CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 3/2000

METCASH TRADING LIMITED — Applicant

versus

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE — First Respondent

THE MINISTER OF FINANCE — Second Respondent

Heard on : 28 March 2000

Decided on : 24 November 2000

JUDGMENT

KRIEGLER J:

[1] This case concerns the constitutional validity of section 36(1) and subsections (2)(a) and (5) of section 40 of the Value-Added Tax Act 89 of 1991 (the Act).[1] The question is whether these provisions unjustifiably limit the right of access to courts protected by section 34 of the Constitution.[2] In substance section 36(1) of the Act says that upon assessment by the

---

1 The three impugned subsections are quoted in paragraph 24 below.

2 Section 34 of the Constitution of the Republic of South Africa, 1996 provides:
"**34. Access to courts.—**
Everyone has the right to have any dispute that can be resolved by the application of law

Commissioner for the South African Revenue Service (the Commissioner), and notwithstanding the noting of an "appeal", a taxpayer is obliged to pay the assessed tax, called value added tax (VAT) plus consequential imposts there and then, possible adjustments and refunds being left for dispute and determination later. Concomitantly the other two impugned provisions of the Act empower the Commissioner to exact summary payment of the assessed amounts: section 40(2)(a) empowers the Commissioner, where payment of an assessment is overdue, to file a statement at court which has the effect of an exigible civil judgment for a liquid debt; and subsection (5) puts the correctness of the assessment beyond challenge in such execution.

[2] The applicant is Metcash Trading Limited (Metcash). It is a wholly owned subsidiary, and the principal operating entity in South Africa, of Metro Cash And Carry Limited (Metro), a public company listed on the Johannesburg Stock Exchange. Metcash conducts business as a wholesaler and distributor of what it calls "fast moving consumer goods", and as a liquor retailer. It employs some 8 500 people at 162 outlets throughout the country and enjoyed a turnover of approximately R6 billion for the financial year to April 1999. Metro's turnover for that period exceeded R28 billion. The respondents are respectively the Commissioner in his capacity as the official charged with the administration of the Act and the Minister of Finance, who was cited by reason of his interest in the validity of the impugned sections of the Act.

---

decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[3] There had been intermittent rumblings from the revenue authorities about Metcash's VAT returns[3] and payments from as early as mid-1996. These were followed by meetings, correspondence, investigations and further meetings between Metcash representatives and the Commissioner's staff. Things came to a head on 31 May 1999 when a letter bearing that date from the Commissioner to Metcash was delivered by hand. The letter gave Metcash formal notice that the Commissioner was not satisfied with the VAT returns furnished by the former for the tax periods from July 1996 to June 1997 and that, for reasons detailed in an annexure to the letter and by virtue of his powers under section 31(1)(b) or (c) of the Act, he had made assessments listed in a further annexure. The annexures run to 52 pages and furnish extensive particulars of the grounds for the Commissioner's decision. The schedule detailing the Commissioner's grounds commences with a summary alleging that transactions entered into by Metcash and /or its associated companies with four named close corporations had been fictitious. It continues:

> "No goods were sold and delivered and accordingly no input tax on the transactions in question could be claimed. The total amount of the claim for input tax in respect of the fictitious transactions, set out in Annexure 1, currently known to the Commissioner . . . is R77 667 722,27."

3 The term will be explained in paragraph 15 below.

The schedule of assessed amounts reflects that Metcash was also assessed for additional tax of double the original R77 667 722, 27, namely an amount of R155 335 444,54, plus a penalty of 10% (R7 766 772,22) and interest as at that date of R25 165 004,01.[4] The total of the assessments at that stage was R265 934 943,04. In terms of the letter the assessments adding up to this substantial sum[5] were to be paid by 30 June 1999, failing which steps for their recovery would be taken without further notice.

[4] On 24 June 1999 Metro's chairman led a delegation to the Commissioner, followed up by a letter the next day in which, among others, the point was made that:

> ". . . Metcash is a business of considerable size . . . and will be in a position to pay whatever assessment it may be determined to be liable for."

and continuing:

> "To this end, we would request that you do not require Metcash to pay the assessment pending the outcome of the investigations, whereafter SARS can assess its position. We envisage that a period of 60 days should be adequate to draw satisfactory conclusions as to what has precisely transpired in this complex matter."

On 30 June 1999 attorneys acting on behalf of Metcash delivered a letter to the Commissioner formally lodging an objection to the assessments and submitting argument in support of another request for a 60 day extension. By letter dated 5 July 1999 the

---

4 The statutory authority for a penalty of 10% of the amount of tax and interest at a prescribed rate is to be found in sections 39(1)(a)(i) and (ii), while section 60(1) empowers the Commissioner to impose treble tax in cases of tax evasion, ie to charge ". . . additional tax not exceeding an amount equal to double the amount of tax . . ."

5 According to a calculation by the Commissioner, interest on the amount accrues at over R3 million per month.

Commissioner granted an extension of 45 days from 30 June 1999. This period, too, proved inadequate and at the eleventh hour, namely on 13 August 1999, the attorneys delivered another lengthy letter, repeating the formal noting of the objection. Although the letter advanced and furnished supporting argument in respect of a number of grounds of objection, there was no serious attempt to join issue with the contentions in the annexures to the Commissioner's letter of 31 May 1999. The letter did however "place on record" that Metcash was not able at that stage "to fully and comprehensively deal with all the allegations" in the factual schedule. It was also contended that:

> "On the evidence currently at our client's disposal, . . . the input tax was duly claimable by our client as it complied with the relevant provisions of the Vat [sic] Act . . . [E]nforceable contracts between our client and the relevant suppliers of goods, . . . did, in fact, exist."

[5] By letter dated 13 September 1999 the Commissioner disallowed Metcash's objection and gave it some 48 hours notice to pay all the amounts in full, failing which the summary procedure contemplated by section 40(2)(a) of the Act would be implemented. This precipitated an urgent application to the High Court in Johannesburg to block the threatened action by the Commissioner. An interim arrangement was made and the case subsequently came before Snyders J, who later delivered a reserved judgment.[6] The learned judge found that the relevant sections of the Act infringed the fundamental right of access to the courts afforded to everyone by section 34 of the Constitution. In arriving at that conclusion she relied heavily on the judgment of this Court in *Chief Lesapo v North West Agricultural Bank and Another*,[7] which she

---

6 The judgment is reported as *Metcash Trading Ltd v Commissioner for the South African Revenue Service and Another* 2000 (2) SA 232 (W); 2000 (3) BCLR 318 (W).

7 *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC), of which paragraphs 11, 13, 14, 16, 17, 19 and 20 are extensively quoted.

regarded as directly in point. The learned judge then turned to a consideration of the possible saving of the offending provisions under section 36 of the Constitution and concluded[8] that they were neither reasonable nor justifiable.

[6] She accordingly proceeded to declare the three challenged provisions of the Act invalid and made certain ancillary orders, including an interdict preventing the Commissioner from enforcing payment of the assessed tax pending conclusion of Metcash's appeal to the Special Income Tax Court (the Special Court) against the assessments. In addition the judge referred the order of constitutional invalidity to this Court in terms of sections 167(5) and 172(2) of the Constitution, which provide that an order of constitutional invalidity made by a high court is of no force unless confirmed by the Constitutional Court.

[7] What this Court therefore now has to consider is whether or not to confirm the order declaring the three subsections of the Act invalid.

---

8 At 245 B.

[8] The Commissioner and the Minister oppose confirmation, contending that the judge erred in finding that the provisions in question infringe section 34 of the Constitution. Their principal argument is that the "pay now, argue later" rule in section 36(1) of the Act nevertheless affords the taxpayer sufficient opportunities for a hearing on the assessment. These they say are by objecting to the assessment; asking the Commissioner to grant an extension of the time for payment; if he refuses, asking a court to set aside such refusal on review; and, ultimately appealing to the Special Court against the assessment and other charges. Therefore the provisions do not infringe the requirements of section 34 of the Constitution. They further argue that even if there is such an infringement, the quick, reliable and predictable recovery of VAT is of vital national importance and that the relevant provisions are saved from invalidity by section 36 of the Constitution, which permits limitations of the rights protected in the Bill of Rights in particular circumstances.[9] Finally they contend that even if the provisions are indeed invalid, an order of invalidity should be suspended for three years to enable Parliament to draft appropriate substitute legislation.

---

9 The section reads as follows:

"**36. Limitation of rights.—**

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[9] Metcash, for its part, supports the ruling and basic reasoning in the High Court, contending that the opportunities for protest seen by the Commissioner in section 36 of the Act are illusory or inadequate: the taxpayer is effectively compelled to pay up and can but hope to get the money back later. They also cite the judgment of this Court in *Lesapo*,[10] which struck down provisions in a Bophuthatswana statute which permitted the bank in question to levy execution against its debtors without recourse to the courts. The sections in question are said to be analogous to those dealt with in *Lesapo* in that they permit self-help and thus oust the jurisdiction of the courts in breach of the principle entrenched in section 34 of the Constitution. In any event, so it is contended, the impugned provisions breach the Constitution in that the double tax they permit the Commissioner to impose is really punishment for criminal conduct without resort to the courts. Therefore, so they argue, the provisions infringe the protection afforded by section 34 of the Constitution in these two respects.

