms of the final DPA are in the interest of justice[228] and fair, reasonable and proportionate.[229] The Court has the discretion to reject the proposed terms of the DPA.[230] Upon the court's approval of the DPA, the prosecutor must publish the DPA and the court's declaration of the DPA and its reasons.[231] In the event of any breach of the terms of the DPA, the prosecutor may make an application to the court.[232] The court will assess the breach on a balance of probabilities.[233] Where the court finds the juristic person is guilty of a breach, the court may either invite proposals to remedy the breach[234] or terminate the DPA.[235] In the event of termination of the DPA, the prosecution may prosecute the juristic person.[236]

This illustrates the legislative framework of deferred prosecution agreements. This may differ from various jurisdictions, but the commonality is that there is legislation that governs the use of DPAs for the juristic person who is guilty of some form of economic crime, including tax offences,[237] as well as some further guidance provided to prosecutors empowered to conclude these agreements. There is often a penalty for the juristic person for the offences committed, this penalty is comparable to the fine a court would have imposed on conviction.[238] Judicial oversight is a common feature of deferred prosecution agreements to ensure fairness.[239] Finally, deferred prosecution agreements do not absolve the juristic person of wrongdoing,[240] but rather

[226] Schedule 17 (7)(1)(a) of the Crime and Court Act 2013.
[227] Schedule 17 (7)(1)(b) of the Crime and Court Act 2013.
[228] Schedule 17 (8)(1)(a) of the Crime and Court Act 2013.
[229] Schedule 17 (8)(1)(b) of the Crime and Court Act 2013.
[230] Schedule 17 (8)(6) of the Crime and Court Act 2013.
[231] Schedule 17 (8)(7) of the Crime and Court Act 2013.
[232] Schedule 17 (9)(1) of the Crime and Court Act 2013.
[233] Schedule 17 (9)(2) of the Crime and Court Act 2013.
[234] Schedule 17 (9)(8)(a) of the Crime and Court Act 2013.
[235] Schedule 17 (9)(3)(a) of the Crime and Court Act 2013.
[236] Schedule 17 (9)(3)(a) of the Crime and Court Act 2013.
[237] Schedule 17 (16) of the Crime and Court Act 2013.
[238] Schedule 17 (5)(4) of the Crime and Court Act 2013.
[239] B Greenblum 'What Happens to a prosecution deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005) 105(6) *Columbia Law Review* 1863 at 1898.
[240] M Bisgrove & M Weekes (n 46 above), 417.

recognise the need for expeditious resolution of these economic crime matters which when resolved through the ordinary court process are slow and costly.[241]

The use of DPAs can be effective as they resolve the difficulty experienced by prosecution authorities, globally, in achieving successful investigations and prosecutions of corporates that commit economic crimes.[242] DPAs allow prosecutors to regulate the future conduct of entities[243] and impose future criminal sanctions for any future criminal conduct of the entity.[244] For the purposes of this research, the appealing element of DPAs, is that they impose financial sanctions which allow the State to recoup the money which has been diverted away from the fiscus.[245]

DPAs remain controversial in law. The first criticism is that they allow corporations to avoid criminal liability and accountability.[246] The second criticism is that larger corporations tend to re-offend as the penalties imposed tend to be marginal compared to their overall profits.[247] A final criticism is that DPAs do not develop jurisprudence on corporate accountability and economic crime as these cases do not proceed through the ordinary criminal justice system.[248]

In considering the literature around DPAs, it is evident that they do provide an alternative to prosecution authorities, globally, on how to address increasing economic crimes and tax non-compliance.

[241] M Bisgrove & M Weekes (n 46 above), 417.
[242] M Bisgrove & M Weekes (n 46 above), 417.
[243] B Greenblum (n 48 above), 1867.
[244] J Arlen & M Kahan 'Corporate Regulation through Non-Prosecution' (2017) 84 *Univ.Chic.L.Rev.* 323 at 330.
[245] M Bisgrove & M Weekes (n 46 above), 417.
[246] C Wray & R Hur 'Corporate Criminal Prosecution in Post-Enron World: The Thompson Memo in Theory and Practice (2006) 43 *Am.Crim.L.Rev.* 1095 at 1104.
[247]Bloomberg Law US Considered HSDB Charge that Could Upend 2012 Settlement' September 2017 https://news.bloomberglaw.com/business-and-practice/u-s-considers-hsbc-charge-that-could-upend-2012-settlement/ (accessed 7 September 2022).
[248] J Arlen 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8(1) *Journal of Legal Analysis* 191.

4.4. Deferred Prosecution Agreements in Tax Cases

Serco Geografix Limited (SGL) is a private limited company whose primary business is to manufacture and supply electronic monitoring equipment.[249] SGL is a wholly-owned subsidiary of Serco Limited (SL).[250] Investigations into SGL and SL revealed that there was evidence of fraudulent and dishonest conduct on the part of both entities.[251] Most relevant for this research, is the manipulation of accounting records between SGL and the holding company SL.[252] This manipulation significantly reduced the profits of both entities affecting their tax obligations.[253]

In dealing with the matter, the UK Serious Fraud Office (SFO) found that SGL and SL were guilty of various offences relating to the manipulation of its accounting records. In the indictment provided by the SFO, Count 4 stated that both entities

> 'dishonestly and with a view to gain for itself or another or with intent to cause loss to another, falsified a record or document required for any accounting purpose, namely the Company Annual Report and Financial Statements for year-end 31 December 2011, by making an entry therein which was or may have been misleading, false or deceptive in a material particular in that the reported profit and loss turnover figure included an additional £7.5m of purported revenue.'[254]

The SFO followed the guidance provided in Schedule 17 of the Crime and Court Act. The DPA proposed to the courts required that SL pay a financial penalty of nineteen million pounds; payment of the SFO costs; that there be an improvement to ethics and compliance policies; and procedures and continued co-operation with the SFO in further investigations.[255]

The matter of SGL and SL illustrates three principles. First, the investigation of the matter began in 2014 and was finalised in the first quarter of 2019. This is a significantly reduced period of litigation as compared to ordinary criminal trials where large corporate entities are

[249] *Serious Fraud Office v Serco Geografix Limited* (Case No: U20190413) para 1.
[250] *Serious Fraud Office v Serco Geografix Limited* (n 226 above) para 3.
[251] *Serious Fraud Office v Serco Geografix Limited* (n 226 above) para 4.
[252] *Serious Fraud Office v Serco Geografix Limited* (n 226 above) para 4.
[253] *Serious Fraud Office v Serco Geografix Limited* (n 226 above) para 7.
[254] *Serious Fraud Office v Serco Geografix Limited* (n 226 above) para 7-8.
[255] *Serious Fraud Office v Serco Geografix Limited* (n 226 above) para 35.

involved. Second, the State was able to recoup a significant amount of money in penalties from SGL and SL as well as the costs of the investigation. Finally, SGL and SL are subject to further monitoring by the SFO and must comply with further investigations. This case illustrates how the prosecution authority can use DPAs when dealing with tax-related offences.

4.5. Deferred Prosecution Agreements in South African Tax Law

Recommendation 4 of the Zondo Report, proposes the introduction of DPAs in South African law.[256] Deputy Chief Justice Zondo recommends the introduction of legislation that allows for DPAs between the prosecution authority and corporations.[257] The recommendations state that DPAs will be allowed where a company has self-reported facts from which criminal liability could be inferred and has furthermore co-operated fully in making such reports.[258] The company has agreed to engage in specific conduct intended to ensure that such conduct is not repeated.[259] The company has also paid a fine or has been subject to remedial action.[260] Lastly the terms and conditions of the DPA have been sanctioned by a tribunal of the agency.[261] Zondo J does not specifically recommend the use of DPAs in tax matters or within the legal framework of SARS. The intention of this recommendation is to provide alternatives to the current South African legal framework to deal with the increase in corruption and economic crimes.[262]

Below I discuss the recommendations and how they can be utilised in the context of tax disputes.

4.5.1. The proposed legal framework of DPAs in the context of tax disputes.

DPAs by their nature, are a prosecutorial mechanism and the power to negotiate and conclude a DPA with an offending company lies with the prosecuting authority.[263] The NPA is the only

[256]Zondo J *Judicial Commission of Inquiry into State Capture Report: Part VI* 2021 page 23-25.
[257] Zondo J (n 33 above) para 61.
[258] Zondo J (n 33 above) para 61.1
[259] Zondo J (n 33 above) para 61.2.
[260] Zondo J (n 33 above) para 61.3.
[261] Zondo J (n 33 above) para 6.1.4.
[262] Zondo J (n 33 above).
[263] The United Kingdom Ministry of Justice *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* 2012, page 3.

constitutionally mandated institution that can prosecute and enter into agreements in the context of prosecution.[264] Section 179(7) of the Constitution states that all other matters concerning the prosecuting authority must be determined by national legislation. The legislature will need to make amendments to the NPA Act to allow for the use of DPAs in tax disputes. The Criminal Procedure Act 51 of 1977 (CPA) should be amended akin to Schedule 17 of the Crime and Courts Act 2013. The recommended amendments would be the introduction of DPAs as part of the South African criminal procedure. The amendments would allow for the use of DPAs as recommended by Zondo J. Specifically DPAs between a company and the NPA would defer prosecution for a specific period of time on the condition of the payment of a fine and other penalties, co-operation with the prosecuting authority with other prosecutions; and specific rehabilitative conditions on the part of the company. This amendment falls within the duties and functions of the Portfolio Committee on Justice and Constitutional Development, as well as the Minister of Justice.[265] In addition, there would need to be further amendments to the NPA's Prosecution Policy and Directives in terms of section 21 and section 22(6) of the NPA Act, to guide prosecutors' conduct in the administration of DPAs.

The recommendation made by Zondo J, that DPAs, be used where companies have self-reported their criminal conduct, is not favourable in the context of tax disputes. DPAs, though not a formal prosecution, amount to a prosecutorial sanction. This would mean that entities that self-report criminal conduct that amounts to a tax offence and then enter into a DPA would have their section 35 right against self-incrimination[266] violated. Where taxpayers make voluntary self-incriminating statements, they are not offered the protection of section 35 of the Constitution.[267] Also, an analysis of other foreign jurisdictions' use of DPAs does not restrict the use of DPAs to self-reporting.[268] The purpose of DPAs is to achieve accountability without the challenge and cost of conventional investigation and prosecution.[269] The limitation to self-reporting as envisaged by Zondo J, renders the use of DPAs in this context, redundant as the state would have to rely on tax offenders to self-report offences to enter into a DPA to recover

[264] Constitution of the Republic of South Africa sec 179(2)
[265] Constitution of the Republic of South Africa sec 44(1)(a)(ii).
[266] Constitution of the Republic of South Africa sec 35.
[267] South African Institute of Taxation 'Civil vs Criminal Investigations. A Taxpayer's Right Not to Give Self-Incriminating Evidence' March 2009 https://www.thesait.org.za/news/96221/Civil-vs.-Criminal-Investigations.-A-Taxpayers-Right-Not-To-Give-Self-Incriminating-Evidence.htm (accessed 06 October 2022).
[268] Schedule 17 (1) of the Crime and Court Act 2013.
[269] M Bisgrove & M Weeks (n 36 above) page 417.

lost tax revenue, which is unlikely to be the case. In addition, as highlighted in chapter 5 of this mini dissertation, many of the successful DPAs that allow the state to recover significant revenue, are not done through the self-reporting mechanism.

Section 103(1) of the TAA empowers the Minister of Finance, after consultation with the Minister of Justice, to create rules around various tax dispute procedures. Section 103(2) of the TAA allows for the rules envisaged in section103(1) of the TAA specifically dispute procedures between SARS and an aggrieved taxpayer. To allow for DPAs to be used in the context of Chapter 9 of the TAA, the Minister of Finance, after consultation with the Minister of Justice and Constitutional Development would need to develop the relevant rules to allow for DPAs to fall within the ambit of alternative dispute resolution procedures.[270]

To give effect to the proposed amendments of Chapter 9 of the TAA, the MOU between SARS and the NPA STU would need to be amended to provide guidance on the use and administration of DPAs in tax cases. In terms of section 7 of Annexure A of the MOU between the NPA and SARS, the responsibility to resolve a matter by civil remedies or through criminal investigations, is in the mandate and discretion of SARS.[271] Where the circumstances justify that the NPA enter into prosecution agreements with legal entities such decisions must be made in consultation with SARS.[272] This presents two possible options for the use of DPAs in the context of tax disputes. The first option is where the decision to enter into a DPA, is made by the Commissioner of SARS in terms of section 103 of the TAA and section 7 of Annexure A of the MOU between the NPA and SARS. The second option is where the decision to enter into a DPA is a prosecutorial decision in terms of the NPA Act and section 7.5 of Annexure A of the MOU between SARS and the NPA. I will discuss the consequences of both options and argue that the decision to enter into a DPA should be a prosecutorial decision.

4.5.2 PAJA and the decisions of SARS

As highlighted previously in this discussion, the decision to enter into DPA can vest with SARS as an alternative dispute resolution mechanism. In order to understand how DPAs can exist within the tax legal framework, an analysis must be done on the current dispute resolution provisions of the TAA. All SARS dispute resolution processes must be done in terms of section

[270] Act 28 of 2011 sec 103(2).
[271] Annexure A to the MOU between the NPA and SARS para 7.5.
[272] Annexure A of the MOU between the NPA and the SARS 10.4.