[10] As regards the justification under section 36 of the Constitution contended for by the Commissioner, Metcash raises several counter-arguments, among them that there are less invasive ways of protecting the national interest in ensuring speedy and dependable receipt of VAT. It further contends that the relevant provisions of the Act are unduly harsh and more invasive of taxpayers' rights than any comparable foreign tax statute. As to the timing of any order invalidating the sections, the submission on behalf of Metcash was that there was no justification for allowing the Commissioner and the Minister time to ask Parliament to remedy the invalidity.

[11] In order to appreciate the effect of the challenged provisions and to evaluate the cogency

---

10 Above n 7.

of the challenge, one must have some understanding of the VAT system, which replaced sales tax in South Africa when the Act came into operation in mid-1991. The system is sophisticated and its provisions are numerous and complex. For present purposes, however, a brief outline of its basic principles and main provisions will suffice. What follows does therefore not purport to be an authoritative analysis of any provision of the Act merely touched on in the course of this introduction. The Act is interlarded with many terms of art. Some are defined in the Act itself and others bear a special meaning in their context. Brief explanations of such terms are provided as and when necessary in order to make the introduction comprehensible. These explanations, too, are not proffered as authoritative or exhaustive.

[12] VAT is, as its name signifies, a tax on added value. It is imposed at each step along the chain of manufacture and distribution of goods or services that are supplied in the country in the course of business; and it is calculated on the value at the time of each such step. The system was instituted by section 7(1) of the Act which, reduced to its bare essentials, provides as follows:

> "... there shall be levied and paid ... a tax, to be known as the value-added tax —
> (a) on the supply by any vendor of goods ... supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;
> (b) ...
> (c) ...
> calculated at the rate of 14 per cent on the value of the supply concerned ..."

[13] Although the tax is payable on a wide variety of transactions, the present discussion can be confined to the facts of this case, which involves the commercial purchase and sale of goods and can therefore serve as a straight forward example of how the system is supposed to work.

The basic idea of VAT is that it is calculated on the value of each successive step as goods move from hand to hand along the commercial production and distribution chain from their original source to their ultimate user. For present purposes it can be accepted that the tax is calculated at the prescribed rate of 14% on the price[11] at which each successive act of handing on takes place. Furthermore, the tax is not only calculated on the value of each successive supply, but is to be paid at that time. As goods move along the distribution chain, everyone making up the sales chain is first a recipient, then a supplier. The Act calls these recipients/suppliers who are engaged in enterprises "vendors"[12] and section 23 makes provision for them to be registered as such with the Commissioner.[13] Section 7(2) of the Act then renders each vendor who supplies goods liable to pay the VAT on that particular supply.

---

[11] Section 10(2) of the Act prescribes that the "value to be placed on any supply of goods . . . shall, . . . be the value of the consideration for such supply, . . ." and subsection (3)(a) that "to the extent that such consideration is a consideration in money, the amount of the money" is the value of the consideration.

[12] "Vendor" is defined in section 1.

[13] Section 23(1)(a) obliges:

> "[e]very person who, . . . carries on any enterprise . . . to be registered — at the end of any month where the total value of taxable supplies made by that person in the period of 12 months ending at the end of that month in the course of carrying on all enterprises has exceeded R300 000;"

[14] Being a tax on added value, VAT is not levied on the full price of a commodity at each transactional delivery step it takes along the distribution chain. It is not cumulative but merely a tax on the added value the commodity gains during each interval since the previous supply. To arrive at this outcome a supplying vendor, when calculating the VAT payable on the particular supply, simply deducts the VAT that was paid when the particular goods were supplied to it in the first place. As a commodity is on-sold by a succession of vendors, each payment of VAT by each successive supplier must then represent 14% of the selling price less the 14% of the price which was payable when that commodity was acquired. According to the scheme of the Act the tax that is payable by a supplying vendor is called output tax and the tax that was payable on the supply to that vendor upon acquisition is called input tax.[14]

[14] Both terms are more elaborately defined in section 1 of the Act but for present purposes these simple definitions suffice.

[15] Of course it would be wholly impracticable to expect merchants to pay and the fiscus to receive individual payments of VAT on each and every separate supply. Therefore the Act provides a detailed mechanism for vendors to keep certain kinds of records and periodically to calculate, account for and pay VAT to the Commissioner. In broad outline the mechanism provides how the deduction of input tax from output tax is to be made and specifies the kinds of vouchers that have to be kept;[15] and then when and how vendors are to make their payments and complete their supporting returns to the Commissioner.[16] In the result vendors are entrusted with a number of important duties in relation to VAT. First there is the duty to calculate and levy VAT on each supply of goods; then to calculate the output tax and the input tax on that transaction correctly; also to keep proper records supported by the prescribed vouchers, periodically to add up the sum of output and input taxes attributable to that period and appropriately deducting the total of the input taxes from those of the output taxes; and, ultimately and crucially, to make due and timeous return and payment of the VAT that is payable in accordance with the vendor's allocated tax period.

[16] It would be convenient to pause at this point to recapitulate and fill in some details before moving on to the next phase of the Act, which deals with assessments by the Commissioner and what they may set in train. The first significant point to note is that VAT, quite unlike income tax, does not give rise to a liability only once an assessment has been made. VAT is a multi-stage tax, it arises continuously. Moreover VAT vendors/taxpayers bear the ongoing obligation

---

15 Particularly sections 16, 20 and 21. Section 16(3)(a)(i) provides that:

> ". . . the amount of tax payable in respect of a tax period shall be calculated by deducting from the sum of the amounts of output tax of the vendor which are attributable to that period, . . . [among others] the amounts of input tax — . . . in respect of supplies of goods . . . made to the vendor during that tax period."

16 Section 27, which provides for vendors to be allocated tax periods, and section 28, which requires specified returns to be made and payments to be made by the 25th of the month following the end of each tax period. See also section 38(1) which requires tax payable to be paid in full within the time allowed by, among others, section 28.

to keep the requisite records, to make periodic calculations of the balance of output totals over and above deductible input totals (and any other permissible deductibles) and to pay such balances over to the fisc. It is therefore a multi-stage system with both continuous self-assessment and predetermined periodic reporting/paying.

[17] An even more important feature of VAT, particularly in contradistinction to income tax, is that vendors are in a sense involuntary tax-collectors. In principle VAT is payable on each and every sale; the VAT percentage, the details for its calculation and the timetable for periodic payment are statutorily predetermined, and it is left to the vendor to ensure that the correct periodic balance is calculated, appropriated and paid over in respect of each tax period. By like token the regularity of VAT payments on the one hand ensures a steady and generally more accurately predictable stream of revenue via a multi-staged taxation that is perceived as resting less heavily on the taxpayer, but on the other hand it does require a great deal of book-keeping by vendors and policing by the revenue authorities.

[18] A special feature of VAT relates to exports. VAT is payable only on consumption in South Africa and as a result output tax is not payable on goods sold and exported. In the arcane language of the Act, they are zero-rated.[17] Therefore a merchant who buys and sells goods in South Africa and also sells some goods that are exported does the periodic calculation by adding up all input taxes for deduction from the sum of output taxes but, in calculating the latter, includes no output tax on the value of the exports. No output tax is payable on the exported goods but a full credit is given for the input tax. This exemption, which aims at promoting exports and enhancing their competitiveness in the world market, holds self-evident benefits for

---

17 Section 11(1)(a) of the Act.

export-orientated vendors. Unfortunately those benefits not only attract honest exporters but are a notorious magnet for crooks who devise all manner of schemes to exploit the system to their advantage.

[19] In the case of VAT the spectre of dishonesty extends beyond export related frauds, however. Although VAT as a system of raising revenue clearly has many advantages,[18] it undeniably also has weaknesses. For present purposes only a few drawbacks need be mentioned. VAT spreads the tax base wide, thus promoting an equitable tax burden, which can be scored as a plus. But at the same time the multiplicity of vendors,[19] many of them small and possibly ill-equipped to perform their statutory duties, places a heavy burden on the revenue authorities.[20] They have to administer a sophisticated system and supervise the performance of a large body of vendors with limited human and material resources. In his affidavit the Commissioner complains of a lack of staff adequately trained in accounting and makes the point that a backlog in the training of accountants country-wide puts trained people at a premium in the private sector, leaving the Department chronically unable to obtain and retain a sufficient number of skilled staff.

[20] The Commissioner also emphasises that unscrupulous vendors take advantage of his Department's notorious staffing embarrassment. He gives depressing statistics in support of the

---

18 These are discussed in the *Report of the Commission of Inquiry into the Tax Structure of South Africa* RP 34/1987, the consequential , WP C-88 and the so-called Vatcom Report by a broad-based commission appointed by the Minister of Finance in 1990, *Report of the Value-Added Tax Committee,* 1990.

19 According to the Commissioner's opposing affidavit there are close on half a million registered vendors in the country.

20 Thus, for example, the Johannesburg revenue office, the largest in the country, has only 145 people in its audit section, of whom some 40% lack tertiary qualifications, and has to audit the returns of approximately 120 000 vendors. The ratio of 827 vendors per auditor is very far below the international norm of 1:200.

proposition that general tax morality in the country is low and that there is a high rate of tax evasion and fraud. By way of illustration he cites 19 816 field audits conducted from March to September 1999 revealing irregularities in 38,52% of the cases and involving R638,3 million. During the same period fraud and evasion cases being investigated by the audit staff involved approximately R650 million while the sum involved in investigations relating to the fiscal years 1996 to 1998 and for the period from April to July 1999 amounted to a staggering R1,45 billion. In the circumstances it is not surprising that the Commissioner's affidavit stresses the difficulties his Department encounters in enforcing proper compliance with the requirements of the Act.

[21] It would now be convenient to revert to the summary of the relevant statutory provisions which, it will be recalled, had reached the point where a vendor's obligation to make timeous periodic returns and payments of VAT to the Commissioner were outlined.[21] The Act, having prescribed the VAT obligations of vendors, proceeds to cater for those vendors who do not voluntarily and faithfully fulfil those obligations. The first step to that end is section 31 of the Act,[22] which empowers the Commissioner to make an independent assessment of both the VAT

---

21 At paragraph 16 above.

22 Section 31, insofar relevant, provides as follows:

> "**31. Assessments.—**
>
> (1) Where—
>
> (a) any person fails to furnish any return . . . ; or
>
> (b) the Commissioner is not satisfied with any return . . . ; or
>
> (c) the Commissioner has reason to believe that any person has become liable for the payment of any amount of tax but has not paid such amount; or
>
> . . . .
>
> the Commissioner may make an assessment of the amount of tax payable, . . . and the amount of tax so assessed shall be paid by the person concerned to the Commissioner.
>
> (2) . . . .
>
> (3) In making such assessment the Commissioner may estimate the amount upon which the tax is payable.
>
> (4) The Commissioner shall give the person concerned a written notice of such assessment, . . .
>
> (5) The Commissioner shall, in the notice of assessment referred to in subsection (4), give notice to the person upon whom it has been made that any objection to such assessment shall be lodged or be sent so as

and the amount on which it is payable, and makes the amount of the assessed tax payable, where there is a failure to make a VAT return, or where the Commissioner is not satisfied with a return or has reason to believe VAT is due but has not been paid. The Commissioner must give the vendor written notice of the assessment and in the notice inform the vendor that objection to the assessment may be lodged.

to reach the Commissioner within 30 days after the date of such notice."

[22] Manifestly section 31 constitutes a valuable weapon in the hands of the Commissioner. The prospect of having the Commissioner independently assess both the underlying amount and the VAT that is to be paid thereon must in itself be a powerful disincentive for recalcitrant, dishonest or otherwise remiss vendors. But the compulsive force of this mechanism of the Act goes a good deal further. The dissatisfied vendor can, by lodging an objection under section 32 of the Act[23] and, that failing, by noting an appeal under section 33[24] or 33A,[25] both compel the

---

23 Section 32 in substance provides:

> "**32. Objections to certain decisions or assessments.—**
> (1) Any person who is dissatisfied with—
> (a) . . . .
> (b) any assessment made upon him [by the Commissioner] under . . . section 31, . . . or;
> (c) . . . .
> may lodge an objection thereto with the Commissioner.
> (2) Every objection shall be in writing and shall specify in detail the grounds upon which it is made.
> (3) No objection shall be considered . . . which is not delivered . . . within 30 days . . . unless the Commissioner is satisfied that reasonable grounds exist for delay . . . : Provided that any decision of the Commissioner . . . under this subsection shall be subject to objection and appeal.
> (4) . . . the Commissioner may—
> (a) . . . .
> (b) alter or reduce any assessment . . . ; or
> (c) disallow the objection,
> and shall send to the objector a written notice of such alteration, reduction or disallowance . . . .
> (5) . . . ."

24 Section 33, insofar here relevant, provides:

> "**33. Appeals to special court.—**
> (1) . . . an appeal against any . . . assessment . . . shall lie to the special court for hearing income tax appeals constituted under the provisions of section 83 of the Income Tax Act . . .
> (2) Every appeal shall be . . . in writing and shall be lodged . . . within 30 days . . . : Provided that the Commissioner may . . . condone any delay . . . : Provided further that any decision of the Commissioner . . . under this subsection shall be subject to objection and appeal.
> (3) At the hearing by the special court . . .
> (a) the appellant shall be limited to the grounds of objection stated in the notice of objection . . . unless the Commissioner agrees . . . or . . . is given leave by the special court to amend . . .
> (b) the special court may . . . confirm, cancel or vary any decision of the Commissioner . . . or, in the case of any assessment, order that assessment to be altered, reduced or confirmed . . .
> (4) The provisions of sections 83 (8), (9), (10), (11), (12), (14), (15), (16), (17), (18) and (19), 84 and 85 of the Income Tax Act and any

Commissioner to reconsider the assessment and have its correctness reconsidered afresh by an independent tribunal. But the burden of proving the Commissioner wrong then rests on the vendor under section 37.[26] Because VAT is inherently a system of self-assessment based on a vendor's own records, it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal. Unlike income tax, where assessments can elicit genuine differences of opinion about accounting practice, legal interpretations or the like, in the case of a VAT assessment there must invariably have been an adverse credibility finding by the Commissioner; and by like token such a finding would usually have entailed a rejection of the truth of the vendor's records, returns and averments relating thereto. Consequently the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner's precipitating credibility finding can be shown to be wrong, the consequential assessment must stand.

> regulations under that Act relating to any appeal to the special court shall *mutatis mutandis* apply with reference to any appeal under this section . . . "

25 Section 33A allows disputes not exceeding R30 000 to be heard by a board in stead of the special court.

26 In substance section 37 provides:

> "**37. Burden of proof.—**
> The burden of proof that any supply . . . is exempt from or not liable to any tax chargeable under this Act or . . . that any amount should be deducted as input tax, shall be upon the person claiming such exemption, non-liability, . . . deduction . . . and . . . any decision of the Commissioner, . . . shall not be reversed or altered unless it is shown . . . that the decision is wrong."

[23] The Act affords the Commissioner additional — and formidable — powers aimed at ensuring proper compliance on the part of vendors with their obligation to keep proper records, make correct returns and effect due payments of VAT on time. First there is section 39, which imposes an automatic penalty of 10% of the amount of tax payable where there is a failure to pay any amount payable under section 28(1).[27] Even more intimidatory is the power vested in the Commissioner by section 60 of the Act[28] to charge additional tax up to double the amount of tax due, in other words to treble tax vendors, in cases of tax evasion. In the third place, a vendor is liable to pay interest at a rate of 1,2% per month on both the outstanding tax and additional tax.[29] There are many other enforcement mechanisms built into the Act, e.g. a form of garnishment under section 47, criminal sanctions under sections 58 or 59 and extensive powers of interrogation, entry, search and seizure under Part 9 of the Act. None of these provisions of the Act is directly in issue in this case and they should merely be noted as part of the textual context in which the challenged provisions are to be interpreted and evaluated.

[24] The target of the challenge on behalf of Metcash is not the basic functioning of the VAT system, nor the incentives aimed at ensuring prompt and proper reporting and payment of VAT. The challenged provisions relate rather — and solely — to a two-pronged supplementary mechanism aimed at enforcing prompt payment pursuant to an assessment. The one prong is section 36(1) and the other is made up of sections 40(2) and 40(5) read together. Shorn of words

---

27 The section imposes the penalty in a variety of circumstances, but we are concerned only with a default under section 28(1). The section also empowers the Commissioner to remit the penalty where appropriate.

28 Section 60(1)(a) provides:

> "Where any vendor . . . fails to perform any duty imposed . . . by this Act . . . with intent — to evade the payment of any amount of tax payable . . . such vendor shall be chargeable with additional tax not exceeding an amount equal to double the amount of tax [payable] . . ."

29 Section 39 and the definition of prescribed rate in section 1.

not germane to the present discussion, these subsections read as follows:

> "**36. Payment of tax pending appeal.—**
>
> (1) The obligation to pay and the right to receive and recover any tax, additional tax, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision . . . a due adjustment shall be made, amounts paid in excess being refunded with interest . . . and amounts short-paid being recoverable with penalty and interest calculated as provided in section 39(1)."

> "**40. Recovery of tax.—**
>
> (1) . . . .
>
> (2)(a) If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act, when it becomes due or is payable by him, the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable by that person, and such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt of the amount specified in the statement.
>
> . . . .
>
> (5) It shall not be competent for any person in proceedings in connection with any statement filed in terms of subsection (2)(a) to question the correctness of any assessment upon which such statement is based, notwithstanding that objection and appeal may have been lodged against such assessment."

It would be as well to quote a further provision, section 42, which bolsters the summary enforcement procedure and may therefore bear on its constitutionality. It reads as follows:

> "**42. Evidence as to assessments.—**
>
> The production of any document issued by the Commissioner purporting to be a copy of or an extract from any notice of assessment shall be conclusive evidence of the making

of such assessment and shall, except in the case of proceedings on appeal against the assessment, be conclusive evidence that the amount and all the particulars of such assessment appearing in such document are correct."