195 of the Constitution[273] and proper procedures must be put into place.[274] Chapter 9 of the TAA outlines the dispute resolution mechanisms available to an aggrieved taxpayer. The provisions of Chapter 9 must be read with the procedures of SARS dispute process[275] commonly known as the dispute resolution process rules.[276]

There are four stages to SARS dispute resolution process.[277] The first stage is the assessment stage where SARS issues an assessment to the taxpayer.[278] Once an assessment is raised the taxpayer may accept such assessment[279] or where the taxpayer is aggrieved by the assessment the taxpayer may within thirty business days[280] request reasons in the prescribed manner [281]for the assessment raised. Once a taxpayer has requested reasons, SARS has forty five business days to provide the taxpayer with reasons for its assessment.[282] Where the aggrieved taxpayer is dissatisfied with the reasons provided by SARS, the taxpayer is entitled to lodge an objection[283] which begins the second stage of the dispute resolution process.[284] In this stage, once the aggrieved taxpayer lodges an objection, in terms of section 106, SARS may allow the objection and reassess the assessment,[285] or disallow the objection and require the taxpayer to comply with the initial assessment.[286] Where the objection is disallowed, in terms of section 106(5) of the TAA, SARS must state the basis for its disallowance. The aggrieved taxpayer may appeal the decision.[287] This initiates the final stage of the dispute resolution process.[288]At this juncture, the taxpayer may proceed by way of litigation, as per section 107(1) of the TAA[289] or alternatively, in terms of section 107(5) of the TAA proceed by way of alternative dispute

[273]*Nondabula v Commissioner: SARS* 2018 (3) SA 541 (ECM) para 24. .
[274] C Olivier 'A Critical Analysis of The South African Revenue Service (SARS) Dispute Resolution Process' unpublished M. Com dissertation, Nelson Mandela University, 2018 1.

[275] Government Gazette 37819 of 11 July 2014.
[276] C Olivier (n 274 above).
[277] C Olivier (n 274 above), 11.
[278] C Olivier (n 274 above), 11
[279] C Olivier (n 274 above), 11
[280] n 275 above, Rule 6(1).
[281] n 275 above, Rule 6(3).
[282] SARS 'SARS guide on the new dispute resolution rules-issue 184' January 2015.
[283] n 275 above, Rule 7.
[284] C Olivier (n 274 above),12.
[285] n 273 above, Rule 9(1).
[286] n 273 above, Rule 9(1).
[287] C Olivier (n 274 above), 15
[288] C Olivier (n 274 above),15.
[289] n 275 above, Rules 10 and 11.

resolution where the taxpayer enters into a settlement agreement with SARS.[290] Where the aggrieved taxpayer elects to proceed in terms of 107(5) of the TAA, there must be mutual agreement with SARS.[291] The dispute resolution process and the alternative dispute resolution process allows for the aggrieved taxpayer and SARS to resolve and settle the dispute in a less formal manner which is inexpensive and streamlined.[292]

The legal framework of Chapter 9 of the TAA raises a number of legal challenges. Most relevant for this research, is whether the framework of Chapter 9 of the TAA, affects the taxpayer's Constitutional rights. Section 34 of the Constitution states that 'everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.' In *Lesapo v North West Agricultural Bank*,[293] the Constitutional Court confirmed that section 34 of the Constitution, is cardinal for a stable and orderly society and ensures regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help.[294] Section 33 of the Constitution guarantees the right to just administrative action. This includes the 'right to administrative action that is lawful, reasonable and procedurally fair.'[295]Arguably, reasonableness is the cornerstone of the right to just administrative action.[296] As an organ of state SARS is bound by section 34 of the Constitution and PAJA to make decisions that are reasonable, lawful, and procedurally fair.[297]

Section 105 of the TAA states that 'a taxpayer may only dispute an assessment or decision as described in section 104 of the TAA in proceedings under Chapter 9 unless a High Court directs otherwise.'[298] The court has yet to consider the constitutionality of the entirety of section 105 of the TAA. However, the courts have considered the reviewability of decisions made by SARS

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[290] SARS 'Guide on Mutual Agreement Procedures' Available at 'https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-IT-G24-Guide-on-Mutual-Agreement-Procedures.pdf' Accessed 2 November 2022.
[291] Act 28 of 2011, sec 107(5).
[292] SARS 'Dispute' Available at https://www.sars.gov.za/businesses-and-employers/tax-exempt-institutions/dispute/#:~:text=By%20mutual%20agreement%2C%20SARS%20and,may%20be%20resolved%20or%20settled.(Accessed 28 October 2022).
[293] *Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC).
[294] *Lesapo v North West Agricultural Bank* (n 294 above), para 22.
[295] Constitution of the Republic of South Africa, 1996, sec33(1).
[296] G Goldswain 'The winds of change – an analysis and appraisal of selected constitutional issues affecting the rights of taxpayers' unpublished PhD thesis, University of South Africa, 2012, 237.
[297] S de Lange & D van Wyk 'The Right to Just Administrative Action in the Context of Suspending Payment of Disputed Tax' (2017) 20 *PER/PELJ* 3.
[298] *Rampersadh v Commissioner of the South Africa Revenue Service* (5493/2017) 2018 ZAKZPHC 36 para 19.

with respect to the tax liabilities of taxpayers. In *Metcash Trading Limited v CSARS and the Minister of Finance,*[299] the court considered whether section 33,33A and 34 of the Value Added Tax Act (VAT Act)[300] adversely affected the taxpayers' section 33 and 34 Constitutional rights to just administrative action and access to courts respectively.[301] In this matter the Constitutional Court found that the relevant sections 'deal with the statutory right afforded to aggrieved vendors to challenge the rejection by the Commissioner of objections to assessments and associated decisions.'[302] The court further found that the sections allow for the aggrieved vendor to challenge the Commissioner's decision in the Special Court or Tax Board.[303] The aggrieved vendor is entitled in terms of section 34 of the VAT Act, to bring the decisions of the Special Court before an ordinary court as further recourse.[304] The court also noted that these provisions of the VAT Act allow for the reconsideration of the administrative decisions of the Commissioner and provides for an avenue for corrective action.[305] The court also noted that these provisions of the VAT Act do not exclude judicial review but rather create a 'tailor-made mechanism for redressing complaints about the Commissioners decisions' while allowing for avenues of relief.[306]

In *Rampersadh v Commissioner,*[307] the High Court considered whether an aggrieved taxpayer may object or review decisions by the Commissioner in the High Court. The court confirmed that section 7(2) of PAJA allows an aggrieved taxpayer to approach the Court, if the available internal remedies have been exhausted or if there are exceptional circumstances that warrant an exemption, and it is in the interest of justice.[308] The court will grant access to an aggrieved taxpayer where there are no internal remedies available to an aggrieved taxpayer to object or review decisions made by the Commissioner.[309] The cases above do not directly deal with the constitutionality of the alternative dispute procedure as set out in Chapter 9 of the TAA but they do illustrate the courts analysis and application of PAJA with regard to the dispute resolution mechanisms found in the various tax legislation. The cases illustrate that the dispute

[299] *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* 2001 (1) SA 1109 (CC).
[300] Value Added Tax Act 89 of 1991.
[301] *Metcash Trading Limited v CSARS* (n 299 above), para 33.
[302] *Metcash Trading Limited v CSARS* (n 299 above), 32.
[303] *Metcash Trading Limited v CSARS* (n 299 above), 32.
[304] *Metcash Trading Limited v CSARS* (n 299 above), 32.
[305] *Metcash Trading Limited v CSARS* (n 299 above), 32.
[306] *Metcash Trading Limited v CSARS* (n 299 above), 33.
[307] *Rampersadh v Commissioner* for the South African Revenue Service and Others 2018 ZAKZPHC 36.
[308] *Rampersadh v Commissioner* (n 307 above), para 8.
[309] *Rampersadh v Commissioner* (n 307 above), para 9.

resolution procedures do not oust the aggrieved taxpayer's section 33 Constitutional rights and that taxpayers may approach the High Court once they have exhausted internal remedies.

The next point of consideration necessary to understand the possible legal framework of DPAs in the context of tax legislation, is what decisions made by the Commissioner are excluded from the application of PAJA. Section 1 of PAJA defines what is meant by a decision. This definition includes a decision of an administrative nature that is proposed to be made or required to be made under an empowering provision that is not excluded by PAJA or an organ of state that adversely affects rights and that has a direct and external legal effect.[310] Administrative actions which are excluded from PAJA, are found in section 1(aa) to (ii) of PAJA. In *Metcash Holdings,* Kriegler J found that 'it has long been accepted that when the Commissioner exercises discretionary powers conferred upon him or her by statute, the exercise of the discretion constitutes administrative action which is reviewable in terms of the principles of administrative law.'[311] However, in *Corpclo 2290 Cc t/a U Care v Registrar of Bank,*[312] the Supreme Court of Appeal found the decision by an organ of state to investigate does not itself adversely affect the rights of the person concerned or have an external legal effect.[313] Therefore, such decision does not amount to an administrative action and is not subject to review in terms of PAJA.[314]

It is submitted that decisions made by SARS the to investigate a taxpayer's affairs in terms of the relevant empowering legislation does not amount to administrative action in terms of PAJA. This position was confirmed in *Carte Blanche Marketing CC and Others v CSARS* and will be discussed in the proceeding chapter.[315]

4.5.3. DPAs as a SARS decision

As illustrated in the case *Serious Fraud Office v Serco Geografix Limited,* DPAs can be utilised to resolve tax disputes involving criminal misconduct of a taxpayer. In the context of the South African

[310] M van Heerden 'Promotion of Administrative Justice Act 2000: three types of administrative actions' (2009) 44 *Journal of Public Administration* 183 page 186.
[311] *Metcash Trading Limited v CSARS* (n 299 above), 1134.
[312] *Corpclo 2290 Cc t/a U Care v Registrar of Bank* 2013 1 SA 127 (SCA).
[313] *Corpclo 2290 Cc t/a U Care v Registrar of Bank* (n 312 above), para 26.
[314] *Corpclo 2290 Cc t/a U Care v Registrar of Bank* (n 312 above), 26.
[315] *Carte Blanche Marketing CC and Others v Commissioner of the South African Revenue Service* 2020 (5) SA 463 (GJ).

tax legal framework, section 43(1) of the TAA empowers a SARS senior official to make the decision to investigate a taxpayer who is suspected of committing a serious tax offence. When the investigation is finalised, and SARS is of the opinion that there is sufficient evidence of criminal misconduct, they may proceed to lay criminal charges and provide assistance that is reasonably required for the investigation and prosecution of tax offences.[316]

In *Carte Blanche Marketing CC and Others v CSARS, the* court found that such a decision by SARS to investigate the affairs of a taxpayer for possible criminal conduct, does not amount to administrative action and does not fall in the ambit of PAJA. In addition, SARS seeks to protect the rights of the taxpayer by mandating that material obtained in an audit after a referral for criminal investigation, must be kept separate and is inadmissible in criminal proceedings.[317] Arguably, the action by SARS to exercise its section 3(1)(2)(f) duties in administering of the tax act by referring a matter for criminal prosecution, is not subject to PAJA as it is a statutory duty of SARS to investigate criminal misconduct as it relates to tax administration and lay a formal complaint. This statutory duty is not discretionary on the part of SARS. An interpretation of section 3(1)(2)(f) requires SARS in its administration of tax act to lay criminal charges where there is evidence of an offence in terms of the relevant tax Act.

This context leads to two important considerations. Primarily it is whether or not SARS can make the decision to enter into a DPA with an offending taxpayer. Furthermore, it is whether or not such a decision or failure to make a decision to enter into a DPA, is subject to review by the taxpayer in terms of PAJA.

4.5.3.1. Can SARS enter into a DPA with an offending taxpayer?

DPAs, by their very nature, are a prosecutorial mechanism. The decision to enter into a DPA therefore is prosecutorial in nature and is not, a tax administrative decision. The question is whether or not in terms of 10.5 of Annexure A of the MOU between the NPA and SARS, SARS must make a decision to consent to the DPA. This provision requires that when the NPA is considering entering into any agreements with the accused taxpayer, such consideration must be made with prior consultation with SARS.[318] In this case, inference can be drawn that though the final decision rests with the NPA, the NPA cannot conclude an agreement without the consultation and

[316] Act 28 of 2011, section 3(1)(f)(i)-(ii).
[317] SARS ' Guide on to the Tax Administration Act 28 of 2011' Available at https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-TAdm-G01-Short-Guide-to-the-Tax-Administration-Act-2011.pdf (Accessed on 29 October 2011).
[318] Annexure A of the MOU between the NPA and the SARS 10.5.

possible consent of SARS. The question to consider is what happens where SARS fails to make a decision timeously as to whether or not it agrees to the NPAs decision to enter into a DPA with the accused taxpayer. As canvassed in this study, decisions to refer a matter for prosecution, does not amount to an administrative decision and is not subject to review in terms of PAJA. However, the decision to resolve tax disputes in terms of an alternative dispute resolution procedure, is an administrative decision.[319]

Section 1(a)(ii) of the PAJA states that an administrative action is 'any decision taken, or any failure to take a decision, by an organ of state, when exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person, and which has a direct, external legal effect.' SARS in its guide, emphasises that PAJA essentially mandates that tax administrative actions that materially and adversely affect the taxpayers' rights must adhere to fairness requirements.[320] The decision to enter into a DPA could be perceived to affect adversely the accused taxpayer's rights to access the courts[321] in terms of section 34 of the Constitution as well as the section 33 Constitutional right to just administrative action.