[25] All the relevant data having been identified and tagged, we can now turn to an evaluation of the basis upon which the constitutional challenges were upheld by the learned judge in the High Court. The reasoning that led to her conclusion that sections 36(1), 40(2)(a) and 40(5) are invalid by reason of their infringement of section 34 of the Constitution was based four-square on the judgment of this Court in *Lesapo.*[30] The statutory provisions under scrutiny in *Lesapo* and in this case she regarded as analogous; and the reasons for the rejection of the one in issue in *Lesapo* she regarded as applicable to those under challenge in this case. The starting point of that line of reasoning[31] was that, subject to a qualification to be considered shortly,[32] it was common cause that, read together, the sections unequivocally have the effect that:

"(a) the obligation by the applicant to pay, which arose as per the determination of the first respondent on 30 June 1999, shall not be suspended by the applicant's appeal against the assessment, nor by the current proceedings, nor by any decision of a court of law;

(b) if the obligation is not settled by the applicant, and for purposes of the illustration I leave aside the first respondent's gratuitous undertaking not to exercise its powers pending this judgment, the first respondent is entitled to enforce payment and even to execute against the applicant on the assessment as if it amounted to a civil judgment, lawfully given by a court of law, by simply filing a statement with the registrar or clerk of any competent court, which statement is to disclose the amount of the indebtedness and is to be certified by the first respondent as correct;

(c) it is not competent for the applicant to question the correctness of the assessment

---

30 Above paragraph 5 and n 7.

31 Above n 6 at 238 I—239 D.

32 Below paragraph 38.

upon which the statement so filed by the first respondent is based, notwithstanding the applicant's appeal against the assessment;

(d) only a direction by the first respondent could have the effect of suspending the applicant's obligation to pay."

The judge considered and disposed of the qualification and continued:[33]

> "The meaning of the Act is that the obligation to pay remains intact: it cannot be suspended by a court of law but only by the first respondent. Thus the power of any court of law to provide an aggrieved vendor with interlocutory relief is clearly excluded irrespective of the merits or demerits of his case. The constitutional challenge by the applicant would therefore remain valid whether the first respondent made a decision and whether that decision was taken on review or not."

---

33 Above n 6 at 239 J—240 B.

[26] The judgment then proceeds to quote extensively from *Lesapo*[34] and wraps up this particular part of the reasoning with the conclusion:[35]

> "Sections 36(1), 40(2)(*a*) and 40(5) explicitly exclude the need for recourse to a court of law and exclude the powers of the courts of law in interfering with that process regardless of the demands of justice. The only option available to a vendor would be to pay prior to having any dispute settled by a court of law or suffer the course of execution outside the auspices of the judicial process.
>
> There is no doubt that the relevant provisions are inconsistent with the provisions of s 34 of the Constitution in that:
>
> *(a)* it substitutes the first respondent for the court in determining every facet of the vendor's liability and the enforcement thereof;
>
> *(b)* it precludes any interlocutory relief by a court of law for the aggrieved vendor whilst the statutory remedy of appeal is pursued.
>
> The prospect that an eventual successful appeal might reverse the situation is no answer to the actual infringement which endures until then."

34 From paragraphs 11—20 thereof.

35 Above n 6 at 242 C—F.

[27] Snyders J then turned to consider whether the impugned procedure could be saved under section 36 of the Constitution, the saving clause of the Bill of Rights,[36] and cited the following passage from the *Lesapo* judgment in weighing the nature of the right infringed:[37]

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."

She then examined the "pressing considerations of public interest" advanced by the Commissioner and the Minister in defence of the impugned limitation on the right guaranteed by section 34 of the Constitution, which limitation she styled "dramatic and extensive". Part of the proffered justification she found to be argumentative and speculative, largely, as I understand the judgment, because it had not been shown that the amounts assessed in this particular case would have any effect on the national budget.

[28] The learned judge continued the discussion of the disparity between general considerations and the circumstances of the particular case, holding[38] that:

> ". . . the approach adopted by the respondents in raising facts relevant to the importance of the purpose of the limitation is too general and loses sight of the particular facts of this case, which is what this Court should be weighing up and balancing."

---

36 Above n 9.

37 Above n 6 at 242 I—243 A.

38 Above n 6 at 243 G—H.

and[39] that the

> ". . . fairly narrow ambit of the facts of this case in the greater scheme of national tax necessarily lessens the impact of a delay in the recovery of the tax in terms of the present assessment and thus the importance of the purpose of the limitation."

She was also of the view[40] that:

> "[n]umerous other measures could be devised in order to discourage or even prevent all the negative consequences foreseen by the respondents. Higher penalties were suggested as a possibility, the furnishing of security, even higher interest rates or time-linked penalties are possibilities. The potential for alternative measures must be numerous and is desirable in order to protect the right embodied in the Constitution."

---

39 Id at 244 B.

40 Id at 244 E–G.

[29] In the course of argument on behalf of the Commissioner before the High Court reliance was placed on the judgment in *Hindry v Nedcor Bank Ltd and Another*,[41] in which a comparable fiscal provision[42] allowing for a form of summary garnishment by the Commissioner of the credit in a taxpayer's bank account, had been held justified under section 36 of the Constitution. First, Snyders J distinguished the judgment in *Hindry* as it had "concerned a different section of a different Act under different circumstances." Next she held it to have been an *obiter dictum*[43] insofar as it pronounced on the constitutionality of the relevant provision of the Income Tax Act. In the third instance she observed that the judge concerned had in any event not had the benefit of studying the judgment in *Lesapo,* which had not been delivered at the time the *Hindry* judgment had been given.

[30] The following issues seem to arise out of the judgment of Snyders J:

(a) The meaning of section 36(1) of the Act and more specifically whether the section bears on the right of access to the courts guaranteed by section 34 of the Constitution.

(b) The meaning of subsections (2)(a) and (5) of section 40 of the Act.

(c) Whether the three challenged provisions jointly have the effect ascribed to them by the learned judge. In this context the possible role of section 42 must also be considered.

(d) Whether the strictures expressed in *Lesapo* are of application to the three sections in question in this case.

(e) Whether, in the final analysis, those sections infringe the right to access to the courts protected by section 34 of the Constitution.

---

41 1999 (2) SA 757 (W), a judgment of a single judge sitting in the same high court.

42 Section 99 of the Income Tax Act 58 of 1962.

43 The implication of this categorisation is that the particular finding, not having been part of the essential reasoning in *Hindry*, was therefore not a precedent binding on Snyders J.

(f) Whether, if indeed they do so infringe, they can be saved under section 36 of the Constitution.

[31] Addressing those issues entails, in the first place, ascertaining what each of the three sections says and, possibly more pertinently, does not say.

The challenge to section 36(1) of the Act

[32] Section 36 should be seen in the context of Part V of the Act, which comprises sections 32 to 37 and deals with objections and appeals. Section 32,[44] section 35[45] and section 37[46] are not relevant to the present discussion and can be put aside. Sections 33, 33A and 34 of the Act deal with the statutory right afforded aggrieved vendors to challenge the rejection by the Commissioner of objections to assessments and associated decisions. Sections 33 and 33A provide that vendors may bring such challenges in either the Special Court[47] or before a board;[48] and section 34 allows a further resort to an ordinary court of law against decisions of the Special Court. The Act calls the proceedings before the Special Court/board (as well as the subsequent resort to a court of law) an "appeal". The Commissioner is not a judicial officer — and assessments and concomitant decisions by the Commissioner are administrative, not judicial, actions; from which it follows that challenges to such actions before the Special Court or board are not appeals in the forensic sense of the word. They are proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative

---

44 Dealing with objections.

45 Allowing members of the Special Court to participate despite their possible liability under the Act.

46 Relating to the burden of proof in appeal proceedings.

47 The Special Court for hearing income tax appeals constituted under section 83 of the Income Tax Act.

48 In the case of disputes with a lesser monetary value or by mutual consent.

decisions — and appropriate corrective action — by a specialist tribunal.[49]

49 Although the subsequent resort to an ordinary court against a decision of the Special Court is not really a routine appeal either but an extraordinary procedure with its own special rules, to be found in section 86A of the Income Tax Act, the introduction of section 86A by section 24 of Act 103 of 1976 rendered it "a rehearing of the case [determined] in the ordinary, well-known way" (per Trollip JA in *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 485 E—F).

[33] It is important to have clarity about the effect of the mechanism created by sections 33 and 33A of the Act. Were it not for this special "appeal" procedure, the avenues for substantive redress available to vendors aggrieved by the rejection of their objections to assessments and decisions by the Commissioner would probably have been common law judicial review[50] as now buttressed by the right to just administrative action under section 33 of the Constitution,[51] and as fleshed out in the Promotion of Administrative Justice Act.[52] Here, however, the Act provides its own special procedure for review of the Commissioner's challenged decisions by specialist tribunals.[53] But, and this is crucial to an understanding of this part of the case, the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing complaints about the Commissioner's decisions, but it leaves intact all other avenues of relief.

---

[50] As to the scope and origin of which, see *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111.

[51] Section 33(1) of the Constitution provides that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair." and subsection (2) safeguards the right ". . . to be given written reasons." where rights "have been adversely affected by administrative action".

[52] Act 3 of 2000, more particularly in section 6 thereof.

[53] In Part V, comprising sections 32—7.

[34] It is in that light that one must look at section 36(1). In its textual context[54] and on its plain wording the subsection is concerned with ensuring two separate but related objectives: first, that the obligation of aggrieved vendors to pay their tax and associated imposts is not delayed by their pursuing their remedies under Part V of the Act and, second, that where necessary refunds, plus interest, will be made later. Here we are concerned with the first objective, namely that:

> "[t]he obligation to pay . . . any tax , additional tax, penalty or interest chargeable under this Act shall not, . . . be suspended by any appeal or pending the decision of a court of law, . . . "

Clearly "appeal" denotes the procedure under sections 33 and 33A and "the decision of a court of law" the subsequent resort to a court of law under section 34 of the Act.[55]

[35] Cogent authority for such an interpretation is to be found in *CIR v NCR Corporation of SA (Pty) Ltd*[56] where Corbett JA[57] had occasion to consider these very words where they appear in section 88 of the Income Tax Act (which corresponds to section 36 of the Act). The learned judge analysed the legislative history of both the "appeal" and the "decision of a court of law" components of the phrase under discussion and observed that:[58]

> "[t]he common-law rule of practice that generally the execution of a judgment is automatically suspended upon the noting of an appeal . . . could hardly apply to an appeal noted to the Special Court against the disallowance of an objection to an

54 Within Part V of the Act.

55 Read with section 86A of the Income Tax Act.

56 1988 (2) SA 764 (A).