In *Ackermans LTD v Commissioner for the South African Revenue Services*,[322] the court had to consider whether the delay of SARS in issuing an additional assessment was procedurally unfair in terms of section 6 of PAJA.[323] Mothle J found that public organs of State are required to execute public power without delay.[324] This confirmed that the decision to raise additional assessments was administrative in nature and that the undue delay on the part of SARS was procedurally unfair and reviewable in terms of section 6(3)(a) of PAJA.[325] Mothle J also confirmed that the precedent is that unreasonable delays in the exercise of public power creates legal uncertainty and has a negative impact on the interest of justice.[326] The courts have the

[319] S de Lange & D van Wyk (n 297 above), 4.
[320] SARS 'Short Guide to the Tax Administration Act, 2011 (Act No.28 of 2011), 2018 10-11.
[321] F Davis 'Judicial Review of Deferred Prosecution Agreements: A Comparative Study' (2022) 60(3) *Columbia Journal of Transnational Law* 751 at 790.
[322] *Ackermans Limited v Commissioner for the South African Revenue Services* (16498/2013) 2015 (ZAGPPHC) 684.
[323] *Ackermans Limited v Commissioner for the South African Revenue Services* (n 323 above), para 2.
[324] *Ackermans Limited v Commissioner for the South African Revenue Services* (n 323 above), para 2.
[325] *Ackermans Limited v Commissioner for the South African Revenue Services* (n 323 above), para 27.
[326] *Ackermans Limited v Commissioner for the South African Revenue Services* (n 324 above), para 29.

discretion based on the facts of each case to determine what amounts to an unreasonable delay.[327]

In analysing the Mothle J decision, it can be said that the failure of SARS to make an administrative decision is subject to review under PAJA. In extending that principle an offending taxpayer who is aware of an investigation in terms of section 46(1) of the TAA and is also aware that there is consideration by the STU prosecutor to enter into a DPA subject to SARS' approval, may review the undue delay on the part of SARS. This scenario is not impossible. DPAs tend to be collaborative between the State and the accused given the nature and duration of the investigations. This is most evident when the accused has self-reported the criminal conduct and seeks to finalise, in a timeous manner, a DPA to minimise the impact that it may have on the company and its reputation.[328]

I submit that DPAs should be introduced within the South African legal framework to assist SARS to fulfil its mandate of effective and efficient tax collection and recovering tax revenue lost during the period of state capture. In the event that a DPA is concluded with an accused taxpayer, SARS would be entitled to recover the funds, interest, and understatement penalties. In addition to this, the DPA could have other penalties such as the costs of investigations and other penalties the prosecution authority deems fit.[329] The DPA may also request the accused taxpayer to implement policies and procedures to strengthen controls and avoid future transgressions. The decision to enter into a DPA, appears to be a prosecutorial decision and not a tax administrative decision and falls outside the ambit of PAJA. It would be inappropriate to locate the discretion to enter into a DPA with an offending taxpayer within the tax legislative framework. However, if the prosecutor decides to enter into a DPA, the decision to enter into the DPA must be made in consultation with SARS. When there is an unreasonable delay on the part of SARS the taxpayer may review such a decision.

[327] *Ackermans Limited v Commissioner for the South African Revenue Services* (n 324 above), para 31.
[328] R Cheung 'Deferred Prosecution Agreements: Cooperation and Confession' (2018) 77(1) *Cambridge Law Journal* 12.
[329] S Bronitt 'Negotiating Punishment Before Conviction?' in V Colvin & P Stenning (eds) *The Evolving Role of the Public Prosecutor: Challenges and Innovations* (2018) 15.

4.5.3. DPAs as a prosecutorial decision

DPAs are often located within a country's prosecutorial legal framework.[330] The power to enter into a DPA is exclusive to a prosecutorial institution.[331] Within the South African legal framework, the discretion to prosecute or not to prosecute, is made by the prosecutor who is assigned the docket.[332] This decision must be made in accordance with the NPA Prosecution Policy and Policy Directives.[333] When prosecutors exercises their discretion on whether or not to prosecute they must consider if there is sufficient and admissible evidence to provide a reasonable prospect of obtaining a conviction.[334] The prosecutor considers, among other things, the strength of the state's case, the credibility of witnesses, and whether or not the decision to prosecute is in the public interest.[335] In *Macrae v State,*[336] the Supreme Court of Appeal highlighted that the decision on whether or not to institute a prosecution has cost implications for the public purse.[337] In *National Director of Public Prosecution v Freedom Under Law,*[338] the Supreme Court of Appeal confirmed that PAJA excludes the 'decision to institute or continue a prosecution' from the definition of administrative action.[339] In terms of section 195(1)(g) of the Constitution, and in the spirit of transparent public administration, prosecutors are required to record their reasons for instituting or declining a prosecution.[340] Should persons with a legitimate interest in the matter request reasons for the exercise of prosecutorial discretion, prosecutors may entertain such requests.[341] The decision on whether or not to divert an accused and resolve a matter in a manner other than through ordinary court proceedings vests with the prosecutor[342] who has the discretion to do so in terms of the NPA Prosecution

[330] B Greenblum (n 48 above) 1865.
[331] B Greenblum (n 48 above) 1865.
[332] National Prosecuting Policy, 2014, sec 3.
[333] P du Toit & G Ferreira 'Reasons for Prosecutorial Decisions' (2015) 18(5) *PER/PELJ* 1507.
[334] *National Director of Public Prosecutions v Zuma* 2009 2 SA 277 (SCA) para 37.
[335] B Greenblum (n 38 above)
[336] *Macrae and Another v State* 2014 (2) SACR 2015 (SCA).
[337] *Macrae and Another v State* (n 104 above) para 1.
[338] *National Director of Public Prosecutions v Freedom Under Law* 2014 2 SACR 107 (SCA)
[339] *National Director of Public Prosecutions v Freedom Under Law* (n 106 above) para 27.
[340] P du Toit & G Ferreira (n 271 above) 1509.
[341] P du Toit & G Ferreira (n 271 above) 1509.
[342] NPA 'Access to Information Manual of the National Prosecuting Authority of South Africa: Version 1.06' 2016 13.

Policy and Directives. NPA Policy Directives: Part 7 provides for non-trial dispute resolution. This provision currently does not extend to juristic persons.[343]

The introduction of DPAs as an alternative to conventional tax prosecution raises a number of issues. The first is whether or not the decision to enter into a DPA is reviewable by the taxpayer or an interested party and secondly whether the decision not to enter into a DPA is subject to review.

4.5.3.1. The reviewability of the decision by the NPA to enter into a DPA.

Section 1(ff) of PAJA excludes the decision to prosecute from the definition of administrative action. The decision may only be reviewed where it offends the principle of legality.[344] In *Kaunda and Other v the President,*[345] the court found that the decision to not prosecute may be reviewable[346] in terms of PAJA as it is not explicitly excluded in the definition of administrative action. Professor Hoexter argues that the distinction between the decision to prosecute and not to prosecute is based on public interest.[347] This is due to the fact that the decision not to prosecute may not be in the public interest. In the matter of *Southern African Litigation Unit and Another v National Director of Public Prosecutions and Others,*[348] the court accepted arguments submitted by the applicants to review the decision by the NDPP to not prosecute international crimes on the basis that her exercise of public power must be rational, lawful and in good faith.[349] The court found that this decision to not prosecute did not satisfy this requirement. The NPA has provided review procedures[350] for an interested party or any accused to review its decision to prosecute or not to prosecute.

[343] N Somaru & Crista Rautenbach 'Non-Criminal Dispute Resolution in South Africa's Criminal Justice System: Proposals for reform' (2020) *SACR* 525 at 652.
[344] *Panday v National Director of Public Prosecutions* 2021 (1) SACR KZP para 9.
[345] *Kaunda and Others v President of the Republic of South Africa and Others* 2008 (1) SA 566 (CC).
[346] *Kaunda and Others v President* (n 346 above), para 81.
[347] C Hoexter *Administrative Law in South Africa* (2012) 242.
[348] *Southern African Litigation Unit and Another v National Director of Public Prosecutions and Others* 2012 (10) BCLR 1089 (GNP).
[349] *Southern African Litigation Unit and Another v National Director of Public Prosecutions* (n 342 above) para 18.
[350] NPA 'Procedure to follow for the review of a decision in a criminal matter' Available at: https://www.npa.gov.za/sites/default/files/Written%20Representations%20&%20Complaints.pdf (Accessed 06 November 2022).

A person may request a review and make representations on the decision made by a prosecutor to prosecute or not prosecute to the Senior Public Prosecutor in the relevant division.[351] If a person is dissatisfied with the reasons provided by the Senior Public Prosecutor, they may request reasons and make representations to the Chief Prosecutor or the Director of Public Prosecutions of the relevant division.[352] Finally, if the person is dissatisfied with the reasons provided, they may appeal to the office of the NDPP. The NDPP is entitled to review such decision in terms of section 175(d) of the Constitution. This appeal may only be made once the Director of Public Prosecutions has reviewed the decision of the Chief or Senior Public Prosecutor. In the case where the Director of Public prosecutions declines to prosecute and a person is not satisfied with the reasons provided for such a decision, they are entitled in terms of section 7 of the Act 51 of 1997 to request a *nolle prosequi.*

4.5.3.2. Private Prosecution in South Africa

In *Nundalal v Director of Public Prosecution KZN and Other,*[353] the court found that 'private prosecution is unusual and a departure from the law that criminal prosecutions must be conducted by a public prosecution.'[354] Section 7 to Section 13 of CPA provides the procedure for a private prosecution in South Africa. Section 7 provides for which persons are entitled to request a *nolle prosequi.* This includes 'a private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence.'[355] Upon obtaining a *nollie prosequi* the private person may institute a private prosecution against the accused subject to the statutory requirements set out in sections 7 to 16 of the CPA. In *Singh v Minister of Justice and Constitutional Development,*[356] the court found that the NPA is not obliged to issue a *nolle prosequi* in terms of section 7(2)(a) of CPA.[357] The prosecutor and the NDPP on appeal are only obliged to decide whether the evidence before them would result in a conviction for the State.[358] A study conducted by the Institute for Security Studies found that the NPA tended to

[351] n 351 above.
[352] n 351 above.
[353] *Nundalal v Director of Public Prosecution KZN and Other 2015* (AR723/2014) ZAKZPHC para 21.
[354] *Nundalal v Director of Public Prosecution* (n 354 above).
[355] Act 51 of 1997, sec7(1)(a).
[356] *Singh v Minister of Justice and Constitutional Development and others* 2009 (1) SACR 87 (N) at para 92F.
[357] *Singh v Minister of Justice and Constitutional Development* (n 357 above).
[358] *Singh v Minister of Justice and Constitutional Development* (n 357 above).

decline to prosecute due to a lack of resources.[359] A *nolle prosequi* is only valid for three months[360] and a court may grant an interdict where a private prosecutor lacks locus standi[361] or under the various provisions of the Vexatious Proceedings Act 3 of 1956.

In the matter of *Barclays Zimbabwe Nominees (Pvt) Ltd v Black,*[362] the Supreme Court of Appeal had to decide whether a private company was entitled to institute a private prosecution in terms of section 8 of Act 51 of 1997.[363] This matter was decided prior to the promulgation of the Constitution. The court found that this right to institute private prosecution did not extend to juristic persons.[364] In *National Society for Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another,*[365] the court had to consider whether the distinction between a natural and juristic person in terms of the provisions of the CPA dealing with private prosecution amounted to discrimination.[366] The Constitutional Court found that the National Society for the Prevention of Cruelty to Animals (NSPCA) where entitled to institute private prosecutions in terms of section 6(2) of the Society for the Prevention of Cruelty to Animals Act.[367] The court found that this was a unique power and necessary for the NSPCA to uphold its mandate.[368] However, the court decided it would not be judicious to decide on whether the sections of the CPA discriminated against juristic persons in not allowing them to institute private prosecutions.[369] In analysing these two cases the precedent is that a person including the complainant or other person or party whom the NDPP considers relevant[370] may review the decision to not prosecute and request reasons from the NPA. If they are dissatisfied with the reasons, they may either review the decision in terms of PAJA or on

[359] J Redpath *Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa* 2012 page vi.
[360] Act 51 of 1997, sec 7(2)(3).
[361] *Nundalal v Director of Public Prosecution KZN* (n 354 above) para 22.
[362] *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* 1990 (4) SA 720 (AD).
[363] *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* (n 363 above) page 2.
[364] *Barclays Zimbabwe Nominees (Pvt) Ltd v Black* (n 363 above), page 23.
[365] *National Society for Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* 2017 (1) SACR 284 (CC).
[366] *National Society for Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* (n 366 above) para 13.
[367] Society for the Prevention of Cruelty to Animals Act 71 of 1962.
[368] *National Society for Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* (n 366 above) para 40.
[369] *National Society for Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & Another* (n 351 above) para 66.
[370] The Constitution, sec 175(5)(d).

the basis of legality or request a *nolle prosequi*. However, this request may only be made by a natural person.