57 With Viljoen JA, Smalberger JA, Vivier JA and Nicholas AJA concurring.

58 Above n 56 at 774 C—D. The judgment cites *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544 H—545 A.

> assessment by the Commissioner, . . ."

However, the analysis reveals that when there was an amendment to the income tax legislation[59] affecting the "pay now, argue later" provision, "it may well have been thought necessary to state explicitly that there was no such suspension unless the Commissioner so directed."[60]

The learned judge then proceeded to consider the meaning of the "decision of a court of law" component and, once again tracing the statutory antecedents of the words, concluded the particular part of the judgment as follows:[61]

> "Be all this as it may, the meaning of the first portion of s 88 is, in my opinion, clear. It enacts in effect that, subject to a contrary direction by the Commissioner, a taxpayer's obligation to pay tax to which he has assessed (and the Commissioner's correlative right to receive and recover such tax) are not suspended *by the fact that* the taxpayer may have appealed to the Special Court against the Commissioner's disallowance of an objection to the assessment, or *by the fact that*, the Special Court having given its decision concerning the assessment, there is an appeal pending in terms of s 86 or s 86A, at the instance of either party, against the decision of the Special Court." (Emphasis added)

[36] Manifestly the reasoning is equally applicable to section 36 of the Act. The common-law rule of judicial practice relating to automatic suspension of execution *by* the noting of an appeal, does not apply to the appellate procedure created by sections 33, 33A and 34 of the Act. Neither the noting of the statutory "appeal" to the Special Court (or the board) nor the noting of any subsequent appeal *in itself* suspends the vendor's obligation to pay according to the tenor of the

---

59 By section 85 of Act 41 of 1917.

60 Above n 56 at 774 E—F.

61 Id at 775 C—E.

assessment and accompanying imposts. That means that, unlike a common-law judgment debtor, an aggrieved vendor cannot procure an automatic suspension of the obligation to pay by the noting of an appeal to the Special Court (or board), and from the Special Court to an ordinary court of law. As in the case of section 88 of the Income Tax Act discussed by Corbett JA in the quotation above, section 36 is not concerned with an appeal against a judgment, but with a statutory form of revision of an administrative decision according to a special procedure.

[37] More importantly, section 36(1) is not concerned with access to a court of law and says nothing that can be construed as a prohibition against resort to such a court. It also has nothing to do with judgment on the tax debt; and even less does it have any bearing on execution of such a judgment. It does not afford any authority to circumvent the courts, nor any right to levy execution. The first part of the section is simply not concerned with anything other than the non-suspension — notwithstanding demur — of the obligation to pay the assessed VAT and consequential imposts chargeable under the Act.[62]

---

62 Those debts arise and become due by operation of the Act: under section 31 upon assessment; under section 60 upon being charged with additional tax; and the penalty and interest under section 39. Under sections 31(6)(b) and 60(2) the Commissioner fixes the time for payment of assessed tax and additional tax respectively. That time stands unless the vendor lodges an objection under section 32(1)(b), in which event the obligation to pay is suspended during its consideration by the Commissioner.

[38] That does not mean that the obligation to pay notwithstanding appeal is inexorable. On the contrary, the provision is directed at *automatic* suspension and expressly gives a discretion to the Commissioner — "unless the Commissioner so directs". This is the qualification adverted to by Snyders J. She made reference to it in relation to a submission by counsel for the Commissioner. Counsel, conceding that section 36(1), read in context with the other two impugned provisions, effectively barred any judicial relief being extended to an aggrieved vendor, argued that the existence of the discretion coupled with the fact that the exercise of discretion would be reviewable on administrative law principles saved the section from unconstitutionality. Snyders J rejected the contention. She held that:[63]

> "I am of the view that s 36(1) of the Act is not reasonably capable of the interpretation contended for by the respondents. The words relied upon stand in the context of the entire subsection and merely create one exception to the provisions of the subsection. They cannot be said to create a procedure for an application to the first respondent to suspend the obligation to pay, which gives rise to a right of review.
>
> Even if this very benevolent interpretation is accepted, the rest of the provisions cannot be clearer in their meaning and effect, namely that no court of law, irrespective of the nature of the dispute which serves before it, has the power to suspend the obligation to pay. Thus, also, if the review of a decision by the first respondent not to suspend the obligation to repay was a competent procedure, it would not have had the effect of suspending the obligation to pay, nor could the Court of review order that and the first respondent would still have been entitled to proceed to file the appropriate statement and act on it as if it were a civil judgment. The meaning of the Act is that the obligation to pay remains intact: it cannot be suspended by a court of law but only by the first respondent."

---

63 At 239 G—40 A of the reported judgment.

[39] In this Court, counsel for the Commissioner once again argued that the discretion conferred upon the Commissioner by section 36(1) should be interpreted in the light of section 39(2) of the Constitution[64] in a fashion that would promote the right of access to court and the protection of the right to administrative justice. Accordingly it was argued that the exercise of that discretion would constitute administrative action as contemplated by section 33 of the Constitution and a refusal to accede to a request for the suspension of the obligation to pay would be reviewable before a court.

[40] 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.[65] Those principles were described in *Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another*[66] as follows:

> "Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' . . . Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he

---

64 Section 39(2) reads:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

65 *Contract Support Services (Pty) Ltd and Others v Commissioner, South African Revenue Services, and Others* 1999 (3) SA 1133 (W) at 1144—5; *ITC 1470* 52 SATC 88 at 92 and *Kommissaris van Binnelandse Inkomste v Transvaalse Suikerkorporasie Bpk* 1985 (2) SA 668 (T) at 671 H and 676 E—F.

66 1988 (3) SA 132 (A) at 152 A—E.

had failed to apply his mind to the matter in the manner aforestated . . . Some of these grounds tend to overlap." (Citations omitted)

[41] When the interim Constitution came into force in April 1994, the normative basis of administrative law shifted. Chaskalson P described this in *Pharmaceutical Manufacturers Association of SA and Another : In re Ex Parte President of the Republic of South Africa and Others*[67] as follows:

> "The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution, which defines the role of the courts, their powers in relation to other arms of government and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution (and that need not be decided in this case), the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it and subject to constitutional control."
> (Footnote omitted)

[42] The Commissioner, in exercising the power under section 36, is clearly implementing legislation and as such the exercise of the section 36 power constitutes administrative action and falls within the administrative justice clause of the Constitution. I cannot agree with Snyders J

---

67 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paragraph 45.

to the extent that she considered the exercise of the discretion conferred upon the Commissioner in section 36 of the Act not to be reviewable. The Act gives the Commissioner the discretion to suspend an obligation to pay. It contemplates, therefore that notwithstanding the "pay now, argue later" rule, there will be circumstances in which it would be just for the Commissioner to suspend the obligation to make payment of the tax pending the determination of the appeal. What those circumstances are will depend on the facts of each particular case. The Commissioner must, however, be able to justify his decision as being rational. The action must also constitute "just administrative action" as required by section 33 of the Constitution and be in compliance with any legislation governing the review of administrative action.

[43] Once the Commissioner has disallowed an objection an aggrieved vendor can appeal such decision. What section 36 clearly does not do is place any impediment in the way of such an appeal, either to the Special Court or from its decision to an ordinary court of law. The crucial point, however, is that the section expressly does not preclude a disgruntled vendor against whom an assessment has been made from resorting to a court of law for whatever other relief that may be appropriate in the circumstances. Although the Act vests jurisdiction to vary or set aside assessments — and other decisions by the Commissioner — in the Special Court in the first instance (and prescribes the avenue for further consideration of the case by the ordinary courts thereafter), there is nothing in section 36 to suggest that the inherent jurisdiction of a high court to grant appropriate other or ancillary relief is excluded. The section does not say so expressly nor is such an ouster necessarily implicit in its terms, while it is trite that there is a strong presumption against such an implication.[68] It follows that Snyders J erred in holding[69] that:

---

68 See, for example, *Richards Bay Bulk Storage(Pty) Ltd v Minister of Public Enterprises* 1996 (4) SA 490 (A) at 494 G—I and the cases there cited.

69 At 240 A of the judgment.

> "... the power of any court of law to provide an aggrieved vendor with interlocutory relief is clearly excluded irrespective of the merits or demerits of his case."

[44] Indeed, it has for many years been settled law that the Supreme Court has jurisdiction to hear and determine income tax cases turning on legal issues. Thus in *Friedman and Others NNO v Commissioner for Inland Revenue: In re Phillip Frame Will Trust v Commissioner for Inland Revenue*[70] McCreath J was asked to resolve the legal question whether a testamentary trust was a person within the meaning of the Income Tax Act. Having referred to half a dozen reported cases, four of them in the Appellate Division,[71] where the existence of such jurisdiction was accepted without discussion, and one Prentice Hall report[72] where the point was specifically considered, McCreath J concluded as follows as to his competence to determine the case:[73]

> "I am in agreement with the finding of the Court in that case that where the dispute involved no question of fact and is simply one of law the Commissioner and the Special Court are not the only competent authorities to decide the issue — at any rate when a declaratory order such as that in the present case is being sought."

---

70 1991 (2) SA 340 (W).

71 *Shell Southern Africa Pension Fund v Commissioner for Inland Revenue* 1982 (2) SA 541 (C); *Thorne and Another NNO v Receiver of Revenue* 1976 (2) SA 50 (C); *Commissioner for Inland Revenue v Jacobson's Estate* 1961 (3) SA 841 (A); *Commissioner for Inland Revenue v MacNeillie's Estate* 1961 (3) SA 833 (A); *Commissioner for Inland Revenue v Emary NO* 1961 (2) SA 621 (A) and *Estate Smith v Commissioner for Inland Revenue* 1960 (3) SA 375 (A).

72 *Emary NO & Another v CIR* 1959 (2) PH T 16 (D).

73 Above n 70 at 341 I—J.

The judgment was confirmed on appeal.[74] Although those cases concerned income tax and the Income Tax Act, not specifically VAT and the Act, there is no reason to doubt the applicability of the jurisdictional principle in the present — analogous — context. Indeed, it is evident from a comparison of the sections that the drafters of the Act borrowed freely from the Income Tax Act, the terminology of which is frequently echoed.[75]

---

74 The judgment is reported as *Commissioner for Inland Revenue v Friedman and Others NNO* 1993 (1) SA 353 (A).

75

Sections in Income Tax Act	Corresponding sections of the Act
91(1)(a)	40(1)
91(1)(b)	40(2)(a)
91(1)(bA)	40(2)(b)
91(c)	40(2)(c)
91(2)	40(3)
92	40(5)
94	42

[45] There is more recent and directly applicable authority for the proposition that, pending the resolution of disputes under the special appeal procedure provided by the Act, a superior court has jurisdiction to consider — and where appropriate grant relief — in VAT cases. It is the judgment in the case of *Contract Support Services (Pty) Ltd and Others v Commissioner, South African Revenue Services, and Others*.[76] The applicants in that case, vendors against whom the Commissioner had made assessments and had then used the garnishment mechanism of section 47 of the Act to enforce payment, applied to the Witwatersrand High Court for urgent interlocutory relief against the Commissioner pending the resolution of their disputes in the Special Court. Part of what they sought was an order reviewing and setting aside the assessments and freezing the situation pending the determination of that issue. There was no suggestion that the Court's jurisdiction to consider relief had been ousted by the Act. On the contrary, the argument on both sides and the judgment implicitly accepted that the Court was empowered to issue an interim declaratory order pending the resolution of the contemplated application to review and set aside the relevant assessments. Similarly in *Shell's Annandale Farm (Pty) Ltd v Commissioner, South African Revenue Service*,[77] an application for a declaratory order by a vendor who intended lodging objection under the Act to an assessment, a preliminary issue raised on behalf of the Commissioner was whether the High Court had the power to grant the order.[78] The learned judge, Davis J, in dismissing the Commissioner's preliminary objection, referred to some of the cases mentioned above as well as to two further tax cases considered in the Appellate Division and one in the Cape Provincial Division[79] where it

---

76 Above n 65.

77 2000 (3) SA 564 (C).

78 As to whether the applicant/vendor was liable for VAT on compensation it had received pursuant to a particular land transaction.

79 *Van Zyl NO v Commissioner for Inland Revenue* 1997 (1) SA 883 (C); *Chancellor, Masters and Scholars of the University of Oxford v Commissioner for Inland Revenue* 1996 (1) SA 1196 (A) and *Commissioner*

was accepted that declaratory relief was competent in cases where a taxpayer wished to challenge an assessment.

[46] It is therefore clear that any decision of the Commissioner to make a VAT assessment under section 31 and/or to levy additional tax under section 60, and not only a refusal by the Commissioner to grant relief under the power to do so vested in the office by section 36(1) of the Act ("unless the Commissioner so directs"), is subject to judicial intervention in certain circumstances. The implacable interpretation of section 36(1) contended for in argument on behalf of Metcash and accepted by the learned judge in the High Court is not warranted. Neither the injunction to pay first, regardless of a resort to the Special Court, nor the non-suspension provision is intended or has the effect of prohibiting judicial intervention. Nor is there any hidden or implicit ouster of the jurisdiction of the courts to be found in section 36 as it stands. That section, therefore, cannot be said to bar the access to the courts protected by section 34 of the Constitution.

[47] Section 36 does not by relegating the specialised subject matter of the Act to the

---

for Inland Revenue v Shell Southern Africa Pension Fund 1984 (1) SA 672 (A).

Special Court purport to oust the jurisdiction of the courts protected by section 34 of the Constitution. In any event, by the very referral of cases to that specialist tribunal, the Act can be seen to have designated an independent and impartial tribunal specifically tooled to deal with disputed tax cases. The Special Court operates to all intents like an ordinary court and has extensive powers to interfere with, amend or set aside decisions of the Commissioner. Although the procedure is referred to in the legislation as an appeal, it is a full hearing more akin to a trial. The relevant provisions of the Income Tax Act that establish the Special Court and prescribe its procedure, principally contained in section 83 thereof, are eminently fair and afford a dissatisfied vendor more than a merely formal right of appeal. The court is presided over by a judge, who sits with an accountant and a representative of the business community. There is a right to legal or other expert representation, to adduce evidence and to challenge or rebut adverse evidence in a full-blown trial on the issues raised in the taxpayer's notice of appeal.[80] Withal, therefore, a hearing before the Special Court meets the criteria of section 34 of the Constitution.[81] It should also be noted that only the first level of adjudication of tax disputes takes place outside the normal forensic hierarchy. There is an unqualified right of appeal from the hearing at the first level in the Special Court to either a full bench of a high court or, if the presiding judge so directs, to the Supreme Court of Appeal.[82]

[48] It follows that none of the grounds for contending that section 36(1) of the Act falls foul of the constitutionally protected right of access to the courts can be supported. In relation to a

---

80 The procedure is set out in sections 83 and 84 of the Income Tax Act and the regulations promulgated thereunder. Absent a specific provision, regulation 4 prescribes that the "practice and procedure of the magistrates' courts" apply.

81 Ironically, the one and only significant respect in which a tax appeal departs from the constitutional norms is that tax cases are heard behind closed doors, a provision for the protection of the confidentiality of the taxpayer's business.

82 Section 86A of the Income Tax Act.

vendor who is aggrieved by an assessment by the Commissioner under section 31, or by the imposition of additional tax under section 60 of the Act, such right is not impaired by section 36(1) of the Act.

The challenge to section 40(2)(a) and (5)

[49] What then of the other two impugned provisions, sections 40(2)(a) and (5)? Subsection (2)(a), it will be recalled, allows the Commissioner to file a document with the clerk or registrar of a competent court, which then has the effect of a civil judgment in the Commissioner's favour for a liquid debt. Undoubtedly the provision creates a short-cut. The Commissioner need not cause the issue of court process initiating a claim for judicial enforcement of a debt, as is normally the case where a creditor seeks to recover a debt. There need not be service of process summoning the debtor to court to answer to the claim, as happens in ordinary litigation. There is no scope for opposition, nor for a hearing of sorts to resolve disputes. But the indictment against section 40(2)(a) — and the finding of the High Court[83] — is not that it short-circuits the judicial process in these or other respects. The analysis founding the order of invalidation of the subsection was that the procedure it permits the Commissioner to employ, like that condemned in the *Lesapo* case, constitutes a form of self-help which by-passes the courts of the land.

---

[83] Above paragraph 5.

[50] The statutory provision condemned in *Lesapo*[84] expressly empowered the Bank, "without recourse to a court of law", to attach and sell up the assets of its defaulting debtors through its own agents and on such conditions as the Bank's board of directors might determine. The thrust of the criticism which founded the invalidation of the section in question was, as Mokgoro J makes quite clear,[85] that it infringed section 34 of the Constitution and breached the rule of law by sanctioning self-help: the Bank was permitted to be the judge in its own cause. In two more recent cases similar powers vested in the Land and Agricultural Bank of South Africa were likewise struck down as impermissible infringements of section 34 of the Constitution.[86] Mokgoro J once again made plain that the fundamental objections against this kind of provision were:[87]

> "It permits the Land Bank to bypass the courts and gives it sole discretion over the conditions of sale. This procedure, unlike the ordinary civil process of execution, allows the Land Bank to take the law into its own hands and serve as judge in its own cause. The Act also authorises it to usurp the inherent powers and functions of the courts by deciding its own claims and relief." (Footnotes omitted)

[51] That is neither what section 40(2)(a) of the Act says, nor what it implies. On a plain reading of its words, the provision expressly contemplates the involvement of the courts. In contradistinction to the self-initiated, self-driven and self-supervised mechanism involved in *Lesapo* and the two cases following it, the execution process created by section 40(2)(a) of the

---

84 Section 38(2) of the North West Agricultural Bank Act 14 of 1981.

85 Especially at paragraphs 10, 11, 19 and 20.

86 Reported as *First National Bank of SA Ltd v Land and Agricultural Bank of South Africa and Others; Sheard v Land and Agricultural Bank of South Africa and Another* 2000 (3) SA 626 (CC); 2000 (8) BCLR 876 (CC).