A DPA by its construction amounts to a decision to not prosecute and enter into a contractual agreement with an accused to defer the prosecution subject to court approved conditions, and, therefore, may be reviewable in terms of PAJA or on the basis of legality. A DPA is voluntary by its nature.[371] If an accused company deems it not in their interest to enter into a DPA they may proceed by way of conventional prosecution. It is improbable that they are likely to review a decision to enter into a DPA but simply decline to enter into a DPA. Therefore, the issue to consider is can the complainant in the matter or a person or party who the NDPP considers to be relevant review the decision to enter into a DPA. I submit that these persons may review the decision to enter into a DPA in terms of the NPAs internal review policy. Once the said person has exhausted these internal remedies, they may review the decision in the High Court in terms of PAJA or on the basis of legality where there is evidence to support that the decision to enter into a DPA is irrational, unlawful, and not in good faith. If such a review is successful, the court would compel the NPA to prosecute the matter.[372] However, in terms of the separation of powers doctrine the courts are not empowered to issue a mandatory interdict to compel the NPA to prosecute.[373] This separation of powers is necessary because prosecutorial discretion to institute or not to institute criminal proceedings should be free from interference by the public.[374] This raises a challenge in the context of a DPA due to the fact that where a person is successful in their review of the decision to enter into a DPA the courts will set aside the decision to enter into a DPA but cannot compel the NPA to prosecute the accused taxpayer for contravention of the relevant tax legislation. This scenario is not ideal as the accused taxpayer may challenge the decision to enter into a DPA with the cognisance that should such a review succeed, they are able to avoid a DPA and prosecution given that the NPA has a lack of resources to prosecute large corporates. This scenario leaves the offending taxpayer unaccountable. I submit that the courts will have to assess whether the decision to enter into a DPA with the juristic person is in the interest of justice[375] and is fair, reasonable, and proportionate.[376]

[371] J Arlen (n 60 above) page 212.
[372] *R v DPP, ex parte C* 1995 (1) Cr App R.
[373] *National Director of Public Prosecutions v Freedom Under Law* 2014 (4) SA 298 (SCA) para 51.
[374] *Democratic Alliance v President of the Republic of South Africa* 2016 (2) SACR 494 (WCC) para 24
[375] Schedule 17 (7)(1)(a) of the Crime and Court Act 2013.
[376] Schedule 17 (7)(1)(b) of the Crime and Court Act 2013.

An alternative available to the interested person would be to proceed by way of private prosecution in terms of section 7 of the CPA against the accused company. In the context of tax prosecution, the NPA's STU and SARS would be required to hand over the docket to enable a private prosecution. In terms of Chapter 6 of the TAA, SARS is prohibited from disclosing taxpayer information[377] even where the request is made in terms of section 46(a) and (b) of the Promotion of Access to Information Act (PAIA).[378]

In *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others*[379] the court considered whether SARS could disclose taxpayer information where such disclosure would reveal substantial contravention of the law and would be in the public interest.[380] The courts considered sections 35 and 46 of PAIA and sections 67 and 69 of the TAA and concluded that these provisions were unconstitutional and invalid in that they precluded access to taxpayer information by an requester where such access would be in the public interest.[381] The appeal of the *Arena Holdings* judgment in the Constitutional Court is pending. The court will decide whether the relevant provisions are in fact invalid and unconstitutional. Should the court confirm the decision by Davis J, it would allow for a private individual seeking to prosecute a company access to the relevant tax information of the company in question. However, the consequence of the Davis J decision is that it violates the section 14 Constitutional right to privacy of a taxpayer and this violation must be weighed up against the right of the 'private prosecutor' to access information as contained in section 32 of the Constitution.

In the context of a DPA this challenge becomes narrow for two reasons. Firstly, the 'private prosecutor' would be a person and not a juristic person who has an interest in prosecuting a company for contravening various tax legislation and would need to persuade the court that access to such information is in the public interest over and above the public interest to enter into a DPA which by its very nature would disclose this information in terms of the published DPA as envisioned in the proposed legal framework. The second challenge, which becomes a more practical one is that of costs of private prosecution. Section 14,15,16 and 17 of the CPA

[377] Act 28 of 2011, sec 67(1)(b).
[378] Promotion of Access to Information Act 2 of 2000.
[379] *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* 2022(2) SA 485 (GP).
[380] *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* (n 360 above) para 1.
[381] *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others* (n 380 above) para 11.

require the 'private prosecutor' to pay all costs and expenses of the private prosecution. In this context, such costs would be substantial in that it would be the private prosecution of a private company. As illustrated above, the motivation for DPAs is that it is costly to prosecute large corporates for crimes given the financial muscle they possess and the limited resources available to the state. I submit that it is unlikely that a person seeking to challenge the decision to enter into a DPA on the motivation of a private prosecution would succeed.

4.5.4.4. Conclusion

DPAs provide the State with a flexible approach to obtaining accountability from corporations for economic crime.[382] DPAs are non-trial resolutions that should be located within the prosecutorial powers of the NPA. It follows that DPAs and policies relating to the administration of DPAs should be located within the powers of the NPA. The ideal amendments would be firstly an amendment to the NPA Act to allow for DPAs as a non-trial resolution mechanism, such amendments should be similar to those of the UK's SFO guidance on DPAs.[383] These guidelines should include among other things the public interest factors that the prosecutor must consider when deciding to enter into a DPA as opposed to pursuing ordinary prosecution.[384] With the necessary amendments to the NPA Act, the TAA, the MOU between the NPA and SARS and the NPA's Prosecution Policy and Directives, the decision to enter into, negotiate and conclude a DPA with an offending corporate taxpayer should lie with a prosecutor of the STU in consultation with SARS.

In relation to the review procedure for the decision to enter into a DPA, I submit the ordinary review procedures provided by the NPA apply and a person seeking a review may approach the High Courts on the basis of legality and rationality. It would be recommended that in the formulation of the DPA legal framework provisions regarding the reviewability of the decision to enter into DPAs should be considered by the legislature and such provisions should allow for the reviewability of DPAs while ensuring such review mechanisms do not interfere with

[382] C Grasso 'Peaks and Through of the English Deferred Prosecution Agreement: The Lesson Learned from the DPA between the SFO and ICBC SB Plc' (2016) *The Journal of Business Law* 388.
[383] Serious Fraud Office 'Deferred Prosecution Agreements' October 2020 Available at: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/ (Accessed 7 October 2022).
[384] Crown Prosecution Services 'The Code for Crown Prosecutors' October 2018 Available at https://www.cps.gov.uk/publication/code-crown-prosecutors (accessed 7 October 2022).

the NPAs discretion to prosecute or to decline prosecution while ensuring that such a decision is in the interest of justice and is fair, reasonable, and proportionate.

4.5.4. Judicial Oversight of DPAs.

South Africa has an adversarial criminal justice system.[385] The role of a judicial officer is passive, and intervention is only necessary when the rules of procedure are not complied with.[386] For DPAs to be effective judicial oversight is necessary[387] which is a diversion from the adversarial system.

In the past, the South African Law Commission has recommended amendments to the CPA to allow for more judicial involvement in sentence agreements.[388] In the UK model of DPAs, the courts are involved in multiple stages of the DPA process. The courts are empowered to review the preliminary negotiations of the DPA between the prosecutor and the offending company,[389] approve the finalisation of the DPA,[390] and hear any matters relating to the breach of the DPA.[391] This form of judicial oversight is preferred as judges can ensure that the DPA is fair, reasonable, and proportionate.[392] In addition, judges would be in the position to ensure that the sanctions and penalties proposed are proportionate.[393]

The current diversion policies for juveniles in South Africa encompass a more inquisitorial mode of procedure and incorporate judicial involvement.[394] For judicial oversight of DPAs to be possible in South Africa, I submit that there are three possible legislative amendments that would allow for this. The first is the amendments to the CPA similar to those amendments made in relation to sentencing agreements to include judicial oversight as it relates to DPAs as detailed as that of the UK. This amendment would provide for the requirements of a valid DPA[395] as it related to tax disputes, the powers of the prosecutor in initiating and concluding a

[385] South African Law Commission *Project 73 Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal Procedure - Police Questioning, Defence Disclosure, The Role of Judicial Officers And Judicial Management of Trials)* 2001 8-10.
[386] South African Law Commission (n 386 above).
[387] B Greenblum (n 48 above) 1865.
[388] South African Law Commission *Simplification of Criminal Procedure (Sentence Agreements)* 2001 16.
[389] Schedule 17 (7) of the Crime and Court Act 2013.
[390] Schedule 17 (8) of the Crime and Court Act 2013.
[391] Schedule 17 (8) of the Crime and Court Act 2013.
[392] Schedule 17 (7)(1)(b) of the Crime and Court Act 2013.
[393] *Serious Fraud Office v Standard Bank PLC* 2015 EWHC(QB) (Case number: U20150854) para 2.
[394] South African Law Commission *Project 106 Juvenile Justice* 2000 100-103.
[395] Schedule 17 (1) of the Crime and Court Act 2013.

DPA,[396] the role of the courts in the preliminary and final hearing of the DPA and any other interlocutory procedures.[397] The provisions should also provide for procedures to address any breach, variation or cancellation of the DPA[398] as well as which offences in relation to which a DPA may be entered into.[399] The second would be the promulgation of DPA legislation by parliament in terms of Chapter 4 of the Constitution. This would likely be an all-encompassing DPA legal framework that is not limited to tax disputes as recommended by Justice Raymond Zondo[400]. This method is currently being considered by Australia in the introduction of its own DPA system which is modelled off of the UK DPA legal framework.[401] The final legislative amendment would be an amendment to Chapter 8 of the Constitution as it relates to courts and the administration of justice, to provide for judicial oversight of DPAs. This amendment would need to address two fundamental issues. The first is that these amendments must ensure separation of powers and that the judicial oversight of the DPAs does not amount to the court interfering with the discretion of the prosecuting authority. The second would be assurance that a DPA would not infringe on an accused's section 34 Constitutional right to access the courts. I submit that DPAs do not deny an accused's right to access the courts in that the decision to enter into a DPA and finalise a DPA must be approved by the courts.[402] Throughout the entire procedure of negotiating and finalising the DPA the accused must consent to the terms proposed by the prosecuting authority. Where the accused is of the opinion that a DPA is not in their interests they may withdraw[403] from the DPA and exercise their section 34 and 35(3) Constitutional rights to access the courts and have a fair trial. This discussion on Constitutional amendments is beyond the scope of this research. However, in studying foreign jurisdictions' legislative dealing with judicial oversight in the administration of DPAs, they have been able to achieve judicial oversight outside of Constitutional amendments.[404]

[396] Schedule 17 (7) & (8) of the Crime and Court Act 2013.
[397] Schedule 17 (8) & (9) of the Crime and Court Act 2013.
[398] Schedule 17 (9), (10) & (11) of the Crime and Court Act 2013.
[399] Part 2 of the Crime and Court Act 2013
[400] Zondo J (note 33 above).
[401] Crimes Legislation (Combatting Corporate Crime) Bill 2017, Chapter 4.
[402] C Grasso (n 383 above0.
[403] E Ainslie 'Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution' Available at https://www.schnader.com/files/Publication/079ca3cc-0006-4aac-8a33-48da4cbb789d/Presentation/PublicationAttachment/78bd395c-9256-4aff-bc3e-a6945457649f/AinslieArthurAndersen6-06.PDF (Accessed 08 November 2022).
[404] See the U.K. Schedule 17 of the Crime and Court Act 2013 & Singapore Criminal Justice Reform Act 2018.

4.6. Conclusion

DPAs allow for a creative solution to remedy structural corporate problems[405] that sanction economic crime and tax non-compliance. The discussion above provides for a detailed discussion of the legislative framework of DPAs in foreign jurisdictions and the necessary provisions to render them effective. The discussion also canvases DPAs in South Africa in the context of tax disputes. Finally, the chapter concludes by arguing that the decision to enter into a DPA with respect to tax disputes should vest in a prosecutor of the STU as it is a prosecutorial decision. This decision should be made in consultation and approval of SARS as the intention of this DPA model is to recover lost tax revenue from offending corporates and strengthen the mandate of both the NPA and SARS.

[405] C Grasso (n 383 above).

CHAPTER 5: COMPARATIVE ANALYSIS OF THE USE OF DEFERRED PROSECUTION AGREEMENTS

"*Justice doesn't mean the bad guy goes to jail; it just means that someone pays for the crime.*"

-Freedom Writers, Adrian Vazquez

5.1. Introduction

The fight against economic crime is a global priority as it affects all societies and economies.[406] The need to combat the impact of economic crime has seen growing developments in the global legal framework.[407] DPAs have become a consideration in a few jurisdictions. This chapter analyses the use of DPAs in the UK due to the relationship between UK jurisprudence and South African laws. The chapter will then discuss DPAs in Kenya, which is the first country in Africa to implement DPAs in its legal framework.[408] This comparative study is necessary, because like South Africa, Kenya is developing more effective policies to combat corruption and economic crime in a developing economy. The chapter will conclude with a discussion of the use of DPAs in the US which has extended DPAs to tax disputes between the Internal Revenue Service and companies.[409]

[406] C Grasso (n 383 above) 391.
[407] C Grasso (n 383 above) 390.
[408] G Kashindi 'Tax Disputes Resolution in Kenya: Viability of Including Alternative Dispute Resolution Mechanisms' Thesis, University of Nairobi, 2017 2.
[409] C Chance ' Deferred Prosecution Agreements and U.S Approaches to resolving Criminal and Civil Enforcement Actions: A regime characterised by limited judicial involvement' April 2012 https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/05/deferred-prosecution-agreements-and-us-approaches-to-resolving-criminal-and-civil-enforcement-actions.pdf (accessed 6 August 2022).

5.2. The United Kingdom Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc.

Rolls Royce Motor is a listed limited British luxury car maker founded in 1904.[410] Rolls Royce is considered a leading company in automobile innovation and engineering.[411] The facts in the DPA state that Rolls Royce was guilty of criminal conduct over several jurisdictions in its three business units over twenty years. The findings were that the entity failed to prevent bribery and conspired to corrupt and falsify accounting records.[412] The investigation of the company began in 2012 and required a digital review of over 30 million documents.[413] The investigation concerned multiple jurisdictions and spanned multiple years.[414] The court in this matter highlights that the proactive approach and cooperation of Rolls Royce with the SFO led to pertinent information being made available to the state which otherwise would not have come to its attention.[415] The cooperation of Rolls Royce and the finalisation of the DPA avoided significant expenditure of money and time on the part of the State.[416]

The DPA between the SFO and Rolls Royce was finalised in 2017. In terms of the DPA, Rolls Royce was required to disgorge its gross profit of 258 170 000 GBP,[417] pay financial penalties of 239 082 645 GBP,[418] and pay the costs incurred by the SFO in its investigations of 12 960 754 GBP.[419] Rolls Royce admitted to the offences listed in the DPA and agreed to complete a compliance programme.[420] The court found that the conduct of Rolls Royce was the most serious breach of the criminal law which displayed careful planning.[421] The court noted that such conduct required prosecution, however, due to the fact that the offences were committed across multiple jurisdictions, it would be hard to identify the conduct and, thus, a DPA was more suitable.[422]

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[410] Rolls Royce 'About' https://www.rolls-royce.com/about.aspx#section-overview (accessed 11 September 2022).
[411] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (Case No: U20170036) para 2.
[412] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 35(i).
[413] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 20.
[414] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 20.
[415] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 20.
[416] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 58.
[417] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 67(ii).
[418] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 67(iii).
[419] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 67(iii).
[420] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 67(iv).
[421] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 67(vi).
[422] *Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc* (n 243 above) at para 20.

The Rolls Royce case doesn't specifically deal with tax offences but illustrates three main principles. First, criminal conduct that involves large multinational corporations tends to be very complex and difficult to investigate and prosecute and DPAs provide an effective remedy. In addition, the SFO obtained the cooperation of Rolls Royce which was possible through the DPA and not necessarily available through conventional prosecution. Second, the DPA allowed for payments of over 500 million GBP into the fiscus which was lost due to the economic crimes committed by Rolls Royce. Finally, the court found that the DPA with Rolls Royce allowed for improved compliance policies and procedures within the corporation which is in the public interest as the conduct of Rolls Royce directly affected the fiscus.

5.3. Kenya's Deferred Prosecution Agreements

Developing countries are more susceptible to economic crimes due to weak regulatory frameworks and very limited government resources and capacity.[423] In 2018, the Kenyan Auditor General said that approximately 400 million USD of public funds could not be accounted for.[424] The cost of economic crimes tends to be higher because of the long-term consequences for development in these nations.[425] During the last few decades, Kenya has experienced an increase in economic crimes, including those perpetuated by corporations.[426] In response to this crisis, Kenya published the Anti-Corruption and Economic Crimes Amendment Bill, 2021. This bill is meant to strengthen the section 137B provision of the Kenyan Criminal Code which governs plea agreements on behalf of the State.[427] This bill introduced DPAs within the Kenyan prosecution system. The bill is similar to the of U.K Schedule 17 DPA provision in that it allows for DPAs between the Office of the Director of Public Prosecution and corporations.[428] It also provides for judicial oversight.[429] In addition to

[423] United Nations 'Economic and financial crimes: challenges to sustainable development' (2005) page 2.
[424] BBC News 'Head of Kenya youth agency arrested in $78m corruption scandal' May 2018 https://www.bbc.com/news/world-africa-44280453 (accessed 12 September 2022).
[425] United Nations 'Economic and financial crimes: challenges to sustainable (n 314 above).
[426] J Omboto 'Economic Crimes: Factors Responsible for Rampant Fraud and Corruption in Kenya' (2018) 5(10) *Advances in Social Science Research Journal* 88.
[427] I Oruko 'Bill allows DPP to negotiate with graft lords' September 2021 https://nation.africa/kenya/news/bill-allows-dpp-to-negotiate-with-graft-lords--3566464 (accessed 13 September 2022).
[428]Anti-Corruption and Economic Crimes Act 2012, Chapter 65, s35B.
[429] Criminal Procedure Code Chapter 75, s135B.

the bill, Kenyan DPAs are to be read with Articles 157 and 159 of the Kenyan Constitution, the National Prosecution Policy,2015 and the Diversion Policy, 2019. Procedurally, the Office of the Director of Public Prosecution certifies that the case meets the public interest test for prosecution, and the relevant prosecutor is authorised to enter into a DPA.[430] The negotiations of the DPA are monitored and regulated by the Office of the Director of Public Prosecution. The finalised DPA must be approved by the High Court.[431]

The National Youth Service of Kenya (NYS) is a State institution focused on training young citizens through voluntary work and educational programs.[432] In 2018 it was reported that the NYS had 30 million USD of state funds unaccounted for.[433] Investigations revealed that the director of the NYS, General Richard Ndubai, 40 civil servants and fourteen private sector individuals were implicated in the three-year-long theft and money laundering syndicate that cost the State 13 billion Ksh.[434] Kenyan authorities entered into a DPA with the five major banks.[435] The prosecuting authority in Kenya criminally charged the individuals implicated in the syndicate. The prosecution authority went further and entered into a DPA with the five banks that were complicit in the laundering of the proceeds of crime from the NYS scandal. The DPA with the five banks was finalised in 2020.[436] The banks were ordered to pay a combined 393 million Ksh for violating Kenya's anti-money laundering laws.[437]

Kenya illustrates that though African countries tend to have limited capacity to investigate and prosecute economic crimes,[438] DPAs act as an effective alternative in resolving cases involving corporations. During 2000-2020, Kenyan authorities promulgated a series of legislation to

[430] Global Legal Insights 'Bribery & Corruption Laws and Regulations 2022: Kenya' https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/kenya (accessed 12 September 2022).
[431] Global Legal Insights 'Bribery & Corruption Laws and Regulations 2022: Kenya' (n 321 above).
[432] National Youth Service 'About us' https://www.nys.go.ke/ (accessed 19 September 2022).
[433]F Obura 'Mega scandal hits Kenyan NYS' June 2018 https://www.standardmedia.co.ke/article/2001307344/2018-the-year-of-big-eating-nys-scandal (accessed 12 September 2022).
[434] BBC News 'Head of Kenya youth agency arrested in $78m corruption scandal' (n 315 above).
[435] Global Legal Insights 'Bribery & Corruption Laws and Regulations 2022: Kenya' (n 321 above).
[436] BBC News 'Head of Kenya youth agency arrested in $78m corruption scandal' (n 315 above).
[436] Global Legal Insights 'Bribery & Corruption Laws and Regulations 2022:Kenya' (n 321 above).
[437] Reuters 'Kenya's prosecutor fines five banks $3.75 mln for violations' March 2020 https://www.reuters.com/article/kenya-banks-idUKL8N2AY1BQ (accessed 12 September 2022).
[438] Institute for Security Studies 'Africa needs a common approach to financial crime, and the resolve to enforce legislation and regulations' August 2018 https://issafrica.org/iss-today/financial-crime-undercuts-africas-economic-growth-gains (accessed 12 September 2022).

support the prosecution in concluding DPAs.[439] DPAs in Kenya are fairly new in law and have yet to be extended to tax offences. DPAs in Kenya have limited guidelines provided by the Office of the Prosecuting Authority on the use of DPAs.[440] However, this is set to change as the prosecuting authority enters into more DPAs as a solution to economic crimes.

5.4. US Attorney's Office Southern District of Florida v HSDB Private Bank (Suisse) SA.

The Internal Revenue Code of 1986 contains all the federal tax laws of the US This code is commonly known as the Internal Revenue Code (the Code).[441] Section 7201 26 of the Code states that 'Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony.' 18 Section 2 of the Code stipulates that 'Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal,[442] and 'Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.'[443] In the matter of *US v Wilson,*[444] the court confirmed that the aforementioned provision of the Code means that a person may be prosecuted under the Code for wilful evasion of another's taxes.[445] Therefore, these provisions allow for the prosecution of a party for their involvement in the evasion of another party's tax liability.[446]

The Hong Kong and Shanghai Banking Corporation Limited (HSBC) is a private bank mired in controversy relating to economic crimes across the world.[447] The bank has been accused of

[439] Global Legal Insights 'Bribery & Corruption Laws and Regulations 2022: Kenya' (n 321 above).
[440] Global Legal Insights 'Bribery & Corruption Laws and Regulations 2022: Kenya' (n 321 above).
[441] Georgetown law library ' Internal Revenue Code' https://guides.ll.georgetown.edu/c.php?g=271147&p=2630483#:~:text=Title%2026%20of%20the%20U.S.,Code%20of%201986%2C%20as%20amended (accessed 11 September 2022).
[442] Internal Revenue Code of 1986 18 U.S.C 2(a).
[443] Internal Revenue Code of 1986 18 U.S.C 2(b).
[444] *United States v. Wilson* 118 F.3d 228, (4th Cir. 1997).
[445] *United States v. Wilson* (n 258 above) 236.
[446] Office of Chief Counsel Criminal Tax Division 'IRS Tax Crimes Handbook' https://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf (accessed 11 September 2022).
[447]International Consortium of Investigative Journalists 'HSBC moved vast sums of dirty money after paying record laundering fine' September 2020 https://www.icij.org/investigations/fincen-files/hsbc-moved-vast-sums-of-dirty-money-after-paying-record-laundering-fine/ (accessed 11 September 2022).

aiding money laundering[448] and assisting citizens across the world in tax fraud.[449] In December 2019, the Southern District of Florida Tax Division concluded a DPA with HSBC Switzerland.[450] The allegations are that HSBC Switzerland conspired with US bank account holders to 'conceal assets and evade taxes' that they were liable to pay as citizens.[451] As of 2002, the bank had 720 undeclared US client relationships with an approximate value of 800 million USD. In court documents, HSBC Switzerland admitted to conspiring with its US clients to defraud the US Internal Revenue Service with respect to taxes in the form of tax evasion and the filing of false federal tax returns.[452] HSBC Switzerland agreed to pay a fine of 192 million USD and a civil forfeiture of 71.8 million USD for proceeds it illegally derived from its conduct.[453] HSBC Switzerland has also agreed to assist in the ongoing investigations and prosecutions of those individuals who evaded their taxes.[454] Importantly, in the settlement, HSBC Switzerland agreed to pay the US Internal Revenue Service 60 600 000 USD in restitution for the unpaid taxes from the conspiracy to defraud the Internal Revenue Service.[455]

The conduct of HSBC Switzerland would have led to the prosecution of the large bank in terms of 18 Section 2 of the Code. According to Don Fort, Chief Internal Revenue Service Criminal Investigations, financial institutions devising massive tax evasion schemes and facilitating such activities on behalf of their clients has an adverse effect on revenue collection and these institutions must be held to account.[456] Since the 2008 financial crisis,[457] and the prosecution

[448] The Bureau of Investigative Journalism 'Money Laundering Ring Pushed $4billion Through HSBC' September 2021 https://www.thebureauinvestigates.com/stories/2021-07-28/money-laundering-ring-pushed-4.2bn-through-hsbc (accessed 11 September 2011).
[449]Aljazeera 'HSBC fined $336m to repay Belgium after huge tax fraud' August 2019 https://www.aljazeera.com/economy/2019/8/6/hsbc-fined-336m-to-repay-belgium-after-huge-tax-fraud (accessed 11 September 2022).
[450] The United States Attorney's Office Southern District of Florida 'Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA' December 2019 https://www.justice.gov/usao-sdfl/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa (accessed 11 September 2022).
[451] US Southern District of Florida (n 451 above).
[452] US Southern District of Florida (n 451 above).
[453] US Southern District of Florida (n 451 above).
[454] US Southern District of Florida (n 451 above).
[455] US Southern District of Florida (n 451 above).
[456] US Southern District of Florida (n 451 above).
[457] The 2008 financial crisis was caused by banks in the United States extending home loans to people who could not afford to repay them. This led to the collapse of large banks such as Lehman Brothers. Financial Crisis Inquiry Commission ' Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States February 2011 https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (accessed 11 September 2022).

of Enron,[458] US authorities are reluctant to prosecute big banks due to the adverse impact it would have on the economy and the threat to render thousands of employees jobless who may not have necessarily been involved in the criminality.[459] However, there must be a balance between accountability and restitution to the fiscus for tax fraud and other related offences and saving juridical resources.[460] The US has since seen great success in utilising DPAs in tax-related offences with large banks and corporations.[461]

5.5. Conclusion

DPAs remain a novice accountability tool for prosecution authorities across the world. The comparative study above illustrates that DPAs are an effective way to achieve retribution and restitution from large corporates who commit economic crimes. They also illustrate that DPAs allow the State to save prosecutorial resources and finalise these matters in a timeous manner. Finally, the discussion demonstrates the use of DPAs in tax related offences and how they allow the revenue authority to recoup lost revenue and gain assistance in prosecuting other individuals who are tax non-compliant. Most importantly, the Kenyan example illustrates that the use of DPAs is possible in developing countries, especially in Africa to hold institutions that facilitate economic crime to account.