87 Id at paragraph 5.

Act specifically goes via the ordinary judicial institutions. It requires the intervention of court officials and procedures. The subsection, by saying that once the Commissioner's statement has been filed it has "all the effects . . . of a civil judgment", quite unequivocally includes by reference the whole body of legal rules relating to execution. Filing the statement sets in train the ordinary execution processes of the particular court. Execution in the high courts is primarily governed by rules 45, 45A and 46 of the Uniform Rules of Court, and in the magistrates' courts by rule 36 and following of the rules of those courts. Whether and to what extent the rules of court and the myriad of common law and judge-made ancillary rules relating to execution have to be adapted to fit this particular process, need not be determined here. The substance of the matter is that the ordinary civil process of execution is employed; and the Commissioner is not authorised to usurp any judicial functions. Manifestly section 40(2)(a) of the Act is a far cry from the kind of open ticket to self-help condemned in the *Lesapo* and kindred cases.

[52] Indeed, in a particular sense, section 40(2)(a) of the Act is the direct reverse of the provision found constitutionally unacceptable in *Lesapo*. Here we have an administrative decision fixing liability for a statutory debt on the part of a vendor which, in terms of the scheme of the Act, cannot be executed upon otherwise than by involving the judiciary. In *Lesapo* this Court was concerned with a contractual debt which could be executed upon domestically without involving the judiciary. The two statutory provisions, far from being closely similar, are virtually diametrical opposites.

[53] That leaves the third of the impugned sections, section 40(5) of the Act. It relates in terms to the certified statement permitted by section 40(2)(a) and is clearly intended as a back-up to it. The language is clear and the intention plain: in proceedings based on such a section 40(2)(a) certificate the taxpayer's scope for challenge is limited. Yet, on that very language, the

limitation is not as sweeping as counsel's argument would have it. In the first place section 40(5) does not purport to bar legal proceedings by a vendor/taxpayer against whom the Commissioner has lodged a section 40(2)(a) certificate. On the contrary, the subsection expressly contemplates the possibility of such proceedings and was inserted to limit the rights of a vendor in those very circumstances. Therefore, although the subsection is couched in broad and general language — "any person", "proceedings", "in connection with" — it pertinently *limits* possible grounds for challenge but does not *prohibit* litigation.[88] Not only is that the tenor of the provision but it is as well to remember that we are engaged in the interpretation of a taxation statute, where verbal precision is essential. Nothing that is not stated is to be read in, especially not an element as important as an ouster.

[54] In the second place the prohibition is specifically narrowly focussed on the correctness of the assessment. Looking fairly at the language the meaning of the subsection is quite clear. The prohibition is aimed at "the correctness of any assessment". Reading the prohibition as striking at a challenge to the assessment itself overlooks the words "the correctness of", which identify the essential core in the prohibition. That is that "[i]t shall not be competent . . . to question the correctness of any assessment upon which such statement is based, notwithstanding . . . objection and appeal . . . ". The sole purpose of the words "the correctness of"is to qualify — and hence limit — the scope of the prohibition; and the result of the limitation they bring about is that a vendor remains free to raise any challenge to the assessment or the certificate[89] falling outside the purview of the circumscribed prohibition.

---

88 Were that not the clear tenor of the language, if there were ambiguity, one would in any event have read the provision restrictively by reason of the presumption against judicial ousters, both at common law and under the Constitution.

89 Or any other aspect of the case.

[55] A prohibition which specifically bars challenges to the correctness of the assessment, as distinct from barring other disputes foundational to, arising from or otherwise relating to it, makes perfectly good sense. A special tribunal has been created to adjudicate upon objections by vendors and has been given the tools to thrash out any factual disputes relating to the calculation of VAT returns and supervening assessments. Objectors ought therefore to be precluded from entering into the kind of factual debate inevitably entailed in challenging the correctness of assessments made under section 31 of the Act, which can and should be thrashed out in the Special Court. Having regard to the nature of VAT and its system of primary self-assessment, disputes about the correctness of assessments made by the Commissioner are likely to involve complicated and contentious issues of fact. As has been observed about the special nature of VAT and VAT returns, assessment under section 31 is tantamount to a finding by the Commissioner that the returns rendered by the vendor have not been truthful. Credibility disputes of this kind belong in the Special Court where the procedure is geared to deal with them.[90]

[56] But whatever other defences a vendor may wish to raise are left undisturbed by section 40(5) of the Act. And it is notorious that the field of tax law can and often does raise a whole panoply of procedural or substantive issues derived from one or more of the individually complex and usually interlocking fields of law involved in tax disputes. They remain at the disposal of the aggrieved vendor against whom the Commissioner has put in motion the special weaponry of the fisc contained in section 40 of the Act. The dividing line between challenges that are permissible under section 40(5) and those that are not may at times be faint; but the distinguishing principle is clear and will have to be applied on a case-by-case basis.

---

90 Above paragraph 47.

[57] Section 40(5) of the Act can therefore not be said to constitute, on its own, a complete bar to legal proceedings by a vendor with a view to obtaining some form of relief in relation to an impending judgment in favour of the Commissioner under section 40 of the Act. Nor can it have that effect if read in conjunction with section 40(2)(a). There is no holistic magic that renders their combined effect greater than that of the component parts. The first provision puts the machinery of the courts at the disposal of the Commissioner as a process in aid of enforcing payment of VAT and ancillary imposts claimed by the revenue authorities pursuant to the exercise of administrative powers; the latter excludes a specific category of — usually disruptive — potential defences in such process.

[58] In this context a different and distinctive point of substance should be made. That is that however restrictive of a vendor's possible claim for relief section 40(5) of the Act may be, its effect is temporary only. The scheme of the Act is that sections 33, 33A and 34 provide an aggrieved vendor ample opportunity for fair judicial determination in due course of any dispute with the Commissioner arising out of the exercise of the latter's powers to impose tax liability by assessment or associated impost. The Act can therefore not be said to constitute a complete bar to access to the courts; at most it obliges the taxpayer to pay the disputed amount(s) subject to appropriate restitution, with interest, once the judicial dispute resolution process has run its course. Moreover, having regard to the fundamental nature of VAT and the painstakingly detailed mechanism provided by the Act for calculating, collecting, recording and regularly transmitting VAT by vendors, an amount assessed by the Commissioner under section 31[91] is in the nature of a liquidated debt.

---

[91] And the amounts of any consequential liability for additional tax, a penalty and interest.

[59] The applicant argues that to the extent that section 40(5) does limit access to a court prior to the full airing of the issues before the Special Court and does prevent a disgruntled taxpayer from obtaining interdictory relief to suspend the operation of the "pay now, argue later" rule, it is in breach of section 34 of the Constitution. I am prepared to assume in favour of Metcash for the purposes of this judgment that section 40(5) does occasion such a limitation. The question that then arises is whether that limitation is justifiable in terms of section 36 of the Constitution.[92]

[60] In considering justification it is important to remember that the limitation under section 40(5) is limited in its scope, temporary and subject to judicial review. There are three additional features. First, the public interest in obtaining full and speedy settlement of tax debts in the overall context of the Act is significant. In their affidavits the Commissioner and the Minister mentioned a number of public policy considerations in favour of a general system whereby taxpayers are granted no leeway to defer payment of their taxes. These are in any event well-known and self-evident. Ensuring prompt payment by vendors of amounts assessed to be due by them is clearly an important public purpose. As stated earlier, the scheme of VAT instituted by the Act is a complex one which relies for its efficacy on self-regulation by registered vendors and regular periodic payments of VAT. Requiring them to pay on assessment prior to disputing their liability is an essential part of this scheme. It reduces the number of frivolous objections and ensures that the fiscus is not prejudiced by the delay in obtaining finality. Section 40(5) plays an important role in this scheme. In order for a "pay now, argue later" scheme to work, it is necessary that the Commissioner is able to obtain execution against a taxpayer without having first to air the subject matter of the objection which will be adjudicated upon by the Special

92 Above n 9.

Court in due course. There is therefore a close connection between the overall purpose of the "pay now, argue later" rule and the effect of section 40(5).

[61] Secondly, the principle "pay now, argue later" is one which is adopted in many open and democratic societies.[93] In many of these jurisdictions, as well, some scheme for immediate execution against a taxpayer is provided to ensure that the rule is efficacious. Given its prevalence in many other jurisdictions, it suggests that the principle is one which is accepted as reasonable in open and democratic societies based on freedom, dignity and equality as required by section 36.

[62] Thirdly, the effect of the rule on individual taxpayers is ameliorated by the power conferred upon the Commissioner to suspend its operation.[94] The rule is not absolute but subject to suspension in circumstances where the Commissioner considers it appropriate. The exercise of this power by the Commissioner constitutes administrative action within the contemplation of section 33 of the Constitution and as such is reviewable as discussed above. The existence of this discretionary power therefore reduces the effect of the principle "pay now, argue later" in an appropriate manner. In all these circumstances, therefore, I am persuaded that even if the effect of section 40(5) constitutes a limitation on the right entrenched in section 34 of the Constitution, it is a limitation which is justifiable within the meaning of section 36.