[458]Enron was an American commodities corporation. In 2002 collapsed after a failed deferred prosecution agreement relating to securities fraud and creating a scheme to hide its debts from investors and creditors. M Koehler 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement' (2015) 49 *U.C.D. L. Rev.* 497 at 501.

[459] S Curral & M Epstein 'The Fragility of Organizational Trust: Lessons from the Rise and Fall of Enron' (2003) 32(2) *Organization Dynamics* 193 at 200.

[460] Q Bu 'The Viability of Deferred Prosecution Agreements (DPAs) in the UK: The Impact on Global Anti-Bribery Compliance' (2021) 22 *European Business Organization Law review* 173 at 174.

[461] J Arlen (n 5 above) 2.

CHAPTER 6: REFLECTIONS AND CONCLUSIONS

'All great changes are preceded by chaos'

-Deepak Chopra

6.1. Introduction

South Africa needs to find solutions to the impact of state capture. These solutions require an evaluation of the impact of capture on SARS and its ability to fulfil its mandate of efficient and effective revenue collection. In the context of tax administration in South Africa this must be the highest amount of tax collection with the lowest possible costs. The purpose of this research is twofold. First it sought to explore the impact of capture on SARS and law enforcement in South Africa and the impact it has had on revenue collection. Second, it aimed to propose the use of DPAs as a mechanism for the STU and SARS to fulfil the objectives set out in their MOU and recoup years of lost revenue.

6.2 Main findings

SARS remains one of South Africa's greatest successes post-Apartheid. The work of the Katz Commission enabled the creation of a revenue authority that was able to fulfil its mandate of effective and efficient tax collection. SARS was able to raise its collection of tax revenue annually for a period of more than 15 years. SARS had investigative and litigation units that were instrumental in ensuring tax compliance in an expeditious manner. In 2014, SARS experienced a capture that severely impacted its ability to fulfil its mandate, decrease the tax gap and ensure compliance. The work of the Nugent Commission canvassed the capture of SARS and recommended that SARS strengthen its relationship with law enforcement agencies and that SARS re-establishes its litigation and investigative units. In response to the recommendation, SARS has signed an MOU with the NPA and committed to provide the necessary assistance required to investigate and prosecute tax offences.

The relationship between the NPA and SARS is necessary for both organisations to fulfil their legislative mandates. The MOU between the NPA, and SARS creates a co-operative

relationship that endeavours to hold non-compliant taxpayers to account. The MOU establishes a framework for the investigation and prosecution of tax offences including a requirement that SARS supports the investigation of tax offences and provides resources to the NPA's STU to assist in the prosecution of these cases. The NPA STU prosecutor is tasked with the prosecution of tax offences and in the event that it is necessary to enter into a settlement agreement with the accused taxpayer the STU commits to do so with the consultation and approval of SARS. This relationship is a positive step to recover years of lost tax revenue and restore the public perception of the NPA/SARS relationship.

DPAs have allowed foreign jurisdictions an ability to hold large corporates accountable for their criminal misconduct. DPAs allows the State to impose penalties, sanctions, and fines on an accused corporate and recover significant proceeds of crime while minimising the costs of prosecution. For DPAs to be effective there must be comprehensive legislation that deals with the procedure of negotiating and finalising a DPA, the role of the judiciary in facilitating the negotiation and finalisation of the DPA and the remedies available for the breach of a DPA. I argue that DPAs are a prosecutorial function and that the power to enter and negotiate a DPA should lie with the NPA. In the context of tax disputes, the decision to enter into a DPA should be made by the NPA STU prosecutor in consultation and agreement with SARS.

In South Africa, DPAs can raise constitutional challenges namely that they infringe on the accused taxpayer's rights to access courts as defined in section 34 of the Constitution. In this regard, I submit that the nature and process of DPAs require substantial judicial oversight and the courts are entrusted to ensure that the DPA is in the interest of justice, fair and proportionate. In the event that an accused taxpayer is of the opinion that the DPA is not in their best interest, they are able to withdraw from the DPA and proceed through the criminal justice system.

I canvass the role of PAJA in the context of DPAs. DPAs amount to a decision not to prosecute. The decision to enter into a DPA may be reviewed in terms of PAJA or on the basis of legality and rationality. In addition, in the event that SARS delays in consenting or opposing a DPA, such a decision is also subject to review in terms of PAJA. The challenge, however, is where a decision to enter into a DPA is reviewed by the accused taxpayer or interested party the court is not empowered to order that the NPA prosecute the matter, and this leaves a lacuna in the process where there is no DPA, but the NPA cannot be compelled to prosecute. I submit that in the creation of the DPA legal framework the legislature must canvass the question of the

reviewability of DPAs in terms of PAJA. Finally, the consequence of the internal review procedures of the NPA enables an interested party to proceed by way of private prosecution. The challenge, however, is that where an interested person is allowed to privately prosecute an accused taxpayer, they would need access to the docket which contains confidential taxpayer information. In terms of the binding decision of *Arena Holdings,* the NPA STU and SARS may be required to hand over this information based on public interest considerations. This places SARS and the taxpayer in a precarious position, and this may have severe consequences on the rights of an accused taxpayer to privacy as provided for in section 14 of the Constitution. This position may change based on the Constitutional Court decision in *Arena Holdings.*

DPAs have become a way for prosecution authorities across the world to hold large corporates accountable. DPAs are effective to achieve restitution from large corporates who commit economic crimes. The UK has the most comprehensive DPA legal framework that is being modelled across the world. The UK SFO is able to enter into DPAs with large corporates while reducing the resource costs on the state. The UK SFO is also able to recoup substantial revenue and impose significant penalties and sanctions while mandating rehabilitative measures to ensure that corporates do not repeat such criminal conduct.

The US has been able to extend the use of DPAs to tax offences. In the DPA with HSBC, the US prosecuting authority was able to hold HSBC to account for its role in the tax evasion of US citizens while recouping the lost tax revenue and imposing substantial penalties on HSBC. Importantly, the US prosecuting authority was able to obtain the cooperation of HSBC in prosecuting the individuals who evaded their taxes and ensuring for more accountability. Kenya is the first African country to introduce DPAs within their prosecutorial legal framework and has since finalised its first DPA with large banks involved in money laundering. This illustrates that DPAs can be utilised in a prosecutorial system that has limited resources and capacity and still ensures accountability, rehabilitation, and retribution.

6.3 Recommendations

On 22 October 2022, the President of South Africa, Cyril Ramaphosa responded to the recommendations made by Chief Justice Raymond Zondo in his report.[462] In responding to the

[462] The Presidency of the Republic of South Africa 'President Cyril Ramaphosa: Response to the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector' Available at:

recommendation on the introduction of a DPA legal framework the President tasked the South African Law Reform Commission (SALRC) to consider the introduction of the DPA framework in the criminal justice system as recommended by Chief Justice Raymond Zondo.[463]

I submit that the work of the SALRC should consider the following in considering a DPA system in South Africa.

6.3.1. Legal framework of a DPA system

For South Africa to have an effective DPA system I recommend that the SALRC considers the UK DPA legal framework. The first consideration must be a specific definition of what a DPA is understood to be. A DPA is an agreement that is between a state prosecutor and a juristic person who has been investigated and there is consideration of prosecution for an offence as provided for in the legal framework.[464] I submit that these offences must include tax offences to enable the NPA STU to negotiate a DPA with an accused taxpayer.[465] The second consideration for an effective DPA system is the role and duty of a prosecutor in deciding to enter into a DPA and the negotiation of a DPA.[466] In the context of a DPA with an accused taxpayer, there must be guidance provided as to how an STU prosecutor must decide to enter into a DPA and negotiate a DPA in consultation and agreement with SARS. The DPA framework must also provide guidance as to the procedure in the event that SARS fails to make a decision on the entering or negotiating of a DPA or disagrees with the decision or negotiation of the DPA. Third, consideration must be given to the content of a valid DPA. This includes the statement of facts relating to the alleged offences,[467] admissions made by the corporate,[468] the expiry date of the DPA,[469] and the financial penalties imposed and any other terms the prosecution authority deem necessary.[470]

I submit that in the context of tax disputes there must be provisions that mandate that the accused taxpayer settle their tax liabilities, interest, and understatement penalties in addition to

https://www.gov.za/speeches/president-cyril-ramaphosa-response-president-cyril-ramaphosa-commission-inquiry-allegations (Accessed 7 November 2022).

[463] President of South Africa 'Response by President Cyril Ramaphosa to the recommendations of the Judicial Commission of inquiry into allegations of State Capture, corruption and Fraud' October 2022.

[464] Schedule 17 (1) of the Crime and Court Act 2013.

[465] Schedule 17 (2) of the Crime and Court Act 2013.

[466] Schedule 17 (3) of the Crime and Court Act 2013.

[467] Schedule 17 (5)(1) of the Crime and Court Act 2013.

[468] Schedule 17 (5)(1) of the Crime and Court Act 2013.

[469] Schedule 17 (5)(2) of the Crime and Court Act 2013.

[470] Schedule 17 (9)-11). of the Crime and Court Act 2013.

any other penalties imposed. Finally, I argue that the DPA framework must make provision for breach, noncompliance, termination, and variation of the DPA and the consequence of such.[471] I submit that the DPA must be published to ensure that the public is aware of such a DPA and to ensure that the accused remains accountable.

Judicial oversight is vital for an effective DPA system. This is necessary to ensure that the DPA and all the procedures associated with the DPA are fair, reasonable, and proportionate.[472] The provisions must require judicial approval for the prosecuting authority to enter into a DPA.[473] In this instance, the prosecution authority would need to satisfy the courts that the decision to enter into a DPA is in the interest of justice, fair reasonable and proportionate.[474] In addition, I argue that the prosecutor must satisfy the court that the decision to enter into a DPA is legal and rational. In this instance the court would have to consider a non-exhaustive list of factors including the costs of pursuing a prosecution,[475] the resources available to the prosecuting authority,[476] the cooperation of the accused juristic person and the reasonable prospect of obtaining a conviction.[477] I propose that throughout the negotiation of DPA, judicial oversight is necessary to ensure and protect the rights of the accused while balancing the interests of justice. At this point the accused is in the position to withdraw from the DPA if they are of the opinion that the DPA is not in their best interests.[478] Judicial oversight is necessary at the finalisation of the DPA, the court must approve the final DPA.[479] In its approval the court must give reasons for its decision, and where the court disapproves of the DPA the court must provide reasons for its position.[480] Where the court declines the DPA, the prosecutor may make a further application to the courts for approval.[481] However, in line with the separation of powers doctrine,[482] the court cannot decline a DPA and order the prosecutor to institute a prosecution against the accused. The final instance where judicial oversight is necessary is where there is variation, breach, termination, and noncompliance of the DPA. This is necessary to ensure the proper management of the DPA system. I submit that the DPA must be published

[471] Part 2 of Schedule 17 of the Crime and Court Act 2013.
[472] Schedule 17 (7)(1) of the Crime and Court Act 2013.
[473] Schedule 17 (7) of the Crime and Court Act 2013.
[474] Schedule 17 (7)(1) of the Crime and Court Act 2013.
[475] J Redpath (n 360 above).
[476] J Redpath (n 360 above).
[477] *National Director of Public Prosecutions v Zuma* (n 335 above).
[478] S Bronitt (n 330 above).
[479] Schedule 17 (7) of the Crime and Court Act 2013.
[480] Schedule 17 (7)(2) of the Crime and Court Act 2013.
[481] Schedule 17 (7)(2)-(3) of the Crime and Court Act 2013.
[482] *National Director of Public Prosecutions v Freedom Under Law* (n 374 above).

along with the court's reasons in approving the DPA to ensure that the public is aware of such a DPA and to ensure that the accused remains accountable.[483]

To give effect to the need of judicial oversight, the SALRC should consider the promulgation of a separate DPA legislation, or the amendment of the CPA as was done in the U.K. and with diversions in South Africa[484] to favour a more inquisitorial system with regards to DPAs. These amendments can achieve judicial oversight independent of the amendment of section 34 of the Constitution as seen in Kenya's DPA legal framework.[485] In relation to the prosecuting authority, the NPA would be required to amend its 2014 Prosecution Policy and Directives to provide prosecutors with the necessary guidance on the administration of DPA. In the context of tax disputes, I submit that there should be amendments to the MOU between SARS and the NPA on the administration of DPAs and the role of SARS in what is a prosecutorial decision. In addition, I submit that amendments to the Chapter 9 of the TAA is necessary to include DPA as an alternative dispute resolution procedure available to SARS in relation to tax disputes. The amendments would allow for a DPA legal framework that allows the NPA and SARS to fulfil their respective legal mandates.

6.3.3. The reviewability of the decision to enter into a DPA

As discussed in this mini dissertation the decision to enter into a DPA by its nature amounts to a decision to not prosecute and defer the prosecution subject to compliance with the terms of the DPA. The decision to not prosecute may be subject to review in terms of PAJA or on the basis that the decision does not satisfy the test of legality and rationality. I also argued that the delay or failure of SARS to agree to the decision to enter into the DPA in terms of section 10.5 of Annexure A of the MOU between SARS and NPA may be subject to review in terms of PAJA. The challenge with the reviewability of the decision to enter into a DPA is that the courts cannot compel the prosecution authority to abandon the DPA and prosecute the matter as this violates the separation of powers doctrine. This requires the SALRC to engage with this challenge and provide guidance on the reviewability of the decision to enter into a DPA, and if they find it is in fact reviewable how should the NPA proceed. I submit that given that the courts must first approve the decision to enter into a DPA on the basis that such a decision is

[483] Schedule 17 (8)(7) of the Crime and Court Act 2013.
[484] South African Law Commission *Project 106 Juvenile Justice* 2000 100-103.
[485] n 430 above.

in the interest of justice, rational and proportionate the courts pre-emptively deal with the possible challenges that may be raised on review and seek to mitigate such. However, an accused taxpayer should be empowered in the legal framework to review any undue delay on the part of SARS in the decision to enter into a DPA.

6.3.4. The benefits of a DPA system in the context of tax disputes

Globally prosecuting authorities are grappling with a lack of resources and capacity to investigate and prosecute economic crime.[486] As a result economic crime including tax evasion and other tax crimes are increasing globally. South Africa is not an exception to the status quo and the capture of SARS has significantly impacted SARS' ability to investigate tax noncompliance and tax crimes to refer them for prosecution in terms of section 43 of the TAA.[487] Chief Justice Raymond Zondo recognised the need to introduce an alternative to conventional prosecution to address the need to hold large corporates accountable for economic crime and recover proceeds of crime.[488] In the context of tax offences it allows for an effective manner to recover lost tax revenue.

DPAs allow the State to hold corporate entities accountable without incurring the extensive resource and financial cost of conventional prosecution.[489] They also allow the State to significantly reduce the time required to achieve this accountability. DPAs allow the prosecution to recoup proceeds of crime,[490] impose penalties and mandate rehabilitation on the part of the offending corporate. The State can also mitigate the unintended collateral damage to the economy and other stakeholders which is often the case with the prosecution of large corporates.[491]

In the context of tax disputes in South Africa, it is evident that the NPA and SARS are still grappling with the impact of capture and have limited resources to pursue prosecution in an expeditious and effective manner. SARS' mandate is not to prosecute but rather to administer the relevant tax acts and collect tax revenue in an effective and efficient manner. I argue that

[486] Duke Law 'The endless cycle of corporate crime and why it's so hard to stop' Available at https://law.duke.edu/news/endless-cycle-corporate-crime-and-why-its-so-hard-stop/ (Accessed 07 November 2022).
[487] n 128 above.
[488] Zondo J (n 33 above) para 61.
[489] G De Franco, A Wahid & R Small 'The Effect of Deferred Prosecution Agreements on Firm Performance' Available at http://hdl.handle.net/10125/64910 (Accessed 07 November 2022).
[490] n 491 above, 2.
[491] n 491 above, 2.

DPAs allow SARS to achieve this aim in the case of corporate taxpayers who contravene the tax legislation in an efficient and effective manner while achieving accountability. In addition, the relationship between the NPA STU and SARS is better served with the use of DPAs as they achieve the aim of in deterring of tax non-compliance given the limited resources available.

6.3.5. Challenges of a DPA system in the context of Tax disputes

DPAs remain contentious. The criticism of DPAs is that they do not deter the criminality on the part of the corporates. This is due to the difficulty experienced by prosecuting authorities in assessing and monitoring compliance.[492] DPAs are also criticised for not holding those responsible for the wrongdoing accountable as they do not get prosecuted. A challenge with DPAs is the perception that the penalties imposed are not significant as compared to the profits received by large corporates and therefore the sanctions do not deter future misconduct. Most importantly the criticism of DPAs is that they do not allow for the development of the jurisprudence of economic crime.[493] In the context of tax disputes these criticisms are applicable. However, as canvassed above, currently corporates that are guilty of contravening tax legislation and various tax offences are not being prosecuted at a rate necessary for SARS to collect lost tax revenue in an effective manner. An overall assessment is that DPAs are a more effective method of accountability compared to conventional prosecution.[494]

6.4. Conclusion

DPAs are a novice tool in prosecution. They are currently the most effective and efficient tool to hold corporates accountable for their criminal conduct. In support of the recommendations made by the Zondo Commission and Nugent Commission of restoring the investigative and litigation units of SARS to recover lost revenue and better tax compliance and introducing DPAs as an alternative to conventional prosecution, this research argues for the possibility of DPAs in the context of tax disputes. DPAs have been effective in the context of tax disputes in the UK and US enabling the relevant tax authorities to recover billions in tax revenue while imposing significant penalties and mandating rehabilitation on the part of the offending

[492] n 491 above, 2.
[493] J Arlen (n 248 above).
[494] n 491 above, 3.

taxpayer. In conclusion, I suggest that the SALRC in its work considers the proposed legal framework of DPAs in tax disputes, the role of judicial oversight in the administration of tax disputes and the possible challenges that may be raised on review. Should these considerations be taken into account and South Africa develops a comprehensive DPA legal framework that enables the NPA STU and SARS to fulfil their mandate in an effective and efficient manner I argue that both institutions will fulfil the objectives as set out in their MOU, specifically a cooperative relationship that deters tax non-compliance.

BIBLIOGRAPHY

Books

J Arlen 'The potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S' in T Soreide & A Makinwa (eds) *Negotiated Settlements in Bribery Cases: A Principled Approach* (Edward Elgar Publishing 2020)

Case Law

Africa Cash &Carry (Pty) Ltd v The Commissioner for the South African Revenue Service 2020 (2) SA 19 (SCA).

Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others 2022 (2) SA 485 (GP).
Macrae and Another v State 2014 (2) SACR 2015 (SCA).

National Director of Public Prosecutions v Freedom Under Law 2014 2 SACR 107

National Director of Public Prosecutions v Zuma 2009 2 SA 277 (SCA).

The Director of Public Prosecution v David Cunningham King 2008 CC 257/2005 (unreported).

Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC).

Serious Fraud Office v Rolls Royce PLC & Rolls Royce Energy Systems Inc (Case No: U20170036).

Serious Fraud Office v Serco Geografix Limited (Case No: U20190413).

Serious Fraud Office v Standard Bank PLC 2015 EWHC(QB) (Case number: U20150854).

United States v. Wilson 118 F.3d 228, (4th Cir. 1997).

Journal Articles

A Argentiero et al 'Does Tax Evasion Effect Economic Crime? (2020) 41 *Fiscal Studies* 114.

A Shah 'The geopolitics of Pakistan's 2018 greylisting by the Financial Action Task Force' (2021) 76 *Int'l J* 280

A Shahroodi 'Investigation of the effective factors in the efficiency of tax system' (2010) 2(3) *Journal of Accounting and Taxation* 42.

B Greenblum 'What Happens to a Prosecution Deferred - Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005)105 *Colum.L.Rev* 1863.

BG Peters 'The future of governing: four emerging models' (1996) 32 *Lawrence KS: University Press of Kansas* 180.

C Grasso 'Peaks and Through of the English Deferred Prosecution Agreement: The Lesson Learned from the DPA between the SFO and ICBC SB Plc' (2016) *The Journal of Business Law* 388.

D Uhlmann 'Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability' (2013) 72 *MD.L.Rev.* 1296.

D Saxunova & R Szarkova 'Global Efforts of Tax Authorities and Tax Evasion Challenge' (2018) *Journal of Eastern Europe Research in Business and Economics* 2.

E Hazlehurst 'A net gain: new legislation and better collection are building government's political credibility (2003) 170 *Financial Mail* 64.

F Davis 'Judicial Review of Deferred Prosecution Agreements: A Comparative Study' (2022) 60(3) *Columbia Journal of Transnational Law* 751.

J Arlen 'Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements' (2016) 8(1) *Journal of Legal Analysis* 191.

J Omboto 'Economic Crimes: Factors Responsible for Rampant Fraud and Corruption in Kenya'(2018) 5(10) *Advances in Social Science Research Journal* 88.

J Warin & A Boutros 'Deferred Prosecution Agreements: A view from the Trenches and a Proposal for Reform' (2008) 121 *VA.L.Rev.Brief* 122.

L Muntingh, J Redpath & K Petersen 'An Assessment of the National Prosecuting Authority: A controversial Past and Recommendations for the Future (2017) 3 *acjr* 35.

L Sitorus 'State Capture: Is it a Crime? How the World perceived it' (2011) 1(2) *Indonesia Law Review* 147.

L Smith 'The Performance of the South African Revenue Service and some of its implications (2003) 16(2) *Policy: Issues and Actors* 5.

M Bisgrove & M Weeks 'Deferred Prosecution Agreements: A Practical Consideration' (2014) 6 *Crim.L.R* 416.

M Koehler 'Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement (2015) 49 *U.C.D. L. Rev.* 497

M Mazur and A Plumely 'Understanding the Tax Gap' (2007) 60(3) *National Tax Journal* 22.

M Schonteich 'A story of trials and tribulations, The National Prosecuting Authority, 1998-2014' (2014) 50 *AJOL* 5.

N Somaru & Crista Rautenbach 'Non-Criminal Dispute Resolution in South Africa's Criminal Justice System: Proposals for reform' (2020) *SACR* 525.

P du Toit & G Ferreira 'Reasons for Prosecutorial Decisions' (2015) 18(5) *PER/PELJ* 1507.

R Delaney 'Congressional Legislation: The Next Step for Corporate Deferred Prosecution Agreements' (2009) 93(2) *Marq.L.Rev* 875.

S Curral & M Epstein 'The Fragility of Organizational Trust: Lessons From the Rise and Fall of Enron' (2003) 32(2) *Organization Dynamics* 193.

S Kumar, A Nagar and S Samanta 'Indexing the Effectiveness of Tax Administration'(2007) 42(50) *Economic and Political Weekly* 104.

S Smulders 'The transformation of the South Africa Revenue Authority in the Post-Apartheid Era' (2013) 43 *TAXtalk* 54.

T Neubig 'Global Tax Administration Initiatives Addressing Tax Evasion and Avoidance' (2018) *Tax Notes International* 113.

Q Bu 'The Viability of Deferred Prosecution Agreements (DPAs) in the UK: The Impact on Global Anti-Bribery Compliance' (2021) 22 *European Business Organization Law review* 173.

W Kaal and T Lacine 'The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013' (2014) 70 *The Business Lawyer* 61.

Legislation

Anti-Corruption and Economic Crimes Act 2012.

Anti-Corruption and Economic Crimes Amendment Bill, 2021.

Crime and Court Act 2013.

Crimes Legislation (Combatting Corporate Crime) Bill 2017.

Criminal Procedure Act 51 of 1977.

Exchange Control Regulations, 1961.

Income Tax Act 58 of 1962

Internal Revenue Code of 1986 18 U.S.C

National Prosecuting Authority Act 32 of 1998.

Promotion of Administrative Act 3 of 2000.

SARS 'Short Guide to the Tax Administration Act, 2011 (Act No.28 of 2011), 2018.

Singapore Criminal Justice Criminal Justice Reform Act 2018.

SFO 'Deferred Prosecution Agreements Code of Practice 2013.

South African Revenue Service Act 34 of 1997.

Tax Administration Act 28 of 2011.

Taxation Laws Amendment Act 20 of 2021.

Reports

1971 Annual Report of the Commissioner of Internal Revenue

Mokgoro J *Mokgoro Enquiry in terms of Section 12(6) of the National Prosecuting Authority Act 32 of 1998, Unabridged Version* April 2019.

NPA 'Access to Information Manual of the National Prosecuting Authority of South Africa: Version 1.06' 2016.

Nugent J *The Commission of Inquiry into Tax Administration and Governance by SARS Final Report* December 2018.

South African Law Commission *Project 73 Simplification Of Criminal Procedure (A More Inquisitorial Approach To Criminal Procedure - Police Questioning, Defence Disclosure, The Role Of Judicial Officers And Judicial Management Of Trials)* 2001.

South African Law Commission *Project 106 Juvenile Justice* 2000.

The United Kingdom Ministry of Justice *Deferred Prosecution Agreements: Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* 2012
United Nations *Economic and financial crimes: challenges to sustainable development* 2005

Zondo J *The Judicial Commission of Inquiry into allegations of State Capture Report Part I* January 2022

Zondo J the *Judicial Commission of Inquiry into allegations of State Capture Report Part VI* June 2022.