[63] A further challenge to these provisions warrants consideration, albeit in passing. It was contended in argument that one must look pragmatically and not theoretically at the challenged

---

93 The United States: *Phillips et al, Executors v Commissioner of Internal Revenue* 283 US 589 (1931); *Bob Jones University v Simon, Secretary of the Treasury et al* 416 US 725 (1974); *McKesson Corporation v Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida et al* 496 US 18 (1990). Australia: *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* 127 ALR 21; *Deputy Commissioner of Taxation (NSW) v Mackey* 45 ALR 284; *Customs and Excise Commissioners v Holvey* [1978] 1 QB 310. Canada: *Lambert v The Queen* (1975) 58 DLR (3d) 74.

94 See discussion at paragraph 42 above.

sections and must gauge their effect jointly and contextually, especially in conjunction with section 42. In a sense that appears to have been the underlying reasoning of Snyders J in the High Court and it would be as well to consider it at this juncture.

The combined effect of sections 36(1), 40(2), 40(5) and 42

[64] The suggestion was that subsections 40(2)(a) and (5), seen against the backdrop of section 36(1) and read together with section 42, so effectively nobbles the vendor who wishes to challenge adverse assessments de hors the statutory appeal procedure, that it really ousts the jurisdiction of a court of law once the Commissioner has filed the certified statement with the registrar or clerk of the court. In substance, so the argument ran, the filing of the statement under section 40(2)(a) does not really entail a resort to a court of law to levy execution, but is a mere administrative step aimed at facilitating the extra-judicial recovery of tax: the trappings of a judicial process are used to afford the enforcement a semblance of legitimacy.

[65] However, there is clear judicial authority to the contrary in the analogous procedure under the corresponding — and virtually identically worded — provisions of the Income Tax Act. The authority arose in the context of a forensic war of attrition conducted for some fifteen years by a Mr Kruger with the revenue authorities relating to estimated assessments and additional tax levied on him. The numerous court battles included an application for rescission of a "judgment" obtained by the revenue in the magistrate's court on a certified statement by the Commissioner under section 91(1)(b) and (2) of the Income Tax Act.[95] The magistrate ruled that the judgment was not susceptible to rescission under section 36 (read with rule 46) of the Magistrates' Courts

[95] The corresponding subsections of the Act are 40(2)(a) and (3).

Act[96] as it was not truly a judgment but merely a step in an administrative procedure. On appeal the Supreme Court held[97] that the judgment was a judgment for the purposes of section 36 of the Magistrates' Courts Act and was indeed susceptible to rescission under that section, e.g. because it had been taken by default or that it had been obtained by fraud or mistake common to the parties.

[66] That finding was considered and approved by the Appellate Division in a later attempt by Kruger to have the original imposition of additional tax set aside on a variety of procedural grounds.[98] Of particular importance in the context of the present discussion is the careful analysis by Jansen JA[99] of counsel's argument that a "judgment" pursuant to section 91(1)(b) of the Income Tax Act (the forerunner of section 40(2) of the Act) did not block a claim for restitution. In the course of considering the finality of that statutory "judgment" the learned judge examined the "conclusive evidence" provision in section 94 of the Income Tax Act (the precedent for section 42 of the Act), which ostensibly prohibits a challenge to an assessment backed by the Commissioner's certified statement. He concluded that, notwithstanding section 94,

> ". . . bly daar dus 'n wye veld vir verweer oop by 'n aansoek om tersydestelling van die 'vonnis'."

The observation not only signifies that section 42 is no bar to an application for rescission

---

96 Act 32 of 1944.

97 The judgment is reported as *Kruger v Commissioner for Inland Revenue* 1966 (1) SA 457 (C) and the relevant passage appears at 462 A. The appeal failed on grounds that are not relevant here.

98 Reported as *Kruger v Sekretaris van Binnelandse Inkomste* 1973 (1) SA 394 (A). The report is preceded by the report of the judgment in the trial court.

99 Id at 412 F—H.

once a judgment has been entered under section 40(2) of the Act, but necessarily implies that a "wide field of defences" would be available to the taxpayer who wishes to pre-empt the entry of such judgment.

[67] The reasoning in the *Kruger* cases links up with the views expressed in the judgments discussed above in connection with section 36.[100] These views point consistently to the conclusion that none of the sections challenged, either singly or in combination, constitutes a constitutionally offensive limitation of the right of access to the courts that is guaranteed by section 34 of the Constitution. In other words the "pay now, argue later" rule applicable to a vendor who is aggrieved by an assessment under our VAT legislation does not infringe such vendor's constitutional right to due adjudication or if it does, the limitation is justified. In the result I cannot agree with the learned judge in the High Court with regard to either infringement by or justification of the sections in question. Likewise the opinion as to the constitutional justifiability of an enforcement mechanism in the Income Tax Act expressed by Wunsh J in *Hindry*'s case,[101] which Snyders J regarded as obiter and which this Court referred to but left open in *Lesapo*,[102] is once again left open. The provision that was considered in *Hindry*'s case in any event differs quite materially from those in issue in this case and no purpose would be served by discussing it further.

[68] What cannot be left there, however, is the belief that was common to the parties in both courts and that coloured the approach and conclusion of the learned judge in the High Court.

---

[100] The *Friedman, Contract Support* and *Shell* cases referred to in paragraphs 44 and 45 above.

[101] Adverted to in paragraph 29 above.

[102] Above n 7.

The three provisions in question, section 36(1), section 40(2)(a) and section 40(5) of the Act, are found to pass constitutional muster because they do *not* bear the meaning ascribed to them in terms of the common belief. Not one of these sections means, nor do any of them read together mean, that a vendor aggrieved by an assessment or other decision of the Commissioner is precluded from seeking appropriate judicial relief, notwithstanding that an appeal under the Act may be pending, whether to the Special Court or against its judgment. However, the nature of the relief that could be afforded is limited by the provisions of sections 40(5) and 42 to the extent discussed above.

[69] The variety of VAT-contentious circumstances that may arise in the affairs of VAT vendors is infinite and their range of legal constructions equally limitless. It would therefore be foolish to try to delineate with any pretence at ultimate accuracy where in a given case the dividing line between permissible interlocutory relief and unwarranted impairment of the "pay now, argue later" rule should be found to lie. Over the years the courts have managed to draw the analogous line in income tax cases, where a closely similar division exists between the discrete but supplementary — and occasionally overlapping — jurisdictions of the Special Court and the ordinary courts. It is a decision that will continue to be made in the unique circumstances of each particular case.

[70] This much can be said, however. Because the very basis of VAT is that it is the vendor that calculates, collects and pays over the tax on each transaction, and because each such payment must be backed by the vendor's records and vouchers, the scope for factual disputes in good faith is very limited indeed.[103] Therefore the formal constraints of sections 40(5) and 42 of

---

[103] See the discussion in paragraph 22 above.

the Act add little to the limitations inherent in the VAT system. Even if one thinks away these two provisions, a vendor seeking to establish a basis for interim relief against an assessment pending the resolution of the underlying factual dispute in the Special Court, will in practice have a formidable hurdle to surmount. The very assessment would postulate that the vendor's records had been found untruthful by the revenue authorities and very unusual circumstances would be necessary before a court would intervene in any way in the dispute resolution mechanism created by the Act.

[71] But that does not mean that a court is prohibited from hearing an application for interlocutory relief in the face of a pending VAT appeal, or from granting other appropriate relief. Nor does it mean that the jurisdiction is theoretically extant but actually illusory. A court would certainly have jurisdiction to grant declaratory relief to such a vendor if, for instance, it were to be alleged that the Commissioner had erred in law in regarding the applicant as a vendor; or had misapplied the law in holding a particular transaction to be liable to VAT; or had acted capriciously or in bad faith; or had failed to apply the proper legal test to any particular set of facts. There are as many examples as can be contemplated in the wide field of administrative law defences, to paraphrase Jansen JA in *Kruger*'s case. In particular the vendor may take on review a decision by the Commissioner under section 36(1) of the Act refusing to suspend the "pay now, argue later" principle. Moreover, a vendor would now be able to found a cause of action for interim relief on any appropriate constitutional ground as well.

Summary

[72] The first three issues identified above[104] have now been analysed. This analysis indicates that sections 36(1), 40(2)(a) and 40(5) of the Act do not oust the jurisdiction of the courts of law. To the extent that it can be argued that section 40(5) does indeed limit an aggrieved vendor's access to an ordinary court of law, such limitation is justified under section 36 of the Constitution.

[73] Little need be said with regard to the contention on behalf of Metcash that the power vested in the Commissioner under section 60 of the Act to impose additional tax is a form of punishment, and therefore trespasses on the exclusive terrain of the judiciary. The validity of section 60 did not form part of the debate in the court of first instance, does not figure in the invalidation order made there, and consequently cannot be considered by this Court. We are concerned here with proceedings under section 172(2) of the Constitution for the confirmation or otherwise of the order made by Snyders J.

Order

[74] In terms of sections 167(5) and 172(2)(a) the Court declines to confirm the order made in the Witwatersrand High Court declaring sections 36(1), 40(2)(a) and 40(5) of the Value-Added Tax Act 89 of 1991 invalid.

Chaskalson P, Langa DP, Goldstone J, Madala J, Mokgoro J, O'Regan J, Ngcobo J, Sachs J,

---

104 Above paragraphs 30(a), (b) and (c).

Yacoob J and Cameron AJ concur in the judgment of Kriegler J.

On behalf of the Applicant : MJD Wallis SC and PF Louw instructed by Fluxman Rabinowitz Raphaely Weiner.

On behalf of the Respondents : GJ Marcus SC and AR Bhana instructed by the State Attorney, Johannesburg.