Research Papers

D Mehta 126th International Senior Seminar Visiting Experts' Papers *Economic Crime in a globalizing society its impact on the sound development of the State- An Indian Perspective.*

LexisNexis *Risk Solutions 2021 True Cost of Financial Crime Compliance Study: United States and Canada Edition*

LexisNexis Risk Solutions *True Cost of Financial Crime Compliance Study, Global Report June 2021.*

J Arlen 'The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S' (2019) *NYU School of Law, Public Law* Research Paper No. 19.

Theses And Dissertations

G Kashindi 'Tax Disputes Resolution in Kenya: Viability of Including Alternative Dispute Resolution Mechanisms' Thesis, University of Nairobi, 2017

C Olivier 'A Critical Analysis Of The South African Revenue Service (SARS) Dispute Resolution Process' unpublished M.Com dissertation, Nelson Mandela University, 2018

C McClellan 'The Consequence of Poor Taz administration: Collections, Growth and Corruption' unpublished PhD thesis, Georgia State University, 2013

G Kashindi 'Tax Disputes Resolution in Kenya: Viability of Including Alternative Dispute Resolution Mechanisms' Thesis, University of Nairobi, 2017.

Websites

Aljazeera 'HSBC fined $336m to repay Belgium after huge tax fraud' August 2019 https://www.aljazeera.com/economy/2019/8/6/hsbc-fined-336m-to-repay-belgium-after-huge-tax-fraud (accessed 11 September 2022).

Airbus Áirbus reports Half-year(H1) 2022 results. https://www.airbus.com/en/newsroom/press-releases/2022-07-airbus-reports-half-year-h1-2022-results (accessed 29 August 2022).

Airbus 'Who we are' https://www.airbus.com/en/who-we-are (accessed 29 August 2022).

BBC News 'Head of Kenya youth agency arrested in $78m corruption scandal' May 2018 https://www.bbc.com/news/world-africa-44280453 (accessed 12 September 2022).

B Garrett 'Declining Corporate Prosecutions' https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2020/03/57-1-declining-corporate-prosecutions.pdf (accessed 2 September 2022) page 115.

Bloomberg Law US Considered HSDB Charge that Could Upend 2012 Settlement' September 2017 https://news.bloomberglaw.com/business-and-practice/u-s-considers-hsbc-charge-that-could-upend-2012-settlement/ (accessed 7 September 2022).

C Chance ' Deferred Prosecution Agreements and U.S Approaches to resolving Criminal and Civil Enforcement Actions: A regime characterised by limited judicial involvement' April 2012 https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/05/deferred-prosecution-agreements-and-us-approaches-to-resolving-criminal-and-civil-enforcement-actions.pdf (accessed 6 August 2022).

Crown Prosecution Services 'The Code for Crown Prosecutors' October 2018 Available at https://www.cps.gov.uk/publication/code-crown-prosecutors (accessed 7 October 2022).

D Hausman 'Reworking the Revenue Service: Tax collection in South Africa, 1999-2009' February 2010 https://successfulsocieties.princeton.edu/publications/reworking-revenue-service-tax-collection-south-africa-1999-2009 (accessed 14 May 2022).

Department of Justice 'Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA' December 2019 https://www.justice.gov/usao-sdfl/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa (accessed 12 June 2022).

Dr A Makinwa 'Current Trends in Foreign Bribery Investigations and Prosecutions' June 2020 https://assets-global.website-files.com/5e0bd9edab846816e263d633/5f15e0a4a35dd9b7abd817b1_FACTI%20BP6%20Foreign%20bribery.pdf (accessed 2 September 2022).

E Cameron, J Du Toit & A Katsignis 'Justice postponed: What causes unreasonable delays in criminal trials?' (2020) 6 *De Rebus* 7.

E Ferreira 'Zondo: Like Moyane, Zuma was central in SARS capture' January 2022 https://ewn.co.za/2022/06/14/top-energy-producer-australia-braces-for-blackouts (accessed 22 May 2022).

Europol 'Economic crime' https://www.europol.europa.eu/crime-areas-and-statistics/crime-areas/economic-crime (accessed 2 September 2022).

European Parliament 'Member States 'capacity to fight tax crimes Ex post impact assessment' July 2017 https://www.europarl.europa.eu/RegData/etudes/STUD/2017/603257/EPRS_STU(2017)603257_EN.pdf (accessed 2 September 2022).

FATF 'Mutual Evaluation Report South Africa' October 2021 https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-South-Africa.pdf (accessed 10 August 2022).

FTI Consulting South Africa 'Deferred prosecution agreements: a solution to prosecuting backlog?' June 2021 https://www.fticonsulting.com/-/media/files/emea--files/insights/articles/2021/jun/deferred-prosecution-agreements-solution-prosecuting-backlog.pdf?rev=3d8c825869f84197a0e810a30a076039&hash=712632C95CF248490A43BA6B2B0245C7 (accessed 4 August 2022).

F Obura 'Mega scandal hits Kenyan NYS' June 2018 https://www.standardmedia.co.ke/article/2001307344/2018-the-year-of-big-eating-nys-scandal (accessed 12 September 2022).

Financial Crisis Inquiry Commission ' Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States' February 2011 https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (accessed 11 September 2022).

Georgetown law library ' Internal Revenue Code' https://guides.ll.georgetown.edu/c.php?g=271147&p=2630483#:~:text=Title%2026%20of%20the%20U.S.,Code%20of%201986%2C%20as%20amended (accessed 11 September 2022).

Global Legal Insights 'Bribery & Corruption Laws and Regulations 2022:Kenya' https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/kenya (accessed 12 September 2022).

House Hearing, 111 Congress 'Accountability, Transparency, and Uniformity in Corporate Deferred and Non-Prosecution Agreements' June 2009 https://www.govinfo.gov/content/pkg/CHRG-111hhrg50593/html/CHRG-111hhrg50593.htm (accessed 10 September 2022).

Institute for Security Studies 'Africa needs a common approach to financial crime, and the resolve to enforce legislation and regulations' August 2018 https://issafrica.org/iss-today/financial-crime-undercuts-africas-economic-growth-gains (accessed 12 September 2022).

I Oruko 'Bill allows DPP to negotiate with graft lords' September 2021 https://nation.africa/kenya/news/bill-allows-dpp-to-negotiate-with-graft-lords--3566464 (accessed 13 September 2022).

Institute for Security Studies & Corruption Watch 'State Capture and the Political Manipulation of criminal justice agencies. A joint submission to the Judicial Commission of inquiry into Allegations of State Capture' June 2016 https://issafrica.s3.amazonaws.com/site/uploads/2019-06-20-other-zondo-commission-submission.pdf (accessed 12 August 2022).

International Consortium of Investigative Journalists 'HSBC moved vast sums of dirty money after paying record laundering fine' September 2020 https://www.icij.org/investigations/fincen-files/hsbc-moved-vast-sums-of-dirty-money-after-paying-record-laundering-fine/ (accessed 11 September 2022).

L Muntingh ' Accountability Op-Ed: The National Prosecuting Authority is in crisis and is failing in its core business — the prosecution of suspects January 2022 https://www.dailymaverick.co.za/article/2022-01-18-the-national-prosecuting-authority-is-in-crisis-and-is-failing-in-its-core-business-the-prosecution-of-

suspects/#:~:text=Declining%20performance%2C%20lack%20of%20independence,to%20acknowledge%20it%20as%20such. (accessed 06 August 2022).

M Merten 'State Capture wipes out third of SA's R4.9-trillion GDP – never mind lost trust, confidence, opportunity' March 2019 https://www.dailymaverick.co.za/article/2019-03-01-state-capture-wipes-out-third-of-sas-r4-9-trillion-gdp-never-mind-lost-trust-confidence-opportunity/ (accessed on 22 May 2022).

National Youth Service 'About us' https://www.nys.go.ke/ (accessed 19 September 2022).

M Soko 'State Capture eroded institutions in South Africa. How the revenue service is rebuilding itself' August 2022 https://theconversation.com/state-capture-eroded-institutions-in-south-africa-how-the-revenue-service-is-rebuilding-itself-187891 (accessed 16 August 2022).

NPA 'NPA Mandate' March 2022 https://www.npa.gov.za/npa-mandate#:~:text=The%20NPA%20derives%20its%20mandate,fear%2C%20favour%2C%20or%20prejudice. (accessed 12 August 2022).

NPA 'Special Tax Component' https://www.npa.gov.za/specialised-tax-component (accessed 2 June 2022).

OECD '2015 Economic Surveys South Africa' July 2015 http://www.oecd.org/economy/surveys/South-Africa-OECD-economic-survey-overview.pdf (accessed 23 July 2022).

OECD 'Resolving Foreign Bribery Cases with Non-Trial Resolutions, Settlements Non-Trail Agreements by Parties to the Anti Bribery Convention' December 2019 https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf (accessed 2 September 2022).

Office of Chief Counsel Criminal Tax Division ' IRS Tax Crimes Handbook' https://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf (accessed 11 September 2022).

P Bejakovic 'How to Achieve Efficiency and Equity in the Tax System?' September 2019 https://hrcak.srce.hr/file/351917 (accessed 1 August 2022).

PARI 'Fiscal Histories of Sub-Saharan Africa: the case of South Africa' July 2017 https://southafrica.fes.de/fileadmin/user_upload/publications/Fiscal-Histories-240817-1.compressed.pdf (accessed 6 August 2022).

R Bird and E Zolt 'Introduction to Tax Policy Design and Development Practical Issues of Tax Policy in Developing Countries, World Bank' April 2003 http://www1.worldbank.org/publicsector/LearningProgram/PracticalIssues/papers/tax%20administration/Admin%20paper%20Jan%202004.doc (accessed 30 July 2022).

Reuters 'Kenya's prosecutor fines five banks $3.75 mln for violations' March 2020 https://www.reuters.com/article/kenya-banks-idUKL8N2AY1BQ (accessed 12 September 2022).

Rolls Royce 'About' https://www.rolls-royce.com/about.aspx#section-overview (accessed 11 September 2022).

SARS '1 April 2014 – Preliminary Outcome of Revenue Collection for the 2013-14 Fiscal Year' April 2014 https://www.sars.gov.za/media-release/1-april-2014-preliminary-outcome-of-revenue-collection-for-the-2013-14-fiscal-year/ (accessed 21 July 2022).

SARS 'SARS and the Criminal Justice System' (April 2021) https://www.sars.gov.za/targeting-tax-crime/what-is-a-tax-crime/sars-and-the-criminal-justice-system/ (accessed 24 July 2022).

SARS 'Media Statement Responding to King' November 2008 https://www.sars.gov.za/sars-mr-2008-030-media-release-on-responding-to-dave-king-4-november-2008/(accessed 06 August 2022).

Serious Fraud Office 'Deferred Prosecution Agreements' October 2020 Available at: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/ (Accessed 7 October 2022).

The Bureau of Investigative Journalism 'Money Laundering Ring Pushed $4billion Through HSBC' September 2021 https://www.thebureauinvestigates.com/stories/2021-07-28/money-laundering-ring-pushed-4.2bn-through-hsbc (accessed 11 September 2011).

The United States Attorney's Office Southern District of Florida 'Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA' December 2019 https://www.justice.gov/usao-sdfl/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa (accessed 11 September 2022).

S Smit 'What the Fica? South Africa's possible grey listing in black and white' August 2022 https://mg.co.za/business/2022-08-05-what-the-fica-south-africas-possible-greylisting-in-black-and-white/ (accessed 10 August 2022).

South African Government 'How does the justice system work?' https://www.gov.za/faq/justice-and-crime-prevention/how-does-criminal-justice-system-work (accessed 10 August 2022).

South African History Online 'Jacob Gedleyihlekisa Zuma' https://www.sahistory.org.za/people/jacob-gedleyihlekisa-zuma (accessed 02 August 2022).

South African Institute of Taxation 'Civil vs Criminal Investigations. A Taxpayer's Right Not to Give Self-Incriminating Evidence' March 2009 https://www.thesait.org.za/news/96221/Civil-vs.-Criminal-Investigations.-A-Taxpayers-Right-Not-To-Give-Self-Incriminating-Evidence.htm (accessed 06 October 2022).

The United States Department of Justice 'Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case' https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case (accessed 29 August 2022).

UNODC *Alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return* September 2021 https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2021-September-6-10/CAC-COSP-WG.2-2021-CRP.1.pdf (accessed 3 September 2022).

SARS '20 years 1997-2017 Tax & Triumphs' 2017 https://www.sars.gov.za/sars-20-year-celebration-doublespread/ (accessed 29 July 2022).

SARS 'SARS and NPA: Joint media statement on prioritising tax crime' February 2021 https://www.sars.gov.za/media-release/sars-and-npa-joint-media-statement-on-prioritising-tax-crime/(accessed 2 June 2022).

South African History Online 'Pravin Jamnadas Gordhan' https://www.sahistory.org.za/people/pravin-jamnadas-gordhan (accessed 26 May 2022).

S Ngqakamba 'Court postponements: Who suffers?' July 2019 https://www.news24.com/news24/SouthAfrica/News/court-postponements-who-really-suffers-20190701 (accessed 1 June 2022).

T Masuku 'Contrary to public expectations, South Africa's many inquiries won't necessarily deliver accountability for the crimes they uncover.' December 2019 https://issafrica.org/iss-today/justice-and-commissions-of-inquiry-a-tenuous-link (accessed 1 June 2022).